

HOT TOPICS

LEGAL ISSUES IN PLAIN LANGUAGE

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Introduction to COURTS

The legal system in Australia is based on the English legal system, which was brought to Australia when eastern Australia was colonised by England in 1788.

In common with other countries that derive their legal and political system from England – the United States, Canada, India and New Zealand – Australia has three arms of government:

- > the legislature, consisting of democratically elected Members of Parliament, which makes statute law (legislation);
- > the executive, which implements legislation and administers the affairs of government. In Australia, the executive is made up of the Queen and her Ministers. The Queen is represented at the Commonwealth level by the Governor-General and at the state level by the governor of the state; and
- > the judiciary (also known as the judicature), which is responsible for making legally enforceable judgments about the legal rights and liabilities of people. The judiciary comprises judges and magistrates operating in the court system.

For more information about the legal system in Australia and how it fits within the system of government see *Hot Topics 60: Australian legal system*.¹

THE FEDERAL STRUCTURE OF AUSTRALIA

The Constitution of the Commonwealth of Australia established a federal system of government. In a federal system, the powers of government are shared between a central, national government (the Commonwealth) and between regional governments (the six states and two territories). The Commonwealth and each state and territory has its own parliament and can make its own laws. There is a dual system of courts to match the dual system of government: federal courts exercise jurisdiction arising under Commonwealth laws (including the Commonwealth Constitution) and state and territory courts exercise jurisdiction under state and territory laws.

State courts may also in some circumstances exercise jurisdiction under Commonwealth laws, if Commonwealth and state legislation provides for this.

THE ROLE OF COURTS

Courts are central to the system of law in Australia as they provide a forum for resolution of legal disputes between individuals (including corporate entities), or individuals and the government. Courts are where the application (and sometimes validity) of laws are determined. The essence of a court of law is that it is a body independent of the executive and legislature that has the power to conclusively determine disputes between persons in accordance with the law.²

Legislation and common law

There are basically two kinds of laws in Australia:

- > statute law – the laws made by parliaments, usually called ‘legislation’, which includes Acts, Regulations and Rules. Courts are responsible for interpreting and applying the relevant laws to the cases before them; and
- > common law – the body of law developed through judges applying the law to the particular facts in individual cases. Where legislation does not cover the specific facts of a case, judges use legal principles and decisions made in similar cases to reach a decision. This is becoming less frequent, however, as legislation increasingly covers most areas of law.

TYPES OF DISPUTES

The types of disputes dealt with by courts can be broadly divided into two types: criminal cases and civil cases. These two types are dealt with quite differently and different processes and approaches apply. For example, there is a difference in who ‘prosecutes’ the case, as well as in the standard of proof and in the outcomes if the case is proven.

1. Available online at www.legalanswers.sl.nsw.gov.au/hot_topics/
2. Halsbury’s Laws of Australia, Butterworths, [125-1].

RELATIONSHIP BETWEEN THE TWO TYPES OF LAW

Australian common law is derived from English common law. This unwritten body of law came to be accepted as standard, and applied 'in common' to all, as opposed to local laws. Traditionally, most law was common law and there were relatively few areas covered by legislation. Since the nineteenth century, however, governments have greatly expanded their use of legislation in order to be able to address problems quickly, or to change the common law, or to create new areas of regulation. There are now very few areas of law that are not covered by legislation.

The way that legislation affects the common law depends on the intention of Parliament. An Act of Parliament will override and replace the common law, if that is the intention of Parliament. The power of a Parliament to make law is limited only by the Constitution that sets out the powers and limitations of the Parliament.

In many cases, Parliament intends that legislation and common law will co-exist, with the legislation filling a gap in the common law or modifying the common law in some way, but leaving the majority of the subject matter to be governed by the common law. In other cases, the intention is to completely replace the common law on a subject matter with a statutory scheme.

Legislation is also necessary when Parliament wants to create a new set of laws in an area where there is no common law. For example, legislation is necessary for a tax to be imposed, because at common law there is no requirement for any person to pay taxes to the government.

Although Parliament can override common law by passing legislation, this does not mean that Parliament is dominant over judges and the courts. Parliament enacts legislation, but it is judges who interpret the legislation and say what effect it has. This is because if there is a dispute about the meaning of a particular piece of legislation, the people in dispute can bring a case to the courts where it is the role of the courts to resolve that dispute and to determine the meaning of the legislation. Common law therefore gradually develops around legislation, and the law governing the subject matter of the legislation becomes a combination of statute law and common law.

Criminal cases

Criminal cases involve a person being prosecuted by the police or a government prosecuting agency, such as the Director of Public Prosecutions, on behalf of the State for an offence against the law.

If the court finds a person guilty of a crime, the court has the power to punish the offender by imposing a sentence (or punishment), such as a fine, a community service order, bond or custodial sentence (imprisonment).

HOT TIP

A 'tort' is a civil (rather than criminal) wrong. The word is derived from the French word for 'wrong'. The law of tort compensates people for harmful things done to them as a result of a person breaching a duty imposed by law on that person. Examples of torts are an injury due to negligence, breach of contract, purchase of faulty goods and defamation.

The sum of money awarded by a court in civil cases to compensate a person for loss suffered is known as 'damages'.

The law generally sets a maximum penalty for the offence, and the judge selects a penalty that is within the scope of the maximum penalty and that is appropriate to the criminality involved.

There are two types of criminal offences:

- > *summary offences* – these are generally less serious offences that are usually dealt with by a magistrate of the Local Court and are punishable by a fine or imprisonment for up to two years; and
- > *indictable offences* – are generally more serious offences that are usually dealt with by a judge and jury of the District Court or the Supreme Court and are punishable by imprisonment for more than two years.

In criminal cases, the person charged with the offence is called the 'defendant' or the 'accused'. The prosecution is conducted on behalf of the Queen, and for this reason the prosecutor is usually called 'the Crown' and is often written in reports of criminal cases as 'R' (short for 'Regina', which means 'Queen', or 'Rex', which means 'King'). If the defendant appeals against a conviction or sentence, the defendant is called the 'appellant'.

Civil cases

A civil case involves a dispute between people (or between a person and the government) about the rights or liabilities of the people or organisations involved. A civil case usually involves one person seeking a remedy of some kind from another person to resolve a dispute between them.

For example, a person who has bought a faulty product may bring civil proceedings against the manufacturer of the product to recover the money paid for the product, or other loss caused by the faulty product. The manufacturer has not committed a crime, because it is not a criminal offence to manufacture a faulty product, but the manufacturer's incompetence has caused loss to the purchaser of the product. The court's role is to decide which party is in the right, and if the court finds in favour of the person who brought the claim, to determine what is the appropriate remedy for the claim.

In civil cases, each person involved in the case (generally, each person whose rights or liabilities are an issue in the case) is called a 'party' to the case. The party who makes a claim or commences the case is generally called 'the plaintiff', but in some types of cases may be called 'the claimant' or 'the applicant'. The party defending themselves against the claim is generally called the 'defendant' or 'respondent'. If a party appeals against the court's decision, the party making the appeal is called the 'appellant' and the party denying or arguing against the appeal is called the 'respondent'.

Standard of proof

There are different standards of proof for criminal and civil cases. In criminal cases, the prosecution must prove that the defendant is guilty 'beyond reasonable doubt'. In civil cases, the plaintiff must prove that the defendant is liable 'on the balance of probabilities'. Criminal cases have a higher standard of proof because of the severe impact of penalties such as imprisonment on the defendant if found guilty.

JURISDICTION

Within the state and federal courts systems, there are a number of different courts. Each court has a particular 'jurisdiction', which is the scope of a court's authority to decide matters. The term comes from Latin: 'juris' – the law and 'dictio' – to say or declare. The jurisdiction given to a court will usually depend on the purpose for which the court was established, which is usually defined in legislation. Which court will have jurisdiction over a case may be based on geographical area, the type of parties who appear, the amount of money involved in the case, or the severity of the maximum penalty for an offence. For example, in NSW, a crime for which the maximum penalty is 14 years imprisonment will probably be heard by the District Court or the Supreme Court, while a crime for which the maximum penalty is only a fine will be heard by the Local Court.

Some courts have a specialised jurisdiction (for example, the Children's Court and the Family Court) and deal with cases only in a narrow range of topics, while other courts have a general jurisdiction (such as the state Supreme Courts) to deal with a wide variety of cases. The Supreme Courts of the states and territories are courts of general jurisdiction in that every matter is within the general jurisdiction of a Supreme Court unless specifically excluded.³

CHILDREN AND COURTS

Crimes against children are most often crimes against the person. In Australia, reported crimes against children have been increasing over recent years. Appearing in court as a witness may be especially traumatic for children, who may experience high levels of stress and 're-traumatisation'. Since the 1980s, the problems faced by children in the court system have been recognised, including:

- > **giving evidence and being cross-examined**
- > **poor perceptions of child witnesses (jurors tend to perceive child witnesses as unreliable)**
- > **low likelihood of conviction (particularly in child sexual abuse cases)**

Several initiatives have been introduced to attempt to minimise the trauma of the process for child witnesses and thereby increase the credibility of their evidence. It appears that some of these have achieved only limited success. Specific examples include:

- > **use of closed circuit television – this allows witnesses to give evidence and be cross-examined from outside the courtroom. There has been poor implementation of this measure in Queensland; technical difficulties and court staff being unable to operate equipment have been issues for NSW; and use in Victoria has been ad hoc.**
- > **use of pre-recorded evidence for child witnesses – although this measure is well-supported by child witnesses and their parents, there have been several cases where pre-recorded evidence has formed the basis for an appeal.**
- > **restrictions on requiring children to give evidence at committal hearings in sexual abuse cases – the Victorian Law Reform Commission found this restriction has not had much impact in the Melbourne Magistrates' Court, with many requests to cross examine witnesses at committal hearings being successful.**
- > **improving interview techniques and child witness statements – includes preparing children for cross-examination, and increased training for investigative interviewers, lawyers and judiciary. Based on transcripts of police interviews, it appears that guidelines on investigative interviewing of child witnesses are not often used by interviewers; specific questions are more often used, rather than allowing a child to tell their story in their own words.**
- > **new offence categories – legislation regarding persistent sexual abuse has been narrowly interpreted by the judiciary.**

The broad issues that affect the usefulness of such provisions have been identified as:

- > **balancing the rights of the accused with consideration for the victim**
- > **problems with the practical application of legislative changes, for example, use of closed circuit television**
- > **the impact of judicial discretion**
- > **balancing the reduction of trauma for witnesses against attempting to increase conviction rates (however it is noted that a less traumatic process may encourage more victims to proceed to trial)**

This information has been adapted from 'Child complainants and the court process in Australia', *Trends & issues in crime and criminal justice*, No. 380, July 2009, produced by the Australian Institute of Criminology and available from their website: www.aic.gov.au

3. Halsbury's Laws of Australia, Butterworths, [125-95].

Another distinction in jurisdiction is between original jurisdiction and appellate jurisdiction. A court that has original jurisdiction in a particular matter will be the court in which the case commences. If a court has appellate jurisdiction for that case, the court will hear an appeal against the decision of the court that had original jurisdiction for that case. See *Appeals* on page 23 for more information.

HIERARCHY OF COURTS

The Commonwealth has three levels of general federal courts:

- > the High Court;
- > the Federal Court; and
- > the Federal Magistrates Court.

These courts were established to hear and determine matters arising under Commonwealth laws. The Commonwealth Constitution established the High Court of Australia, which is the highest court in Australia.

The High Court is at the top of the hierarchy of federal courts. It is also at the top of the hierarchy of state courts, because decisions of state Supreme Courts may be able to be appealed to the High Court.

Each of the states (except for Tasmania) also has three levels of courts of general jurisdiction: the state Supreme Court, the District Court (called County Court in Victoria) and the Local Court. Tasmania, the Northern Territory and the Australian Capital Territory do not have an intermediate level court.

Courts are classified as either superior courts or inferior courts. The principal Australian superior courts are:

- > the High Court;
- > the Federal Court of Australia;
- > the Family Court of Australia;
- > the Supreme Courts of the states and territories;
- > the Land and Environment Court of New South Wales;
- > the Industrial Relations Commission of New South Wales in Court Session; and
- > the Industrial Court of Queensland.

