

## Non-legal work

The legal profession was largely involved in private practice until the 1970s, but many lawyers are not in legal practice and are instead working in related areas, such as administration, banking (especially investment banking), compliance, insurance, tax (in accounting firms) and elsewhere in business. Some lawyers work in the public sector (government, law reform, Legal Aid Commissions, regulatory policy).

## Globalisation

Globalisation of the legal profession is the next step, with local admission of foreign legal practitioners, and further development of transnational legal practices and transnational multi-disciplinary partnerships being made up of, for example, lawyers and accountants (§10-020).

## [§1-060] Hierarchy of courts

Legal matters and legal disputes are heard (brought, litigated, tried) in a wide variety of courts and tribunals.

The court structure provides that the most serious and costly cases (in terms of seriousness of offence or value of money involved) are handled at the highest level by the 'superior' courts, while minor offences, which can be solved quickly, are dealt with in readily accessible 'inferior' courts. In between there are the 'intermediate' courts.

The hierarchy of courts exists for at least four reasons:

- (1) Geographic factors lead to the 90% of cases considered to be minor being dealt with locally in the local magistrates' courts.
- (2) For administrative convenience regarding specialisation and economy of operation, cases of a similar nature are tried in similar courts.
- (3) Because there is a hierarchy of courts, each court can specialise in certain types of cases.
- (4) Finally, judges and juries (§2-120) may make mistakes, and the hierarchy of courts allows an appeal (§1-170) to a higher court to have an error of law corrected. This also means that the superior courts supervise the inferior courts.

The diversity is compounded by the division of courts and tribunals according to whether they are set up under Commonwealth (federal: §1-100) legislation or state/territory legislation.

Proceedings in Australian courts are 'adversarial' not 'inquisitorial' in nature (§2-110).

## [§1-070] Courts of summary jurisdiction

Magistrates' courts<sup>12</sup> — or inferior courts, local courts, courts of summary jurisdiction or courts of petty sessions — are set up under Commonwealth, state and territory Acts to handle small civil and criminal matters. They handle most of the legal disputes going before Australian courts and provide an accessible location for civil and criminal cases.

<sup>12</sup> There have been sittings in NSW since 19 February 1788.

## Civil jurisdiction

The civil jurisdiction of magistrates' courts covers a wide range of disputes concerned with small debts and other small matters. These small disputes may cover claims arising under contract, claims for compensation for injuries received in car accidents, claims as to title to land, and some family law matters. An important prerequisite is the need to fall within the monetary jurisdictional level. These are outlined below.

ACT: \$250,000	<i>Magistrates Court Act 1930 (ACT) s 257</i>
NSW: \$100,000 (General Division), \$60,000 (personal injury or death), \$10,000 (Small Claims Division)	<i>Local Court Act 2007 (NSW) s 29</i>
NT: \$100,000	<i>Local Court Act 1989 (NT) s 3</i>
Qld: \$150,000	<i>Magistrates Courts Act 1921 (Qld) s 2 'prescribed limit'; s 4</i>
SA: \$100,000	<i>Magistrates Court Act 1991 (SA) s 8</i>
Tas: \$50,000 (\$5,000 for minor civil claims)	<i>Magistrates Court (Civil Division) Act 1992 (Tas), s 3 'prescribed amount'; s 7</i>
Vic: \$100,000	<i>Magistrates' Court Act 1989 (Vic) s 3 'jurisdictional limit'; s 100</i>
WA: \$75,000	<i>Magistrates Court (Civil Proceedings) Act 2004 (WA) s 4</i>

## Criminal jurisdiction

The criminal jurisdiction of magistrates' courts is of two types.

- (1) **Committal proceedings** — this is the procedure where a preliminary hearing is held ('committal proceedings': ¶12-130) into cases of more serious crime, such as murder, theft, corporate crime (such as insider trading) and conspiracy.

Committal proceedings aim to work out whether the prosecution has sufficient evidence to show that the accused may be guilty and should be remanded for trial. If so, the accused will be sent to a higher court for trial ('committed for trial') by a judge and jury.

- (2) **Summary offences** (in contrast to indictable offences: ¶12-050) — such as police prosecutions for failure to pay fines for traffic offences. These matters are tried 'summarily' by the magistrate and are disposed of in a summary manner by either the imposition of a fine or a period in jail. Magistrates can generally jail as well as impose fines.

## Specialised jurisdictions

In addition, a magistrates' court may function as a coroner's court to investigate unexplained deaths and fires. In some jurisdictions, a magistrates' court sits as a specialist drug court, with both adult and juvenile jurisdiction (such as the Alcohol Court in the Northern Territory).