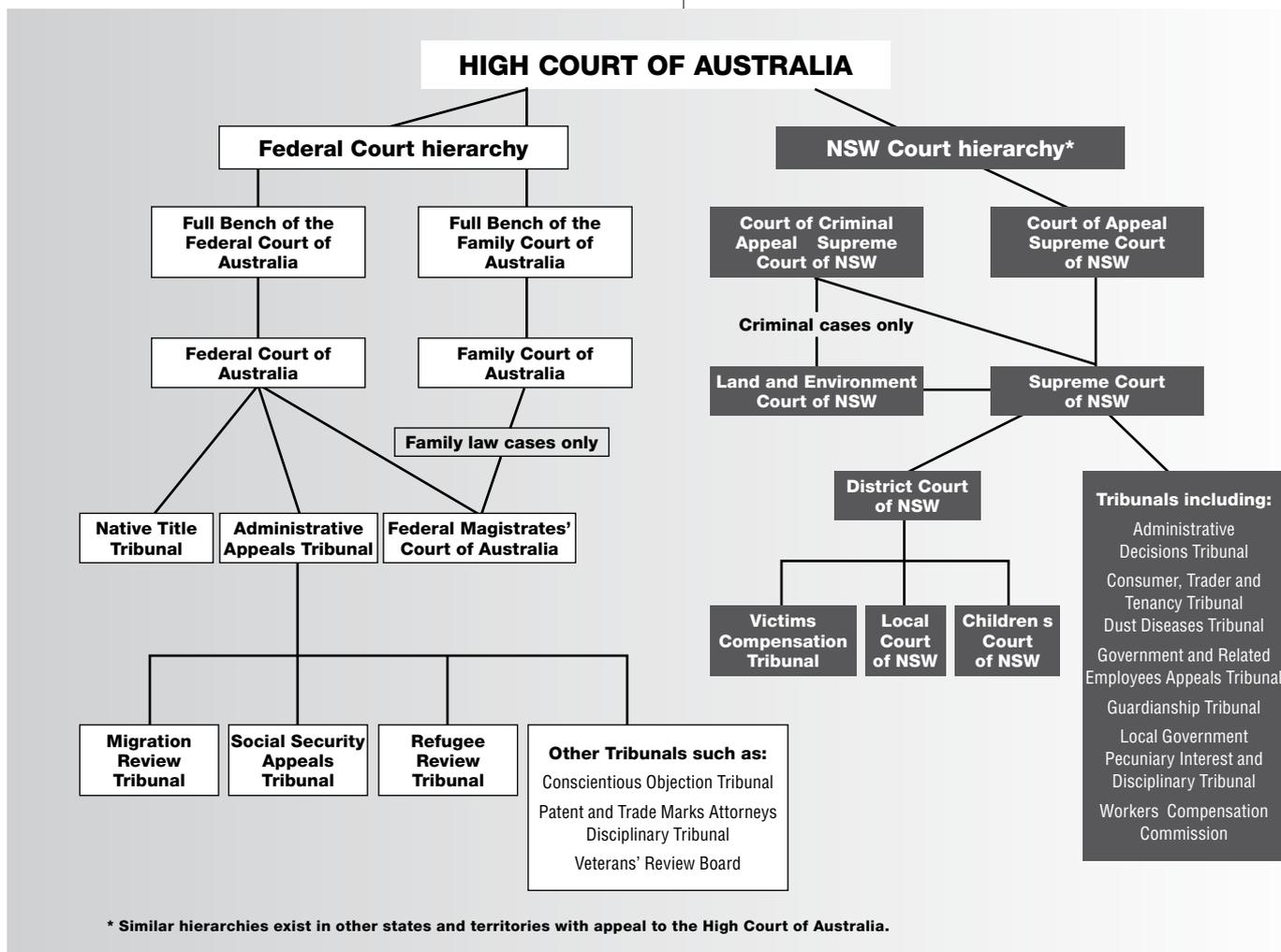


Diagram provided by the Public Interest Advocacy Centre.

All courts that are not superior courts are inferior courts. Intermediate courts (such as the District Court of New South Wales) are therefore technically inferior courts. Magistrates make decisions in the lower courts (the state local courts and the Federal Magistrates Court).

The higher in the hierarchy a court is, the greater the authority their decisions have for other courts. See *Precedent* below.

Tribunals

In both state and federal systems there are also a range of tribunals which operate in a more informal way to reach decisions on civil matters: see page 19 for more information.

PRECEDENT

The '*doctrine of precedent*' is the rule that a legal principle that has been established by a superior court should be followed in other similar cases by that court and other courts. The doctrine of precedent was developed to promote consistency in decision-making by judges, on the basis that like cases should be determined in a like manner. There are two kinds of precedent: binding and persuasive.

Binding precedent

A precedent is 'binding' on a court if the precedent was made by a superior court that is higher in the hierarchy of courts. A binding precedent must be followed if the precedent is relevant and the circumstances of the cases are sufficiently similar. For example, decisions of the High Court are binding on all courts in Australia, but a decision of the Supreme Court is not binding on the High Court, and a decision of the District Court is not binding on the Supreme Court.

Persuasive precedent

A precedent is 'persuasive' if it was established by a superior court that is not higher in the hierarchy of courts. This means that the precedent should be seriously considered, but is not required to be followed. For example, a precedent established by the Supreme Court of New South Wales is persuasive but not binding on the Supreme Court of Victoria, since these courts are not in the same hierarchy and are of equal authority. Decisions of superior overseas courts, particularly the superior courts of the United Kingdom, are persuasive precedents in Australia.

EVIDENCE

Evidence is the information, documents and other material that is presented to a court to prove facts that are an issue in a case. For example, in a case involving a traffic accident, there may be a dispute about facts such as how fast the cars were travelling, or what the weather and visibility conditions were. Evidence to prove such facts might be drawn from sources such as eyewitness accounts of the accident, or weather reports for the location at the time of the accident, and the state of the cars and of the road after the accident (such as the nature of damage to the vehicles, and the length and direction of tyre marks on the road).

There are many rules about what kinds of evidence a court can accept for consideration, and in what circumstances. Evidence that can be taken into consideration (or 'admitted') by the court is called 'admissible evidence'; evidence that cannot be admitted by the court is called 'inadmissible evidence'. The rules of evidence are designed to ensure that only evidence that is reliable and fair is taken into consideration by the court in determining the factual circumstances of the case. The rules of evidence were developed at common law, but the Commonwealth, New South Wales and the Australian Capital Territory have enacted uniform legislation that sets out most of the rules of evidence, largely replacing the common law rules of evidence: see, for example the *Evidence Act 1995* (NSW).

There are several different types of evidence, such as:

- > **eyewitness evidence** – evidence that was directly observed by a witness giving evidence in the case;
- > **circumstantial evidence** – evidence that can be used to make an inference about a fact for which there is no direct witness. For example, evidence by police of the nature and length of skidding tyre tracks on a road may be used to establish that a car was on the wrong side of the road, even though the car was not seen on the wrong side of the road;
- > **hearsay evidence** – evidence given by a witness of something that the witness has heard but has not seen for himself or herself. For example, a witness may report that someone else who witnessed the accident said that the car was on the wrong side of the road, but the witness did not see this himself. Hearsay evidence is not admissible to prove that what is reported to have been said is actually true (but may be admissible to prove that what was reported to have been said was actually said); and
- > **expert evidence** – evidence given by an expert in a particular field, such as medical practitioner giving evidence about the nature and effects of an injury, or an engineer giving evidence about a bridge that has collapsed.

LEGAL PRINCIPLES IN THE COURT

Open justice

One of the fundamental principles of the common law system is that justice should be administered in public. This means that court proceedings are usually open to the public and generally nothing should be done to discourage the publication of reports of court proceedings. Courts do have an inherent power to exclude members of the public where necessary to secure the orderly administration of justice. However, that power is rarely used.⁴

Parliament can also legislate to allow or require courts to exclude the members of the public in certain circumstances, and to limit disclosure about the parties or the proceedings. This is the case, for example, in the Children's Court, where the names of people appearing before the court are not publicly disclosed to protect the identity of minors involved in criminal proceedings or care and protection proceedings. It is a criminal offence to disclose the identity of minors involved in criminal proceedings.⁵

Court proceedings that are closed to the public, including all proceedings in the Children's Court, are called 'in camera' proceedings. (This apparently contradictory term arose because the word 'camera' is based on the Latin word for 'chamber'). The *Supreme Court Act 1970 (NSW)* permits the Supreme Court to exclude people if their presence would be defeat the ends of justice, or in other circumstances (section 80).

Natural justice

The common law requires all courts and tribunals to comply with the rules of natural justice (also called procedural fairness). These are principles developed to ensure that a person receives a fair hearing. The rules include:

- > each party should be given an opportunity to present the party's case;
- > the decision-maker should be disinterested (absence of personal involvement or bias: *Macquarie Dictionary*, 4th ed.);
- > the decision-maker should take into account all relevant considerations, and should not take into account any irrelevant considerations; and
- > the decision should be based on the evidence presented to the decision-maker.

Presumption of innocence

In criminal law, anyone charged with a criminal offence is presumed to be innocent until proven guilty by the prosecution. Guilt must be proven beyond reasonable doubt (for more information see *Standard of proof*, p 3).

Right to legal representation

Legislation generally allows a person to be legally represented in court hearings, although in some tribunals, legislation may limit or prohibit legal representation. In criminal proceedings, an accused person has a right to legal representation (*Criminal Procedure Act 1986 (NSW)*, section 36). At common law, there is no right to be represented by a lawyer in court at public expense. However, there is a common law right to a fair trial. The High Court has interpreted this right to mean that if a person without financial resources is charged with a serious criminal offence and the person does not have legal representation, the court should proceed with the trial only in exceptional circumstances.⁶ If a defendant or an accused person is not legally represented, it is the duty of the magistrate or judge to ensure that the person receives a fair trial.

Judicial independence

The concept of judicial independence means that neither the parliament (the legislature) nor the government (executive) can influence or determine the outcome of any particular case before the court, so that judges are able to act impartially and to make up their own minds about the merits of the case. See *Judicial accountability*, page 8.

4. Information in this section is based on Halsbury's Laws of Australia, Butterworths, [125-330].

5. *Children (Criminal Proceedings) Act 1987 (NSW)*, section 15A.

6. *Dietrich v R* [1992] HCA 57, available online at www.austlii.edu.au/au/cases/cth/HCA/1992/57.html

Judges & juries

Court proceedings in countries that have a common law system (such as the UK, USA and Australia) are *adversarial* in nature.

This means that each party to the case presents argument and evidence in support of his or her version of events to the court, and the court decides whether the party that commenced proceedings has proved their version of events to the relevant standard (see *Standard of proof*, page 3). The court can only make decisions on the issues that the parties indicate to the court are in dispute, and decides only on the basis of the evidence and argument presented to the court by the parties. The court does not conduct its own investigation, or construct its own version of events.

In the majority of cases a judge or magistrate alone will hear the evidence and make the decision in a case. They are also responsible for imposing sentences in criminal cases. In some cases, superior courts may sit with more than one judge (for example the High Court or Federal Court sitting as a Full Court). Juries are used for serious ('indictable') criminal cases, and for some civil and coronial cases: see *Juries*, page 10.

The adversarial system may be contrasted with the inquisitorial system used in many European countries. In the inquisitorial system, the judge has a much more active role in directing the case, and often makes inquiries, calls and examines witnesses and generally determines the matters that the court will decide.

HOT TIP

The term 'proceedings' is used to describe the process of a court dealing with a case that has been brought to the court throughout the various stages of the case. The proceedings before the court in a particular case cease when the court has heard the evidence and arguments and reached its decision.

HOT TIP

Barristers (also called 'counsel') are lawyers who are skilled in advocacy and specialise in appearing before courts (particularly the higher courts) in addition to giving legal advice. Solicitors are lawyers who, in addition to giving legal advice, act for clients in non-litigious matters (such as in the purchase or sale of a house). Solicitors will occasionally appear before lower courts to represent clients.

JUDGES

In Australia, constitutions or other legislation provide for appointment of judges by the executive arm of government. Judges of courts that are established under the Commonwealth Constitution (the High Court, the Federal Court and the Federal Magistrate's Court) are appointed by the Commonwealth executive. Judges of courts established by a state are appointed by their state's executive; ACT court appointments are made by the executive and Northern Territory appointments are made by the Territory Administrator.

Judges are addressed in court as 'Your Honour', and are referred to in writing as 'Justice', eg, 'Justice Smith'. For formal written correspondence they would be addressed as 'The Honourable Justice Smith'. In judgments they are referred to as 'Smith, J.'

There are statutory criteria for eligibility to be appointed as a judge (such as legal qualifications and a minimum period of practice as a lawyer). Those appointed are generally lawyers with extensive experience as a practising barrister, but sometimes solicitors and law academics are also appointed as judges.

In contrast, in the United States many judges (depending on the laws in the state concerned) are elected. In other cases in the United States, judges are appointed by the Executive Government, but the appointment must be confirmed by the legislature. For example, a judge can only be appointed to the Supreme Court of the United States with the consent of a majority of the US Senate.

JUDICIAL INDEPENDENCE

For centuries in England judges were subject to the control of the King, and heavy punishments were used against judges who gave decisions that contradicted the King or prevented the monarch taking some action. Loss of office, banishment or even execution could be the fate of judges who defied the monarch. The *Act of Settlement of 1701* (UK) gave judges some security in judging cases involving the Crown, by providing that they would hold office 'while of good behaviour' and could only be removed from office 'upon the address of both Houses of Parliament'.⁷

The concept of judicial independence means that neither parliament (the legislature) nor the government (executive) can influence or determine the outcome of any particular case before a court, so that judges are able to act impartially and to make up their own minds about the merits of the case.

The elements of judicial independence today are identified as:⁸

- > security of tenure (removal only for misconduct);
- > appointment until a fixed retirement age;
- > payment of an adequate salary out of public revenue (that is, judges should not accept private payments); and
- > judges should be immune from being sued for performing their functions.

Tenure and remuneration

It is extremely rare, and only in the most exceptional circumstances, that a judge is removed from office. The circumstances in which a judge can be removed are generally set out in the Constitution or other legislation. The tight restrictions on removing judges are a safeguard against the executive or legislature using removal from office as a threat against a judge in order to influence the judge's decision. They are an important means of ensuring the independence of the judiciary.

In general, a judge can only be removed by the Governor-General or the Governor at the request of both Houses of Parliament (that is, if a majority of Members of each House of Parliament vote to request the removal). For example, the Commonwealth Constitution provides that judges of the High Court and other federal judges 'shall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity' (s 72).

In New South Wales, section 53 of the *Constitution Act 1902* (NSW) provides that a judge can only be removed from office by the Governor on an address from both Houses of Parliament, seeking removal on the ground of proved misbehaviour or incapacity. In addition, a judge can only be removed if the Conduct Division of the Judicial Commission has made a report to the Governor setting out its opinion that the matters referred to in the report could justify parliamentary consideration of removal of the judge (*Judicial Officers Act 1986* (NSW), section 40). See the **Judicial Commission**, page 9 for more information.

There are generally age limits set out in the Constitution or in legislation setting compulsory retirement ages for judges. For example, the Commonwealth Constitution provides that the appointment of a judge of the High Court expires when the judge reaches the age of 70 (section 72); the same limit applies for judges of other federal courts. Most states have followed suit except for NSW and Tasmania, where the age of retirement for judges is 72. Magistrates retire in some jurisdictions at 65, but in Victoria it is 70, and in NSW and Tasmania it is 72. Most states have provision for acting judges, and in NSW the age limit for this role is 75.

To protect the independence of judges, it is important that their remuneration should be fixed by law and not be capable of being reduced during their term of office.⁹ For judges of federal courts section 72 (iii) of the Commonwealth Constitution provides that the remuneration of a federal judge may not be diminished during the judge's continuance in office. At the state level, remuneration of judges is usually fixed by statute. For example, in New South Wales, judicial salaries are set under the *Statutory and Other Offices Remuneration Act 1975* (NSW), and cannot be reduced.

JUDICIAL ACCOUNTABILITY

If judges cannot be sued, in what ways are they accountable for their decisions? It has been argued that the public nature of court proceedings and judgements, with the requirement for reasons, provides an important means of accountability:

Public confidence is also maintained by the fact that judges are clearly accountable in the most public way for their decisions. Litigation is conducted in public. There is an obligation to give reasons for decisions. Those reasons are public. Those reasons are also liable to appeal. If not appealed, they are open to academic and other criticism. Thus, the work of judges takes place in the open and in a public way and is a manifestly transparent process.¹⁰

7. Available in full text online at <http://australianpolitics.com/democracy/documents/>

8. B Debelle, 'Judicial Independence and the Rule of Law', (2001) 75 *Australian Law Journal* 556 p 561.

9. Some of the information in this section is drawn from Halsbury's Laws of Australia, Butterworths.

10. B Debelle, p 563.

The other side of the independence of the judiciary from interference by the executive is that judges in their turn do not become involved in the political process. In 2000, then Chief Justice Gleeson, in a speech given in New York, summed up the difficult balance in this way:

Like other members of the community, individual judges will, on occasion, disapprove of some of the laws enacted by Parliament. Provided their capacity to administer the law impartially is not compromised, they are free to criticise the law, and to propose change. In fact judges regularly point out defects in the law, and make proposals for law reform. ... Impartiality is a condition upon which judges are invested with authority. Judges are accorded a measure of respect, and weight is given to what they have to say, upon the faith of an understanding by the community that to be judicial is to be impartial. Judges, as citizens, have a right to free speech, and there may be circumstances in which they have a duty to speak out against what they regard as injustice. But to deploy judicial authority in support of a cause risks undermining the foundation upon which authority rests.¹¹

Duty to give reasons

A judge has a duty to give sufficient reasons for his or her decision. The reasons should be sufficient so as to inform the parties of the broad outline and constituent facts of the reasoning on which the court has acted.¹²

Judges are required to give decisions according to law, not according to the popularity of their decisions with the government, with the parties or with the public in general. It is the role of the courts to apply the law according to precedent, legal reasoning, standards and principles, and it is by this means that the courts gain credibility with the public. Australia's first Commonwealth Attorney-General, Alfred Deakin, noted that 'What the legislature may make, and what the executive may do, the judiciary at the last resort decides'.¹³

JUDICIAL COMMISSION OF NEW SOUTH WALES

The Judicial Commission of New South Wales is a body established by statute: *Judicial Officers Act 1986* (NSW). Its main functions are:

> to assist the courts to achieve consistency in sentencing;

- > to organise and supervise an appropriate scheme of continuing education and training of judicial officers;
- > examination of complaints against judicial officers; and
- > to give advice to the Attorney General on matters concerning judicial officers.

The Judicial Commission operates independently of the executive government. It is made up of ten members, being six judges, one legal practitioner and three non-lawyers who are of high standing in the community. The President of the Judicial Commission is the Chief Justice of New South Wales.

The Judicial Commission can investigate complaints against New South Wales judicial officers about matters concerning the ability or behaviour of a judicial officer. It does not deal with complaints against federal judicial officers, or with allegations of criminal conduct or corruption. Under the *Judicial Officers Act 1986* (NSW), a complaint may be made by a member of the public or alternatively referred to the Commission by the Attorney General. A recent report of to the Commonwealth Parliament has recommended that the Commonwealth Government establish a federal judicial commission modelled on the Judicial Commission of NSW.¹⁴

JURIES

The origins of the jury date back to the thirteenth century, when it seems a jury was a collection of local witnesses or local men of good standing. The function of trial by jury today is to decide facts based on evidence presented to the court, under the direction and supervision of the judge.

Juries are used in both criminal and civil cases, although they are much less common in civil cases. In all Australian states and territories, juries in criminal cases for serious offences (called indictable offences) consist of 12 people. In New South Wales, the requirements of a unanimous jury of 12 were amended in 2006 to allow for a majority verdict of 11 jurors in criminal trials in certain circumstances (*Jury Act 1977* (NSW), section 55F). Some other states also accept a majority verdict (such as 10 or 11 out of 12). Juries are not used in less serious ('summary') criminal proceedings, which are heard by a magistrate or judge alone. In New South Wales, a defendant charged with an indictable offence who has a right to trial by jury may elect to be tried by a judge alone.

11. Gleeson, *Judicial legitimacy*, Australian Bar Association Conference, New York, 2 July 2000, available on the High Court website at http://www.hcourt.gov.au/speeches/cj/cj_aba_conf.htm

12. Halsbury's Laws of Australia, Butterworths, [125-335].

13. Australia, House of Representatives, Parliamentary Debates (Hansard), 18 March 1902, pp 10966-10967.

14. Senate Legal and Constitutional Affairs Committee Australia's judicial system and the role of judges, 7 December 2009.

WIGS AND GOWNS

Judges and barristers in a number of courts wear special traditional clothing (consisting of a wig and gown and other elements of clothing) when appearing in court. In addition to the wig and gown, barristers also wear a bar jacket, wing collar and neck bands (a short white necktie, also called a jabot). This traditional clothing, known as court dress, dates from formal gentleman's attire worn in England in the 18th century. Solicitors in NSW are not permitted to wear special court dress when they are appearing in court.

There are many variations in court dress. The particular type of clothing worn depends on the court concerned, and the status of the judge or the barrister, and the type of proceedings. For example, judges of the Court of Appeal of New South Wales wear red robes and long ('full-bottomed') wigs. Magistrates wear black robes but generally not wigs (except on particular formal occasions). Barristers wear black robes and shorter wigs. Senior barristers are known as 'Senior Counsel' and wear robes made of silk, while junior barristers wear gowns of wool, cotton or polyester. Senior Counsel wear a different (longer) wig on ceremonial occasions from that which is worn by other barristers. In NSW before 1993, Senior Counsel were known as Queen's Counsel (QC), and were appointed by the NSW Governor. Senior Counsel are now appointed by the NSW Bar Association.

Each court determines what kind of dress will be worn by judges and by barristers appearing before judges.¹⁵ For example, in the Federal Court, robes are worn but not wigs. Some judges choose not to wear the formal dress that is traditional for their court. As a general rule, traditional court dress is not worn by barristers appearing before tribunals, or by the members of tribunals, or by barristers appearing in Local Courts. In the High Court, the judges wear robes and no wigs, but the barristers who appear before them follow the rules of the jurisdiction in which the case originated.

A jury verdict can only be appealed against if there is a serious error of law or serious misdirection by the trial judge. In criminal cases the jury determines whether the defendant is guilty 'beyond reasonable doubt' but does not decide on the sentence to be imposed.

In civil cases, the size of a jury varies between states. In NSW a civil jury consists of four people; in Victoria, 6-8, in Tasmania, 7; and in South Australia juries are only used for criminal trials. The use of juries in

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Phil Carrick, *Australian Financial Review*.

civil cases is limited, and in New South Wales usually only occurs in defamation cases. In civil cases the jury decides whether the defendant is liable *on the balance of probabilities*. Majority verdicts in civil cases are also allowed for now under the *Jury Act 1977* (NSW), section 57. In NSW, a coroner's jury, if the coroner does not sit alone, is six persons.

Juries in NSW

Members of juries are selected at random by computer from the State electoral roll and are notified in writing. Jury selection is also governed by the *Jury Act 1977* (NSW). Jury service is compulsory, but under the *Jury Act*, certain people are disqualified from serving on a jury, including those who:

- > have served a prison sentence within the last 10 years;
- > have served a sentence as a juvenile offender within the last 3 years; and
- > are currently bound by a court order such as parole, driver disqualification, community service order, apprehended violence order, good behaviour bond or bail.

15. The New South Wales Bar Association website maintains a list of the types of court dress required for barristers in NSW courts and tribunals: see http://www.nswbar.asn.au/docs/professional/attire_state.php

Certain people are ineligible to serve on a jury, including:

- > judicial officers, including those previously employed in these roles (includes judges, magistrates and coroners, Crown Prosecutors, Director of Public Prosecutions);
- > public sector employees in areas of law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration;
- > Australian lawyers (whether practicing or not);
- > Members of parliament, parliamentary officers and staff;
- > people who are unable to read English; and
- > people who are unable because of sickness, disability or infirmity to carry out the duties of a juror.

People who are called for jury duty must attend court, where they might be chosen for a particular case by a ballot. Once this occurs, both the prosecution and defence in the case have the right to object to up to three people without giving a reason, and more with reasons which must be assessed by the judge.

Jurors either take an oath on the Bible (although it is not necessary that a religious text be used) or make an affirmation in accordance with their beliefs: see *Jury Act 1977* (NSW), section 72A. During the course of the case, they are forbidden to discuss the case with anyone else, although they are able to go home each night. Jurors are provided with a note book which must be left with the court when they go home at night. The notebooks are destroyed at the end of the trial.

At the end of the case, the barrister for each side will sum up their arguments. The judge will then give a summary of the evidence presented and may give warnings of dangers in certain types of evidence that may not be obvious to jurors. Instructions, warnings and comments given by the judge to a jury are known as 'jury directions'. The jury then retires to a private room where they discuss the evidence and try to reach a verdict. If they are unable to agree by the end of the day, they are generally allowed to go home, but cannot discuss the case with anyone else.

Once agreement is reached, the jury returns to the court and the jury leader, selected by the jury, delivers the verdict. If the jury cannot agree on a verdict (known as a 'hung jury'), the court discharges the jury and may order a new trial.¹⁶

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Judges attend Red Mass at St Mary's Cathedral, Sydney, which marks the commencement of the Law Term, 3 February 2009.

Renee Nowytarger, *The Australian*, © Newspix/News Ltd.

16. More information on jury duty is available from the Office of the Sheriff. Go to www.lawlink.nsw.gov.au and select 'Jury service' from the Quick links on the left of the page.

Federal Courts

Federal courts are courts established by the Federal Parliament under Chapter III of the Constitution.

There are four federal courts:

- > the High Court;
- > the Federal Court;
- > the Family Court; and
- > the Federal Magistrates Court.

HIGH COURT OF AUSTRALIA

The highest court in Australia is the High Court of Australia. It is the highest court of both the federal court system and the state and territory court systems. The High Court was established under section 71 of the Australian Constitution, as a consequence of the federation of the six Australian colonies into the Commonwealth of Australia. The High Court is based in Canberra, but occasionally sits in state and territory capital cities.

The High Court was established in 1903, originally with three Justices, and held its first sitting in Melbourne. Since 1912, the High Court has consisted of a Chief Justice and six other Justices, who are appointed by the Governor-General on the advice of the Cabinet.

As the highest court in Australia, the role of the High Court is to interpret and to enforce the Commonwealth Constitution, to develop a coherent body of common law for application across Australia, and generally to supervise the administration of justice in the courts.

Original jurisdiction

The *Judiciary Act 1903* (Cth) gives the High Court original jurisdiction in all matters arising under the Constitution or involving its interpretation, but this jurisdiction is not exclusive. Constitutional questions can be decided in any court, with the High Court being the ultimate court of appeal on constitutional questions and other questions of law.

The Commonwealth Constitution also allows the Commonwealth Parliament to confer original jurisdiction on the High Court in four classes of cases:

- > matters arising under the Constitution or involving its interpretation;
- > matters arising under any laws made by the Commonwealth Parliament;

- > matters of admiralty and maritime jurisdiction; and
- > matters relating to the same subject-matter claimed under the laws of different states.

The High Court has original jurisdiction as the Court of Disputed Returns for Commonwealth elections, which means any legal challenges involving Commonwealth elections begin in the High Court.

Appellate jurisdiction

The High Court is the final court of appeal for Australia in state as well as federal matters. Until 1986, parties to a case before the High Court could appeal to the Judicial Committee of the Privy Council in the United Kingdom, a court that hears appeals from courts in a number of Commonwealth countries. Appeals to the Privy Council were abolished by the *Australia Act 1986* of the Commonwealth, and there is now no appeal from a decision of the High Court.

The appellate jurisdiction of the High Court is established by section 73 of the Commonwealth Constitution. The High Court's appellate jurisdiction is comprehensive. Cases appealed to the High Court are usually heard by three or more judges. Appeals to the High Court require special leave of the Court, which means that the Court will only hear the appeal if it agrees to do so. Applications for special leave to appeal are usually heard by two High Court judges.

The High Court will generally only deal with the legal issues raised in an appeal. The High Court generally sends a case to a lower court if it is necessary for any factual issues to be determined, even if the matter will then be returned to the High Court for it to deal with the legal issues. For more detail see *Appeals*, page 23.

FEDERAL COURT

The Federal Court was established in 1976 by the *Federal Court of Australia Act 1976* as a court exercising jurisdiction under particular Commonwealth laws. It replaced two specialist federal courts (the Federal Court of Bankruptcy and the Australian Industrial Court) and relieved some of the workload of the High Court.

Since it was established, the Federal Court has been given further original jurisdiction relating to areas such as administrative law, taxation and intellectual property, and admiralty. The Federal Court currently deals with over 120 federal Acts of Parliament. The

Court operates two divisions – a General Division and a Fair Work Division: see *Fair Work Australia* below. The Court is able to hear cases in relation to human rights, bankruptcy, native title, workplace relations, trade practices, intellectual property and consumer protection. It also has the power to review some federal government decisions in areas such as social security, immigration and taxation. The Federal Court does not have a criminal jurisdiction. The Federal Court sits in all capital cities and elsewhere in Australia when necessary.

The Federal Court exercises appellate jurisdiction over decision of single judges of the Court, decisions of the Supreme Courts of the ACT and Norfolk Island, decisions of the Federal Magistrates Court in non-family law matters and certain decisions of state Supreme Courts exercising federal jurisdiction. For further information see *Appeals*, page 23.

FAMILY COURT

The Family Court of Australia was established in 1976 by the *Family Law Act 1975* of the Commonwealth. The Family Court has jurisdiction over matters relating to divorce, dividing the property of divorcing couples, and since March 2009, the property of separating de facto couples as well.¹⁷ The Family Court also makes orders for maintenance of a spouse or child, and orders as to the residence of a child, contact by the parents and other persons with a child. The Family Court's jurisdiction is over all children (whether of a marriage or not), and in making decisions, the Court is required to give priority to the best interests of the child. There are restrictions on publishing the names of parties to proceedings (*Family Law Act 1975*, section 121).

The function of the Family Court has changed through a series of reforms over recent years. The introduction of the Federal Magistrates Court and the establishment of Family Relationship Centres have meant that the Family Court is now focused on the most complex family law disputes. Alternative dispute resolution and counselling are encouraged by the Family Court. These are services that are accessed outside the Family Court. The dispute resolution provisions of the *Family Law Rules 2004* impose requirements for dispute resolution that must be complied with before an application can be made to the Family Court for a parenting order.

Western Australia has different arrangements in relation to the operation of the Family Court. Section 41 of the *Family Law Act 1975* allows for family law jurisdiction to be vested in State family courts, if an agreement is made between a State government and the Australian government. Western Australia is the only State to have entered into such an agreement so that family

law jurisdiction is exercised by the Family Court of Western Australia and the Magistrates Court of Western Australia, rather than the Family Court of Australia or the Federal Magistrates Court.

FEDERAL MAGISTRATES COURT

The Federal Magistrates Court is the lowest level of the federal courts. The Court was established under the *Federal Magistrates Act 1999* (Cth) and started operating in July 2000. The Court comprises two divisions: a General Division and a Fair Work Division (see *Fair Work Australia* below).

The jurisdiction of the Court includes matters such as:

- > family law;
- > bankruptcy;
- > migration;
- > judicial review of administrative decisions of Commonwealth officers bankruptcy;
- > equal opportunity and anti-discrimination; and
- > consumer protection and trade practices.

The Federal Magistrates Court does not deal with federal criminal matters. Federal Magistrates are located in capital cities in the states and territories and in Cairns, Dandenong, Launceston, Newcastle, Parramatta and Townsville. The Court will travel on circuit to regional areas.

FAIR WORK AUSTRALIA

The start-up of Fair Work Australia on 1 July 2009 saw the creation of specialist Fair Work Divisions of the Federal Court of Australia and the Federal Magistrates Court of Australia.

The Fair Work (Transitional and Consequential Provisions) Act 2009 amended the Federal Court of Australia Act 1976 (Cth) by creating a General Division and a Fair Work Division. The same Act amended the Federal Magistrates Act 1999, also establishing a Fair Work Division and a General Division within the Federal Magistrates Court.

The Fair Work Divisions hear matters that arise under the new workplace relations laws. The Courts can make any orders considered appropriate to remedy a contravention, including injunctions, rather than just imposing a penalty. State and territory courts will retain their existing jurisdiction and powers.

Fair Work Australia has replaced the Australian Industrial Relations Commission which operated from 1988 until 2009.

17. Go to www.familylawcourts.gov.au – see 'Property and money after separation'. There is also a fact sheet available from the Family Relationships website www.familyrelationships.gov.au – search by 'de facto'.

State Courts

In New South Wales there are three courts of general jurisdiction (the Local Court, the District Court and the Supreme Court) and several specialist courts (the Children's Court, the Coroner's Court, the Drug Court and the Industrial Relations Commission in Court Session). For each court, an Act of Parliament sets out the court's jurisdiction, structure and procedure.

THE LOCAL COURT

All states in Australia have a system of lower courts located in most major towns and metropolitan centres. In New South Wales it is called the Local Court (previously called Courts of Petty Sessions), and is established under the *Local Court Act 2007*.

In other states and territories the lower court is called the Magistrates Court.

Local Court hearings are presided over by judicial officers called magistrates. (Judicial officers in higher courts are called judges or justices). Magistrates are appointed from members of the public service, practising barristers, solicitors or academics. Magistrates have legal qualifications and are referred to as 'Your Honour'.

The Local Court conducts hearings in 155 locations across New South Wales, dealing with the vast majority of cases that come before the courts. The Local Court hears minor civil matters involving amounts of money up to \$60 000, and also summary criminal matters. There is no jury in any civil or criminal proceedings in the Local Court. The Local Court also deals with applications for apprehended violence orders.

The majority (95%) of criminal cases commence in the Local Court. One of the most important functions of the Local Court is to conduct committal hearings for indictable offences (more serious offences). A committal hearing is a hearing to determine whether the prosecution can establish that there is sufficient evidence of a case against the accused person for the prosecution to proceed to trial in the District Court or the Supreme Court before a judge or a judge and jury. If the accused person pleads guilty to an indictable offence at the committal hearing, the Local Court can commit the person to a higher court for sentencing.

HOT TIP

Less serious criminal offences that are heard before a magistrate are known as *summary offences*. More serious (*indictable*) criminal offences involve a written accusation of the charge (*indictment*) and are heard before a jury. An indictment includes any process or document that commences criminal proceedings: *Criminal Procedure Act 1986 (NSW)* section 15.

THE DISTRICT COURT

All states, except Tasmania, have an intermediate level of court between the lower courts and the Supreme Courts. There is no intermediate level court for the Northern Territory or the Australian Capital Territory. In Victoria, the intermediate court is called the County Court; in other states it is called the District Court. These courts have both criminal and civil jurisdiction, and are presided over by judges.

The NSW District Court is established under the *District Court Act 1973* and sits regularly in regional areas. It is the largest trial court in Australia. The NSW District Court has a wide jurisdiction and is able to hear matters such as:

- > serious criminal offences including drug offences, manslaughter and serious sexual offences, but not murder or treason;
- > civil cases such as debt recovery or personal injury claims involving amounts of money up to \$750 000 (or larger amounts if the parties agree to the District Court dealing with the matter). The court has an unlimited jurisdiction in claims for damages for personal injury arising out of a motor vehicle accident;
- > appeals from the Local Court and the Children's Court; and
- > appeals from some tribunals (eg professional conduct tribunals for physiotherapists, optometrists, podiatrists etc; and some Consumer Trader and Tenancy Tribunal appeals).

The District Court hears most of the serious criminal cases that come before the courts in New South Wales. Criminal cases are heard before a judge and a jury of 12 citizens (unless the accused person elects to have the matter heard before a judge alone). Civil cases sometimes have a jury of four citizens to decide questions of fact and to assess damages, but the use of juries in civil trials is becoming less common.

SUPREME COURTS

Each state and territory has a Supreme Court, presided over by a Chief Justice. The NSW Supreme Court was first established in 1823, and is now regulated by the *Supreme Court Act 1970* (NSW). It is the largest superior court of general jurisdiction in Australia.

The Supreme Court hears serious civil cases involving amounts of money over \$750 000 and hears serious criminal cases involving murder, treason and piracy. The areas of civil law dealt with by the Supreme Court include:

- > contract and negligence cases;
- > equity (such as matters involving trusts);
- > probate (matters involving the validity of wills and the functions of executors of wills, or administrators if the deceased person died without a will);
- > admiralty (matters involving ships); and
- > commercial (such as building disputes).

The Supreme Court may also hear matters under Commonwealth laws where the Supreme Court has been vested with federal jurisdiction.

The Court of Appeal and Court of Criminal Appeal hear appeals from decisions made by most of the courts of New South Wales and from decisions made by a single judge of the Supreme Court (see *Appeals*, page 23).

SPECIALIST COURTS

Land and Environment Court

The NSW Land and Environment Court is a specialist superior court established in 1979 under the *Land and Environment Court Act 1979* (NSW), to hear disputes relating to land development, planning, local government, land tenure, land valuation, environmental crimes such as pollution and some native title and aboriginal land rights matters. It has a status equal to the Supreme Court but generally operates in a more informal manner.

Not all decisions of the Land and Environment Court are made by judges; the Court also includes Commissioners and Assessors. Commissioners hear cases involving building applications, development applications and valuations, disputes between neighbours about trees; and Assessors make expert assessments. Judges of the Land and Environment Court only hear cases involving criminal offences, civil enforcements, appeals against a decision of a Commissioner or Assessor, or cases that raise important issues of law.

Coroners Court

The functions of coroners are to investigate certain deaths, suspected deaths, fires and explosions, as set out in the *Coroners Act 1980* (NSW). The State Coroner oversees and co-ordinates coronial services in New South Wales, assisted by the Senior Deputy and Deputy State Coroners. All magistrates of the Local Court are coroners. Registrars at Local Courts in most towns throughout New South Wales are also coroners or assistant coroners.

Certain deaths must be reported to a coroner. For example, the death of a person who has died a violent or unnatural death, or a death where a medical practitioner has not issued a medical certificate stating the cause of death are reportable. The coroner will hold an inquest if the law requires an inquest to be held, or if the coroner believes an inquest is necessary. An inquest is a court hearing, held to determine the identity of the deceased and the date, place, manner and cause of death. A coroner must conduct an inquest if:

- > the person's identity, date, place, manner and cause of death have not been sufficiently disclosed;
- > the person died as a result of a homicide;
- > the person died as a result of the administration of an anaesthetic;
- > the person died while in custody;
- > a child's death may be due to abuse or neglect;
- > the person who died was in residential care;
- > the Attorney General orders an inquest; and
- > the State Coroner directs that an inquest be held.

The coronial process is inquisitorial in nature, rather than adversarial (see page 7), and coroners are not bound by the rules of evidence. However, a coroner has the power to call witnesses to give evidence at an inquest. A coroner may refer a matter to the Director of Public Prosecutions if the inquest reveals that a known person has committed a serious criminal offence in connection with the death.

A coroner may also promote public health and safety by recommending to the relevant authorities, changes to any practices, policies or laws to prevent similar deaths in the future.

Children's Court

The Children's Court is a court of the same status as the Local Court. It is established under the *Children's Court Act 1987* (NSW). The Court is composed of a President (of the same status as a District Court judge) and Children's Magistrates. The Chief Magistrate of the Local Court (in consultation with the Court President) may appoint magistrates of the Local Court as specialist Children's Magistrates. To qualify as a Children's Magistrate, a magistrate must have had training in the social or behavioural sciences or experience in dealing with children, or have personal qualities that are appropriate for a Children's Magistrate.

The Children's Court deals with children (under the age of 18) charged with summary criminal offences. The Court also deals with some indictable offences, if the child was under 18 when the offence was committed and under 21 when the offence comes to court. Children charged with serious indictable offences are dealt with by the appropriate adult court (the District Court or the Supreme Court, depending on the nature of the offence). A serious indictable offence includes offences such as homicide, armed robbery, and serious sexual assault. In addition, the Children's Court does not usually have jurisdiction over traffic offences.

Proceedings in the Children's Court are generally closed to members of the public. There is a prohibition on publishing the name of a child convicted of an offence. However, a court can permit publication of a child's name if the child has been convicted of a serious indictable offence (*Children (Criminal Proceedings) Act 1987* (NSW), sections 10 and 11).

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Appeals against a decision of the Children's Court may be made to either the District Court or the Supreme Court. Appeals to the District Court involve a rehearing of the matter.

Children's Court care proceedings provide judicial oversight of the Department of Community Services (DOCS) when removing children from their families for neglect or abuse. Care proceedings are most commonly initiated by the Department of Community Services under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

There are a number of important features about care proceedings. They do not involve a child or young person being charged with any offence. The child or young person is rather the subject of proceedings where a protective order is sought. Although the same events may give rise to care proceedings and a criminal prosecution against a parent, for example for the sexual abuse of a child, the care proceedings are separate proceedings and the Children's Court can hear the care proceedings regardless of what happens in the criminal proceedings.

There is an emphasis on alternate dispute resolution during proceedings in an effort to avoid a court hearing where possible. There is also an emphasis on the participation of children and young persons in care proceedings, and giving due weight to their views in accordance with their developmental capacity and the circumstances of the case.

Care proceedings are closed to the general public, and the publication of names and other identifying material of children and young persons (with certain exceptions contained in section 105) is an offence with a substantial fine.

Parties who are dissatisfied with a final order (as opposed to an interim order) of the Children's Court may appeal to the District Court. Parties can also go back to the Court when their circumstances have changed.

NSW Drug Court¹⁸

The NSW Drug Court commenced operation, initially as a pilot scheme, on 9 February 1999. The Drug Court deals with non-violent criminal offences committed by drug dependent offenders. A recent study¹⁹ has shown a significant reduction in the recidivism rate of those who complete the program, compared to offenders given a conventional sentence (usually imprisonment). The Drug Court has both a Local Court and District Court jurisdiction.

To be eligible for the Drug Court, a person must:

- > be 18 years or over;
- > be dependent on a prohibited drug;
- > reside within specified areas of the Western Sydney region;
- > have pleaded guilty to (or indicated that they will plead guilty to) the offence;
- > be highly likely to be sentenced to full-time imprisonment; and
- > be willing to participate in a Drug Court program.

A person will not be eligible if:

- > the criminal offence they are charged with involves violence, sexual assault or a large commercial supply of prohibited drugs; and
- > they are suffering from any mental condition that could prevent or restrict participation in a Drug Court program.

If an offender is found eligible to participate on the drug court program, the Drug Court will impose an initial sentence on the offender for the offence to which he or she pleaded guilty and that sentence is suspended while the offender remains on the program.

A Drug Court program lasts for a minimum of 12 months and consists of:

- > intensive judicial supervision;
- > provision of drug dependency treatment;
- > intensive case management by the Probation and Parole Service;
- > the provision of a range of support services for housing, education, vocation training and employment;
- > random drug testing; and
- > the use of rewards or sanctions to encourage compliance with a program.

When the drug court program is terminated, a final sentence is imposed by the court. If the program is completed successfully, the Drug Court is expected to impose a lesser sentence instead of the original sentence, and the lesser sentence will probably not be a sentence of imprisonment. If the Drug Court finds that there is no useful purpose in the offender remaining on the program a final sentence will be imposed which cannot exceed the initial sentence that was imposed by the court when the participant came onto the program. The final sentence imposed by the Drug Court can be appealed to the Court of Criminal Appeal. There is no right of appeal against the initial sentence or in respect of any sanctions imposed by the court.

18. Information in this section taken from the Drug Court NSW website: www.lawlink.nsw.gov.au/drugcrt *About the Drug Court of NSW*.

19. *The NSW Drug Court: A re-evaluation of its effectiveness*, D Weatherburn, L Snowball and J Hua, Contemporary issues in Crime and Justice No 121, *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, September 2008. Available online at www.bocsar.nsw.gov.au

The Drug Court differs from other courts in that judges have close personal contact with the offender participating in a Drug Court program. The first evaluation of the operation of the Drug Court by the Bureau of Crime Statistics and Research described the involvement of the judge in the rehabilitation process:

‘There is frequent contact between the Judge and the participant, such that a personal, supportive and encouraging relationship is developed ... Unlike the traditional criminal justice process, the Drug Court of NSW has adopted a team approach to the management of offenders, as occurs in US Drug Courts. At the Drug Court of NSW, the team consists of a senior Judge in her absence, the Drug Court Registrar, an Inspector of Police, a Probation and Parole coordinator, solicitors from the Legal Aid Commission, solicitors from the Office of the Director of Public Prosecutions, and a Nurse Manager from Corrections Health who coordinates the treatment services. Another key feature of US Drug Courts that has been adopted by the Drug Court of NSW is a non-adversarial relationship between members of the team. This approach stems from the supposition that all team members share the common goal of reducing the drug dependence and offending of the participants.’²⁰

The re-evaluation stated that ‘The apparent success of the Drug Court suggests that consideration should be given to expanding its reach’.²¹

Youth Drug and Alcohol Court

The Youth Drug and Alcohol Court (YDAC) is a pilot program which began operation in July 2000. It is administered by the Children’s Court under the (*Criminal Proceedings Act 1987* (NSW)). The program aims to rehabilitate young offenders with alcohol and or drug problems. In a six month program participants undergo detoxification and rehabilitation, attend educational and vocational courses, and appear regularly throughout that period before the YDAC.

As well as ongoing substance misuse, many young offenders have a range of other difficulties including poor educational achievement, dysfunctional family backgrounds and psychological problems. The YDAC attempts to address this wide range of needs and problems through intensive case management. The program offers young offenders an individual plan that includes treatment schedules, regular appointments with the court, and assistance with health, housing

and education needs. It has similar requirements and exclusions to the adult’s Drug Court of NSW (for more information see page 17).²²

Chief Industrial Magistrates Court

The Chief Industrial Magistrate’s Court exercises the Local Court’s industrial jurisdiction. It has both civil and criminal jurisdiction under a broad range of NSW and Commonwealth legislation. The Chief Industrial Magistrate and other Industrial Magistrates are appointed by the Governor of NSW from the Magistrates of the Local Court: *Industrial Relations Act 1996* (NSW), section 381.

The Court deals with such matters as:

- > recovery of money owing under industrial instruments, for example, awards, enterprise agreements and statutory entitlements;
- > prosecutions for breach of industrial instruments; and
- > appeals from various administrative decisions (licenses); and prosecutions for statutory breaches.

Industrial Relations Commission in Court Session

The Industrial Relations Commission of New South Wales is the industrial tribunal and industrial court for the State of New South Wales. The Industrial Relations Commission in Court Session is known as the Industrial Court of NSW and is a superior court, of equivalent status to the Supreme Court. The court may hear industrial relations matters affecting both national system and NSW system employers and employees. It is as an eligible court under the *Fair Work Regulations 2009* (Cth).

The Industrial Court also has jurisdiction to hear criminal proceedings in relation to breaches of industrial and occupational health and safety laws. The Court determines proceedings for avoidance and variation of unfair contracts (and may make consequential orders for the payment of money); prosecutions for breaches of occupational health and safety laws; proceedings for the recovery of underpayments of statutory and award entitlements; superannuation appeals; proceedings for the regulation and registration of industrial organisations.

The Full Bench of the Industrial Court has jurisdiction in relation to decisions of single judges of the Court, industrial magistrates and certain other bodies. The Full Bench of the Industrial Court is constituted by at least three judges.

20. K Freeman, R Lawrence Karski, P Doak, ‘NSW Drug Court Evaluation: Program and Participant Profiles’, *Crime and Justice Bulletin* No 50, April 2000 p 2.

21. As above.

22. Information taken from the Youth Drug Court website: www.lawlink.nsw.gov.au/youthdrugcourt

Tribunals

Tribunals are generally set up to provide a faster, less expensive and more informal process for deciding disputes between people. Since the 1970s, a wide range of tribunals have been established to deal with disputes in specific areas of the law at both state and federal levels. The nature and role of tribunals vary greatly, depending on the purposes of the tribunal. The characteristics of different tribunals are determined by the legislation under which they are established.

Tribunals generally have many of the features of courts, such as independence from the executive government, public hearings, a duty to decide disputes according to law and to give reasons for decisions. There is usually a right of appeal on a question of law to a court, such as the District Court or the Supreme Court. They generally differ from courts in having a more informal procedure, such as greater freedom to depart from the rules of evidence. Tribunals are generally made up of 'members' rather than judges or magistrates (although a member of a tribunal may be a judge or a magistrate). Some tribunals have non-lawyer members, for example, a tribunal may be constituted by two legal practitioners and another person with special expertise in a particular area. In some tribunals, the parties may not be entitled to legal representation, or the use of legal representation may be limited.

The growth in tribunals is a response to the problems of the expense and time-consuming nature of litigation in court. Tribunals are intended to be less formal, more efficient, cheaper and more accessible to ordinary people. Criticisms about the trend towards directing disputes towards tribunals centre on the fear that they may provide a lower standard of justice than the courts, because:

- > they are not required to apply the rules of evidence;
- > reduced use of legal representation and adversarial procedures;
- > tribunal members may have less expertise than judges or magistrates;
- > the high volume and fast turnover of matters may limit the amount of consideration that can be given to each case; and

- > the appointment of tribunal members by the executive government for limited terms (rather than life-time tenure) reduces the independence of tribunal members from the executive government.

The main types of tribunals are:

- > tribunals set up to deal with matters that were previously heard by the courts, eg the Consumer, Trader and Tenancy Tribunal (CTTT);
- > tribunals that provide an avenue of review of administrative decisions (decisions made by government authorities); and
- > professional disciplinary tribunals established to regulate professional standards within a particular profession.

Administrative review tribunals

Administrative review tribunals deal with disputes about the merits of administrative decisions, rather than resolving disputes between private individuals or companies. 'Merits review' means that the tribunal looks not just at whether there were any legal errors in the decision being reviewed, but whether the decision was the correct or preferable decision in the circumstances. An example of a review tribunal is the Administrative Decisions Tribunal of New South Wales, one function of which is to review a number of licensing decisions.

A person who is dissatisfied with a decision made by a public body or official can only apply to the ADT for review if legislation provides for such a right. There is no right at common law for review by a tribunal.

An administrative review tribunal deciding an application for review usually has the power to make any of the following determinations:

- > to affirm the original decision (in which case the original decision remains unchanged);
- > to vary the original decision in some way; and
- > to set aside the original decision and either substitute a new decision or send the matter back to the original decision-maker for the decision to be reconsidered.

Professional disciplinary tribunals

These tribunals are established to regulate professional standards within a particular profession. For example, the Medical Tribunal hears some kinds of complaints against medical practitioners, and has a range of powers to deal with medical practitioners where a complaint has been established. The Medical Tribunal can give a caution or reprimand, order counselling or further training, or even fine a medical practitioner or order the suspension or deregistration of a medical practitioner. Tribunals exist for a range of other professionals such as physiotherapists, chiropractors, optometrists and podiatrists.

FEDERAL TRIBUNALS

Administrative Appeals Tribunal

The Administrative Appeals Tribunal was established by the *Administrative Appeals Tribunal Act 1975* of the Commonwealth to hear applications for review of a wide range of administrative decisions made by Commonwealth Government Ministers, officials, authorities and other tribunals, and some other decisions made by non-Commonwealth Government bodies.

There are several hundred statutes that give review jurisdiction to the AAT. Its jurisdiction covers areas such as taxation, social security, veteran's affairs, Commonwealth employees' compensation and superannuation, civil aviation, customs, freedom of information and bankruptcy. The AAT hears applications for review of decisions made by the Social Security Appeals Tribunal.

Social Security Appeals Tribunal

The Social Security Appeals Tribunal was established in 1975 to hear applications for review of decisions of the Department of Social Security (now the Department of Family and Community Services). Originally the SSAT could only make recommendations to the Department, but since 1988 it has had the power to make binding decisions. The SSAT has jurisdiction to review decisions about pensions, benefits, allowances and student assistance, among other matters. Decisions of the SSAT may be appealed to AAT, as described above.

Migration Review Tribunal

The Migration Review Tribunal is established under the *Migration Act 1958* to review decisions relating to migration made by the Minister for Immigration and Multicultural and Indigenous Affairs, or a delegate of the Minister. These include some decisions to refuse visas to applicants in Australia or overseas and visa cancellations within Australia (other than cancellations on character or conduct grounds). The MRT also has jurisdiction to review certain business nomination and sponsorship decisions. The MRT is not bound by the formal rules of evidence and there is no right to legal representation (lawyers can be present but cannot speak on behalf of clients, except in exceptional circumstances).

Refugee Review Tribunal

The Refugee Review Tribunal was established under the *Migration Act 1959* (Cth) to review decisions of the Minister for Immigration, or a delegate of the Minister, to refuse to grant a protection visa, or to cancel a protection visa, for a person who claims onshore in Australia to be a refugee. Like the MRT, the RRT is not bound by the formal rules of evidence and there is no right to legal representation (lawyers can be present but cannot speak on behalf of clients, except in exceptional circumstances).

Fair Work Australia

Fair Work Australia is the national workplace relations tribunal which began operation on 1 July 2009 under the *Fair Work Act 2009*. It is an independent body with power to carry out a range of functions relating to workplace disputes and industrial action, minimum wages and employment conditions safety net, enterprise bargaining and more.

Fair Work Australia also has responsibilities relating to the registration of unions and employer associations and their financial accountability. This work is governed by the *Fair Work (Registered Organisations) Act 2009*.

The new tribunal assumed the functions of the Australian Industrial Relations Commission and the Australian Industrial Registry (both date back to 1904) and the Australian Fair Pay Commission (established in 2005) and some of the functions of the Workplace Authority (established in 2007).

FWA is part of Australia's national workplace relations system which also includes the Fair Work Ombudsman and the Fair Work divisions of the Federal Court of Australia and the Federal Magistrates Court of Australia. See *Fair Work Australia*, page 13.

Other federal tribunals

- > National Native Title Tribunal
www.nntt.gov.au
- > Australian Competition Tribunal
www.competitiontribunal.gov.au
- > Veteran's Review Board
www.vrb.gov.au
- > Defence Force Discipline Appeal Tribunal
www.defenceappeals.gov.au
- > Defence Force Remuneration Tribunal
www.dfrt.gov.au
- > Copyright Tribunal of Australia
www.copyrighttribunal.gov.au
- > Superannuation Complaints Tribunal
www.sct.gov.au

NEW SOUTH WALES TRIBUNALS

Administrative Decisions Tribunal

The Administrative Decisions Tribunal (ADT) is a tribunal with a wide jurisdiction to review particular types of administrative decision made by New South Wales Ministers, officials or authorities. It is established under the *Administrative Decisions Tribunal Act 1997*. The administrative review jurisdiction of the ADT includes a number of licensing or accreditation decisions, freedom of information, a number of decisions made by the Department of Human Services NSW (agencies within the department include Community Services; Ageing, Disability and Home Care; Aboriginal Affairs; Housing and Juvenile Justice). Decisions in the area of State Revenue (such as land tax, stamp duty or payroll tax) are also under the ADT's jurisdiction.

As well as reviewing a range of administrative decisions, the ADT has jurisdiction to resolve certain kinds of disputes between private individuals or companies in the area of:

- > equal opportunity complaints under the *Anti-Discrimination Act 1977*;
- > privacy complaints relating to public sector organisations under the *Privacy and Personal Information Protection Act 1998*; and
- > retail lease matters.

The ADT also has jurisdiction in disciplinary proceedings relating to certain professions (such as complaints about the professional conduct of solicitors, barrister or registered conveyancers).

Consumer, Trader and Tenancy Tribunal

The Consumer, Trader and Tenancy Tribunal (CTTT) is established under the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW). It merges two previous tribunals, the Fair Trading Tribunal and the Residential Tribunal. The CTTT has nine divisions:

- > **tenancy** – for disputes between landlords and tenants;
- > **social housing** – disputes where the landlord is an agency such as NSW Land and Housing Corp, Housing NSW, Office of Community Housing, Aboriginal Housing Office;
- > **general** – mostly consumer claims against a business concerning the supply of goods or services up to the value of \$30,000;
- > **home building** – disputes between consumers, trader and insurers concerning residential building work up to the value of \$500,000;
- > **motor vehicles** – disputes about a new or used motor vehicles and repairs to vehicles;
- > **strata and community schemes** – common disputes include excessive noise, exclusive use by-laws, damage to common property, appointment of a strata manager, keeping pets, contributions and levies;
- > **residential parks** – disputes from caravan park residents and owners;
- > **retirement villages** – disputes between retirement village administration and one or more residents; and
- > **commercial** – disputes involving debtors, credit providers, consumers, mortgagors and lessees.

Generally people involved in cases before the CTTT are required to represent themselves at a hearing, although the CTTT can allow legal representation in some circumstances.

Industrial Relations Commission of New South Wales

The Industrial Relations Commission regulates industrial and workplace issues in New South Wales. It is established under the *Industrial Relations Act 1996* (NSW). The Industrial Relations Commission has both administrative and judicial functions, which gives it a dual nature. Its administrative functions are exercised by Commissioners. These administrative functions include resolving industrial disputes, making awards and approving enterprise agreements. In the exercise of its administrative functions, the IRC is a type of tribunal. For information on the judicial functions of the Commission, see page 18.

Workers Compensation Commission

The Workers Compensation Commission is a tribunal established under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) to resolve workers compensation disputes between injured workers and employers.

Victims Compensation Tribunal

The Victims Compensation Tribunal (VCT) was established in 1987 as an independent body to provide financial compensation to individuals who have suffered injury as the result of a criminal act of violence. Payments are made out of a Victims Compensation Fund established by the NSW Government. The VCT is now governed by the *Victims Support and Rehabilitation Act 1996* (NSW).

Initial decisions about compensation are made by administrative assessors on the basis of a table of specified injuries that can be compensated. A person who has made a claim for compensation and who is dissatisfied by the assessment can appeal to the VCT for a reconsideration of the compensation assessment. Most appeals to the VCT are decided by a member of the VCT on the basis of documents only. However, applicants can request an oral hearing by the Tribunal.

The VCT has the power to recover money from convicted offenders after money has been paid to the victim. These proceedings are known as 'restitution proceedings'.

Guardianship Tribunal²³

The Guardianship Tribunal is established under the *Guardianship Act 1987* (NSW). The main role of the Tribunal is to appoint guardians and financial managers for people 16 years and over with impaired decision-making ability. To make a guardianship order the Tribunal must be satisfied that:

- > the person is 16 years of age or more and is resident in New South Wales;
- > the person has a disability that affects their decision making; and
- > there is a current need for someone to be given legal authority to make personal decisions for them.

The Tribunal can review a guardianship order on request if the order is not working in the interests of the person or it is thought that there is no longer a need for guardianship.

Other roles include giving consent to medical and dental treatments for people 16 years and over who do not have the capacity to consent to their own treatment and approval to participate in clinical trials.

The Tribunal consists of at least:

- > one member with legal qualifications;
- > one professional member who has experience assessing or treating adults with disabilities (such as a doctor, psychologist or social worker); and
- > one community member who has experience with adults with disabilities.

Parties to a hearing may be legally represented, but only with the Tribunal's permission.

The Tribunal members consider the relevant written evidence. They take evidence from those attending the hearing (including the person the application is about, and the applicant) or giving evidence by telephone. If the Tribunal is satisfied there is a need to appoint a guardian or financial manager or consent to treatment, it makes an order. The written order and the reasons for decision are sent to all legal parties.

An appeal against a decision of the Guardianship Tribunal may be made to the Supreme Court or the Administrative Decisions Tribunal, and usually have to be made within 28 days of receiving the order and reasons for decision.

Other NSW tribunals

- > Dust Diseases Tribunal
www.lawlink.nsw.gov.au/ddt
- > Government and Related Employees Appeal Tribunal
www.great.greatab.nsw.gov.au/
- > Local Government Pecuniary Interest and Disciplinary Tribunal; Local Government Remuneration Tribunal
www.dlg.nsw.gov.au
- > Mental Health Review Tribunal
www.mhrt.nsw.gov.au
- > Transport Appeal Boards
www.tab.greatab.nsw.gov.au

23. Information in this section is taken from the Guardianship Tribunal website: www.gt.nsw.gov.au accessed 15/02/10.

Appeals

An appeal is an application to a higher court by a party who believes that a decision of a lower court was incorrect. There is no right at common law to appeal against a decision, so a party can only appeal against a decision where an appeal is allowed by legislation.

NATURE OF APPEALS

There are three general types of appeal from a decision of the trial court (that is, the court that made the decision that is being appealed against):²⁴

Appeals in the strict sense

An appeal where the appellate court, in determining whether the trial court made a mistake, is limited to considering the evidence that was before the trial court at the time that the trial court made the decision, and the law at the time of that trial. That is, the appellate court cannot consider any fresh evidence that may have come to light since the trial, or any changes in the law. The appeal is limited to particular issues raised by the appellant and therefore the appeal does not involve a rehearing of the whole case.

Appeals by way of rehearing

An appeal where the appellate court considers the law as at the time of the determination of the appeal, and may consider events up until the rehearing. Usually the appellate court can also receive fresh evidence. The appeal may be limited to particular issues raised by the appellant, or the appeal court may review the whole of the decision of the trial court.

Appeals by way of hearing *de novo*

An appeal where the appellate court retries all the issues tried by the trial court, without being limited to the evidence that was before the trial court, is called an appeal '*de novo*'. Each side presents their case again, and fresh evidence may also be presented. The court rehears the whole matter and does not simply review the decision before the lower court.

The legislation that provides for an appeal will generally also provide whether there is a right of appeal, or whether an appeal requires the consent of the appellate court (this is referred to as obtaining 'leave' to appeal). Legislation may also specify whether the appeal is only on a question of law, or whether the appellate court can consider whether the trial court made a mistake as to fact in its decision.

Legislation may also determine what the appeal court can do if it decides that there was an error by the trial court. Usually the appeal court will be able to make any decision that the trial court could make, or vary the decision of the trial court, or send the matter back to the trial court to be heard again correctly. However, legislation may impose limits on the remedies available to the appeal court.

Appeal courts usually consist of three or more judges. Each judge can make their own decision, or they can combine to write joint decisions. The decision of a majority of the judges of the appeal court is the decision of the court. For example, if the appeal court is made up of three judges, of whom two judges are in agreement and the other judge is in dissent, the decision of the appeal court is the decision of the two judges in agreement. A unanimous decision is a decision where all the judges agree on the point in question.

APPELLATE STRUCTURE

The structure of appeals from Australian courts is generally as follows:²⁵

- > from an inferior court to another inferior court of intermediate status (for example, from the Local Court to the District Court);
- > from an inferior state or territory court to a single judge of the Supreme Court or other superior court of that state or territory;
- > from an inferior state or territory court to a Full Court of the Supreme Court of that state or territory;
- > from an inferior state or territory court exercising jurisdiction under a federal law to a single judge of a superior federal court;

24. Information in this section taken from Halsbury's Laws of Australia [325-11105].

25. The information in this section is taken from Halsbury's Laws of Australia, Butterworths, [125-485].

- > from a single judge of the High Court, the Federal Court, the Family Court, the Supreme Court of a state or territory to the Full Court, Court of Appeal or Court of Criminal Appeal of that court;
- > from the Federal Magistrates Court to the Federal Court or the Family Court;
- > from a single judge of the Supreme Court of a state or territory to the Full Court of the Federal Court; and
- > from the Federal Court, the Family Court or the Supreme Court of a state or territory to the High Court.

Some courts have only appellate jurisdiction (for example, the NSW Court of Criminal Appeal only hears appeals from decisions in criminal cases), while some courts have both appellate and original jurisdiction (for example, the NSW District Court hears appeals from decisions of the Local Court, and also has original jurisdiction in many civil and criminal cases).

HIGH COURT APPEALS

In its role as the highest court of appeal, the Full Court of the High Court generally hears appeals from:

- > the decision of a single judge of the High Court in its original jurisdiction;
- > any other Federal court or court exercising federal jurisdiction; and
- > Full state and territory Supreme Courts of Appeal.

Generally, an appeal may not be brought to the High Court without the permission ('leave') of the Court. In deciding whether to grant special leave, the Court considers:

- > whether the proceedings involve a question of law that is of public importance;
- > whether it is necessary to resolve differences of opinion between different courts, or within the same court, as to the state of the law; and
- > whether the interests of the administration of justice, whether generally or in the particular case, require consideration by the High Court of the judgment.

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The High Court heard an appeal from the Northern Territory Government against the finding of the Full Bench of the Federal Court in the Blue Mud Bay case: Northern Territory of Australia v Arnhem Land Aboriginal Land Trust [2008] HCA 29 (30 July 2008). The traditional owners from Blue Mud Bay are pictured outside the High Court in Canberra, 5 December 2007.

Mark Graham, AAP Image.

DIFFERENT TYPES OF REVIEW

An appeal is a right created by legislation to apply to a higher court to determine whether a decision of a lower court was correct, as described above. There are other forms of review that may achieve similar results to an appeal.

Merits review

A right of merits review applies to decisions by government agencies, rather than decisions of courts. It is a right created by legislation for a person who is affected by a decision of a government agency to have that decision reviewed by other government officers. The review may be internal (that is, the review is done by other government officers within the agency) or external (that is, the review is done by a body independent of the government agency, usually a tribunal). In undertaking a merits review, the reviewer looks not just at whether the original decision was correct, but also at whether the decision was the preferable decision in all the circumstances of the case. Merits review is not undertaken by courts, which are concerned with the legality of decisions, rather than their merits. (See *Tribunals* on page 19)

Judicial review²⁶

This is a common law right (that is, it does not depend on legislation) to apply to a higher court to decide whether a decision of a government officer or of a lower court or a tribunal breached the law in one of several ways. Judicial review is also known as the 'supervisory jurisdiction' of the superior courts, because the superior courts take it on themselves to ensure that the actions of the executive government and of the lower courts are correct according to law.

There were traditionally four grounds for applying for judicial review of a decision:

- > the decision was ***ultra vires*** (it was beyond the legal power or authority of the decision-maker to make the decision);
- > the decision was made in breach of the rules of ***procedural fairness*** (for example, if the decision-maker did not give the person concerned a fair hearing);
- > in the case of a court or tribunal, there was a ***jurisdictional error*** (the court or tribunal mistakenly decided that it had (or did not have) jurisdiction over a particular matter); and
- > in the case of a court or tribunal, there was an ***error of law on the face of the record*** (there was a mistake of some kind in the record of the court's decision, not in its reasons for decision).

HOT TIP

A writ was originally a written command by the King to his officers or servants to carry out some judicial or administrative function. Some forms of writs were gradually taken over by the courts for various purposes. These writs were still in the form of a royal command, but in fact were issued by the courts themselves.

Writs were for a long time used extensively by the courts for the commencement of proceedings, the supervision of inferior courts, and the enforcement of judgments. In more recent times, as court procedures have been reformed and modernised, writs have often been replaced by court orders or other procedures.

Writs are still generally used outside the courts by the Governor-General or a State Governor to commence the election process for the election of a new Commonwealth or state government.

Other remedies include an ***injunction*** (a court order requiring a person to refrain from a breach of the law) and a ***declaration*** (a court judgment that conclusively declares the pre-existing rights of the parties, without separately ordering a person to do or refrain from doing anything).

The traditional remedies that a court exercising supervisory jurisdiction could grant were called the ***prerogative writs***. They consisted of the writs of:

- > ***prohibition*** (which prohibit the lower court or tribunal from proceeding to exceed its jurisdiction);
- > ***certiorari*** (which cancels or 'quashes' a decision already made by the lower court or tribunal and removes the matter into the higher court); and
- > ***mandamus*** (which compels an administrator to exercise power or jurisdiction according to law).

In NSW, these are now orders under the *Supreme Court Act 1970*, section 69.

26. Information in this section is taken from Halsbury's Laws of Australia, Butterworths, [125-410]-[125-830].

Alternative Dispute Resolution

Alternative dispute resolution (ADR) is the term used for a number of dispute resolution processes that are an alternative to traditional court proceedings. Some ADR processes are court-based, which means that the parties are involved in court proceedings but the court has recommended or directed them to engage in ADR. Others ADR processes are separate to the courts, such as Community Justice Centres. ADR is used in civil proceedings, rather than criminal proceedings.

ADR can be beneficial even if a resolution is not achieved and the dispute proceeds to court. The ADR process can help to define the real issues in dispute, so that when the dispute reaches the court the court and parties can concentrate on those issues, and not waste time on matters that they do not disagree about.

COURT-BASED ADR

There are three basic types of court-based ADR.

Mediation

A neutral and independent mediator assists the parties to work out their own solution by exploring options. The options are often broader than those that can be considered by the court. The mediator does not impose a solution on the parties.

Neutral evaluation

A neutral and independent evaluator assists the parties to identify the real issues in the dispute. The evaluator may assess the strengths and weaknesses of the case and offer an opinion as to the likely decision of the Court, for example, which party is likely to win and the amount of a likely monetary award. The opinion given by the evaluator is not binding.

Arbitration

A neutral and independent arbitrator assesses the strengths and weaknesses of the case and makes a decision as to which party has the strongest case and the appropriate amount of damages. Arbitration is more adversarial in nature than mediation or neutral evaluation. Parties to a commercial contract sometimes include as a term of the contract that any dispute will be referred to an arbitrator, and the parties agree to be bound the decision of the arbitrator without going to a court.

BENEFITS OF ADR

Courts and tribunals encourage parties to civil proceedings to use alternative dispute resolution to reach agreement between themselves, and so to avoid the expense and time of a court case. Promoting alternative dispute resolution allows court time to be concentrated on intractable disputes that cannot be resolved by agreement. Many courts and tribunals provide alternative disputes resolution measures to assist parties, and in some civil matters can require parties to attempt to resolve their disputes through some form of alternative dispute resolution before the matter proceeds to a hearing before the court or tribunal. For example, the Supreme Court can refer cases to mediation or neutral evaluation without the consent of the parties.

There are numerous benefits to using alternative dispute resolution, such as:

- > an early resolution of the dispute;
- > lower costs to the parties involved;
- > a faster result;
- > greater flexibility in resolving the dispute; and
- > greater 'ownership' of the resolution of the dispute by the parties.

ADR can be beneficial even if a resolution is not achieved and the dispute proceeds to court. The ADR process can help to define the real issues in dispute, so that when the dispute reaches the court the court and parties can concentrate on those issues, and not waste time on matters that they do not disagree about.

COMMUNITY JUSTICE CENTRES

Community Justice Centres resolve disputes through mediation, free of charge to members of the public. There are Community Justice Centres throughout New South Wales, providing an informal and impartial dispute resolution service to all sections of the community and government agencies. The types of matters dealt with by Community Justice Centres includes family disputes and youth conflict, workplace grievances, neighbourhood arguments and community disputes.

OMBUDSMEN

Many governments have established an office of Ombudsman, whose role is to monitor and report on many aspects of government activities on behalf of citizens. An Ombudsman has powers to investigate complaints and to write reports and make recommendations, but does not have power to institute civil or criminal proceedings.

Some private sector industries have also adopted the model of an Ombudsman to deal with complaints by consumers. Examples include the Banking Ombudsman, the Telecommunications Industry Ombudsman and the Energy and Water Ombudsman. These private sector Ombudsmen do not have statutory powers to investigate, but their recommendations are taken seriously by industry participants.

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The launch of the Financial Ombudsman Service which provides independent dispute resolution covering financial services disputes including banking, credit, loans, general insurance, life insurance, financial planning, investments, stock broking, managed funds and pooled superannuation trusts. Pictured are the Financial Ombudsman Colin Neave (left) and the Minister for Superannuation and Corporate Law, the Hon. Nick Sherry (right). Melbourne, 10 July, 2008.

Court diversion programs

Court diversion programs in various forms have been a part of the justice system in Australia for several decades. Court diversion programs in NSW typically involve the Local Court magistrate adjourning a case while a defendant participates in rehabilitation or other program to assist with his/her needs. Other court programs provide an alternative forum for hearing a case or negotiating an outcome.

MERIT PROGRAM

The Magistrates Early Referral into Treatment (MERIT)²⁷ program is a Local Court based diversion program that targets adult defendants with illicit drug use problems who are motivated to undertake drug treatment. Defendants assessed as suitable for MERIT can undertake supervised drug treatment as part of their bail conditions. The primary goal of the MERIT program is to break the drug-crime cycle by involving defendants in treatment and rehabilitation programs.

The MERIT program was developed in response to recommendations from the

NSW Drug Summit (NSW Government 1999). In July 2000 the program was piloted in five courts in the Northern Rivers region of NSW. By 2007 the program operated in 61 NSW local courts where 80 per cent of defendants appear.

The MERIT program is a 'pre-plea' drug diversion program, as both referral and treatment occur prior to the defendant making a plea of guilty or not guilty for the relevant offence(s). A MERIT treatment program is typically three months in duration and occurs prior to sentencing while the defendant is on bail. An individual can be referred for a MERIT assessment by the magistrate, the defendant's lawyer or by self-referral. While referrals can also be made prior to court by the arresting police officer, this method is rarely used.

An evaluation recently conducted by the NSW Bureau of Crime Statistics and Research (BOCSAR) into the MERIT program found that:

'Acceptance and completion of the MERIT program significantly reduced the number of defendants committing any type of offence by an estimated 12 percentage points, and any theft re-offence by four percentage points. This evaluation provides strong support that participation in the MERIT program reduces defendants' propensity to commit theft offences and, for those who complete the program, substantially reduces their propensity to commit any type of re-offence.'

BOCSAR *Crime & Justice Bulletin* No. 131, July 2009

YOUTH JUSTICE CONFERENCING

Youth Justice Conferencing is a NSW scheme that diverts young offenders away from the courts by providing for young offenders to meet the victims of their behaviour. The aim is to produce an agreed 'outcome plan' to restore the harm done and to encourage the offender to overcome his or her offending behaviour.

The scheme is established by the *Young Offenders Act 1997* and is administered by NSW Juvenile Justice. A young offender can be referred to a youth justice conference by the investigating police officer, the Director of Public Prosecutions or a court. There are conference administrators throughout New South Wales.

A conference can only be held if the young offender admits the offence and agrees to the conference. The people who are entitled to be present at the conference are the young offender, the conference convenor, a person responsible for the young person (such as a member of the child's family or a lawyer advising the young person), the investigating officer or specialist youth officer, and the victim, or a representative of the victim, and the victim's support people.

27. More information on the MERIT program is available from the Justice and Attorney Generals Crime Prevention Division website www.lawlink.nsw.gov.au/cpd – see *Crime Prevention Issues* No 8: 'Magistrates Early Referral Into Treatment: An overview of the MERIT program as at June 2009'.

The aim of the conference is to agree on an outcome plan. An outcome plan might include elements such as making written or oral apologies, making amends to a victim or the community, or participating in an appropriate program. Conferencing is based on the theory of 'restorative justice', which means that the object of conferencing is for the offender to be reintegrated back into the community after performing acts that satisfy the victim.

An evaluation in 2006 by the Bureau of Crime Statistics and Research (BOCSAR)²⁸ compared the reoffending rates for those issued a caution, as against those who participated in a youth conference. While there was clearly a greater rate of reoffending among those who had participated in conferencing, the report concluded:

... this difference should not be taken as an indication of the relative efficacy of cautions versus conferences in reducing juvenile reoffending. It is likely that some, and possibly all, of the difference between the two groups in their likelihood of appearance in court reflects the fact that low-risk offenders are more likely to be given a caution instead of a conference.²⁹

CIRCLE SENTENCING³⁰

Circle sentencing is an alternative sentencing process for adult Aboriginal offenders in NSW. It began in Nowra in 2002, based on the model of circle courts used in Canada. In NSW, circle sentencing is operating in Armidale, Bourke, Brewarrina, Dubbo, Kempsey, Lismore, Mt Druitt, Nambucca Heads, Nowra and Walgett. Nearly half of all sentences involve an offence of common assault; the next most prevalent offences are unlicensed driving and breaching an apprehended violence order.

There are eight objectives for circle sentencing set out in the NSW Criminal Procedure Regulation 2005, Schedule 4:

- > to include members of Aboriginal communities in the sentencing process;
- > to increase the confidence of Aboriginal communities in the sentencing process;
- > to reduce barriers between the Aboriginal communities and the courts;
- > to provide more appropriate sentencing options for Aboriginal offenders;

- > to provide for greater participation of Aboriginal offenders and their victims in the sentencing process;
- > to increase the awareness of Aboriginal offenders of the consequences of their offences on the Aboriginal communities to which they belong; and
- > to reduce recidivism in Aboriginal communities.

Punishment is incorporated into the sentencing plan. It is not necessarily a prison diversion program as a term of imprisonment is available to the circle if the circle believes that to be appropriate.

Circle courts operate with the belief that crime is broader than one person, that it has consequences that can affect whole communities, and that ruptures within communities need to be healed. It operates on the understanding that the underlying causes of crime are often more broad than a single incident and need the active participation of the whole community to fix.

Empowering the Aboriginal community in the sentencing process is one of the fundamental aims of circle sentencing. Further, having communities punish their own members means that punishments are seen as real community sanctions and not a continuation of an oppressive colonial system. The offender is confronted with his or her sentencers everyday making the sentence more real and immediate for offenders.

The circle encourages openness and honesty from its participants and is able to get a full picture of the offence, the offender, the victim and the circumstances that may have led to the crime. The participation of the community in determining a sentence ensures that the sentence is realistic and is not beyond the scope of the community's resources.

An evaluation of circle sentencing in 2008 by the Bureau of Crime Statistics and Research (BOCSAR) looked at whether participants showed any reduction in the frequency of reoffending; any increase in the length of time before a further offence; or any reduction in seriousness of a future offence. The results showed no difference between the circle sentencing group and a group sentenced through the court.

28. 'Re-offending by young people cautioned by police or who participated in a youth justice conference', S Vignaendra and J Fitzgerald, Bureau of Crime Statistics and Research *Crime and Justice Bulletin* No 103, 2006; available online at www.bocsar.nsw.gov.au

29. As above, at page 13.

30. Some information in the section is taken from 'Does circle sentencing reduce Aboriginal offending?', J Fitzgerald, Bureau of Crime Statistics and Research *Crime and Justice Bulletin* Contemporary Issues in Crime and Justice No 115, May 2008; available online at www.bocsar.nsw.gov.au

However, the report commented:³¹

It should not be concluded that circle sentencing has no value simply because it does not appear to have any short term impact on reoffending. Reducing recidivism is just one of several objectives of the process. There is nothing in this analysis to suggest that circle sentencing is not meeting the other objectives. If it strengthens the informal social controls that exist in Aboriginal communities, circle sentencing may have a crime prevention value that cannot be quantified through immediate changes in the risk of reoffending for individuals.

FORUM SENTENCING

The Forum Sentencing scheme (formerly known as the Community Conferencing for Young Adults Pilot Program) commenced in September 2005 at two NSW sites: one metropolitan Local Court (Liverpool, in south-western Sydney) and a non-metropolitan Local Court circuit (encompassing Tweed Heads, Murwillumbah, Byron Bay and Mullumbimby Local Courts). This scheme operates as an alternative to regular court sentencing procedures in much the same way as Youth Justice Conferences operate for young offenders (see page 28). Under the scheme, adults who meet certain eligibility and suitability criteria can be dealt with at a community conference rather than by regular court sentencing procedures.

To be eligible, offenders must:

- > be aged between 18 and 24 years;
- > plead or be found guilty;
- > be facing the likelihood of a prison sentence;
- > not be charged with any offences that would exclude them from participating (strictly indictable offences and indictable offences that cannot be dealt with summarily exclude offenders from participating);
- > not have a prior record of any offences that would exclude them from participating (eg drug importation, firearms offences); and
- > be prepared to participate.

In addition, the offender has to be assessed as suitable for the program. Factors taken into consideration include whether the offender:

- > accepts responsibility for the offence;
- > accepts the facts;
- > has an understanding of the process involved;
- > is willing to actively participate in deciding how to make reparations for the offence; and
- > understands that the conference is only part of the sentencing process.

The nature of the relationship between the victim and the offender is also taken into account.

Forum Sentencing provides the victim(s) and other people with the opportunity to meet face-to-face with the offender and tell them about the impact of the crime on their lives. During the Forum, the victim(s) can help create a list of actions for the offender that aims to repair harm to the victim and the community, and reduce the offender's likelihood of reoffending.

The offender has an opportunity to learn about the impact their behaviour had on the victim(s) and other people. To be eligible for Forum Sentencing, the offender must be facing a prison sentence. The offender's suitability is also carefully assessed – if it is considered the offender may not be respectful to the victim(s), a Forum will not be held.

A recent study by the Bureau of Crime Statistics and research (BOCSAR) found that no evidence emerged to suggest that Forum Sentencing participants were less likely to re-offend; committed fewer offences; took longer to offend; or committed less serious offences if they reoffended.³²

Commenting on the findings the Director of the Bureau, Dr Don Weatherburn said:

'Many of the individuals referred to Forum Sentencing have substantial criminal records, dating back in many cases to their teenage years.'

... Entrenched patterns of criminal behaviour are difficult to change without a sustained effort to alter the factors that keep them involved in crime. A program like Forum Sentencing may work more effectively with offenders that do not have substantial criminal records.'³³

31. 'Does circle sentencing reduce Aboriginal reoffending?' J Fitzgerald, Bureau of Crime Statistics and Research *Crime and Justice Research Bulletin* No 155, May 2008; available online at www.bocsar.nsw.gov.au

32. 'Does Forum Sentencing reduce re-offending?' Bureau of Crime Statistics and Research, *Crime & Justice Bulletin* No. 129, June 2009; available at www.bocsar.nsw.gov.au

33. Media Release, Evaluation of Forum Sentencing, 13 August 2009, www.bocsar.nsw.gov.au

34. Go to the Crime Prevention Division site at www.lawlink.nsw.gov.au/cpd and look under 'Programs'.

OTHER DIVERSIONARY PROGRAMS

There are a number of other programs running in NSW including:

- > CREDIT (Court referral of eligible defendants);
- > Domestic Violence Court Intervention Model – a specialist court to improve safety for victims and ensure offenders are held accountable for their actions;
- > Rural Alcohol diversion pilot program – the opportunity for drug and alcohol rehabilitation through the bail process (based on the MERIT program);
- > Traffic Offender Intervention program – aims to develop safer driving habits in offenders who have been found guilty of a traffic offence;

- > Aboriginal Client Specialist Service – to increase awareness and understanding of court processes and justice related support services for Aboriginal victims, court users and their families;
- > Safe Aboriginal Youth (SAY) program; and
- > Care circles – a program where Aboriginal people in the Shoalhaven area help the Children’s Court to make decisions about children’s care matters.

More details are available from the Justice and Attorney Generals Crime Prevention Division.³⁴

image unavailable

Campbelltown Police and elders from the Pacific Islander community gained approval from the Attorney General's Department to develop the first sentencing program involving Pacific Islanders. In an extension of current forum sentencing programs, elders have worked on intervention programs as part of the sentencing process. 7 March 2008.

Tracee Lea, © Newspix.

Useful websites

High Court of Australia

www.hcourt.gov.au

Federal Court of Australia

www.fedcourt.gov.au

Family Court of Australia

www.familycourt.gov.au

Federal Magistrates Court of Australia

www.fmc.gov.au

Administrative Appeals Tribunal

www.aat.gov.au

NSW Department of Justice and Attorney General

www.lawlink.nsw.gov.au

The Attorney Generals Department provides information on all NSW courts and tribunals under 'Courts & tribunals', including links to individual court and tribunal websites. There is also a range of information about Courts under Community information and links to information about jury service. See especially *Going to Court* publication.

Australian Government Attorney-General's Department

www.ag.gov.au

NSW Bureau of Crime Statistics and Research

www.bocsar.nsw.gov.au

Contains court statistics, annual reports on courts and crime, and many publications relevant to courts. See especially the Crime and Justice Bulletin, which has recent issues on the MERIT scheme, forum sentencing and the NSW Drug Court.

Australasian Institute of Judicial Administration

www.aija.org.au

Judicial Commission of NSW

www.judcom.nsw.gov.au/

NSW Law Reform Commission

www.lawlink.nsw.gov.au/lrc

Includes three papers on juries: Report 117 (2007), Report 118 (2007) and Consultation paper 4, 2008.

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www.legalanswers.sl.nsw.gov.au

Find answers to everyday questions about the law.

At the State Library

A specialist legal information service in the State Library of NSW provides free access to information about the law for all members of the community in NSW. Specialist librarians are on hand to help during these hours:

Mon-Fri 10am to 5pm

Sat closed; Sun 10am-5pm

(Tel) 9273 1558

Research assistance and access to the State Library's extensive resources (including current and historical legislation and case law).

Look at the **Courts** page on our website:

www.legalanswers.sl.nsw.gov.au/subject.cfm/generalID/25/

There are also databases available for access to newspaper and journal articles.

Books available in the Library include:

Australian courts of law,

J Crawford, B Opeskin, 4th ed, OUP, 2004.

Non-adversarial justice,

M King, A Frieberg, B Batagol, R Hyams, Federation Press, 2009.

Justice in tribunals,

J R S Forbes, Federation Press, 2nd ed, 2006.

Especially for students and teachers

See our *Legal Studies Research Guide* for HSC legal studies students and the *Legal Studies News Watch* blog for keeping up to date with the latest information.

At your local library

You can also find relevant books at your local public library, eg:

Australian courts of law,

J Crawford & B Opeskin, 4th ed, OUP, 2004.

Understanding law,

R Chisholm & G Nettheim,
7th ed, Butterworths, 2007