A further jurisdiction of the magistrates' court is that of the children's court (¶12-210) involving the hearing of all summary and indictable offences (except homicide) committed by persons under the age of 18 years.

In some jurisdictions, less formality and greater public access has been introduced to the magistrates' court through the introduction of:

- compulsory arbitration for smaller matters, where the magistrate is released from the technicalities of the rules of evidence and the adversary system, can actively seek information ('inquisitorial' not 'adversarial': ¶12-110), and is bound only by the common sense rules of natural justice
- in the case of larger matters over the arbitration limit, pre-hearing conferences conducted by a magistrate or senior court officer to promote settlement of the complaint, or at least clarification of the issues to speed up settlement, and
- in areas of high Aboriginal populations, 'circle sentencing', where Aboriginal elders and community members sit with the magistrate in determining an appropriate sentence.

In most jurisdictions, appointments to the position of magistrate are made from the ranks of barristers, solicitors, government and academic lawyers. In some jurisdictions, legally unqualified Justices of the Peace (JPs) can carry out administrative functions normally performed by magistrates, such as granting bail and issuing search warrants.

## Federal Circuit Court of Australia

<[www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au)>

The predecessor of the Federal Circuit Court — the former Federal Magistrates Court — was established in 1999.<sup>13</sup>

The Federal Circuit Court has jurisdiction in federal areas (¶1-475 – ¶1-480) such as appeals from administrative decisions, bankruptcy, consumer law, intellectual property, misuse of market power (¶8-300) and privacy. It can award damages up to \$750,000. It does not deal with criminal matters.

## [¶1-080] Intermediate courts

Intermediate courts — the District Court or County Court — exist in all jurisdictions except Tasmania, the Northern Territory and the ACT. Their jurisdiction is between magistrates' courts and the Supreme Court. Their practice and procedure is virtually the same as the Supreme Court, with the full range of pre-trial fact finding procedures such as interrogatories and discovery (¶1-430).

### Civil jurisdiction

Differences with the Supreme Court include:

<sup>13</sup> The change of name from Federal Magistrates Court took place in 2013.



- (1) the upper jurisdictional level, which is in the middle range but extends to the same jurisdiction as the Supreme Court in South Australia. For example:

NSW: \$750,000	<i>District Court Act 1973</i> (NSW) s 4
Qld: \$750,000	<i>District Court of Queensland Act 1967</i> (Qld) s 68
SA: same as Supreme Court	<i>District Court Act 1991</i> (SA) s 8 (with some limitations)
Vic: unlimited civil jurisdiction	<i>County Court Act 1958</i> (Vic) s 37
WA: \$750,000	<i>District Court of Western Australia Act 1969</i> (WA) s 6 'jurisdictional limit' s 50

- (2) some restrictions on exercising jurisdiction in equity, admiralty and probate, and  
 (3) that they can usually administer justice more quickly and are cheaper in less complex litigation.

### Criminal jurisdiction

The criminal jurisdiction of intermediate courts covers most indictable offences (¶12-050 — where there is trial by judge and jury) except capital offences like murder, and some crimes reserved for the Supreme Court like treason and sedition.

The intermediate courts also hear appeals from a magistrates' court sitting in its criminal jurisdiction.

Trials may be lengthy and protracted, and, as in the Supreme Court, indictable criminal offences (¶12-050) are tried by judge and jury.

### [¶11-090] Supreme courts

The state supreme courts are 'superior' (higher) courts, compared to the 'inferior' (lower) courts (¶11-060).

Supreme courts have both an original and unlimited jurisdiction to hear all civil cases, and they handle the most serious criminal cases such as murder and drug charges.

Some have a common law division (negligence, contracts, land) and an equity division (¶11-010), the latter dealing with injunctions (¶16-410) and specific performance (¶16-400).

Some of their jurisdiction has been removed by statute, such as cases which go to the Federal Court.

### Appeal courts

In all jurisdictions, appeals on questions of law go to intermediate appellate courts usually with three appellate judges.

Courts of Appeal (Full Courts, Courts of Criminal Appeal) exist in all Australian jurisdictions.

The benefits of a court of appeal include providing a permanent appellate court not disrupted by the rostering of judges to trial work and a court better able to develop the common law in a researched and principled way.

Now that Privy Council appeals (§1-150) have been abolished, and the High Court has restricted appeals to those of public or general importance, intermediate appellate courts are important to keep up the 'oxygen of fresh ideas'.<sup>14</sup>

## [§1-100] Federal courts and tribunals

The Commonwealth Government has developed the federal court system since the mid-1970s in areas of Commonwealth (federal) law (§1-475 – §1-480) including the:

- Administrative Appeals Tribunal (AAT; §1-160)
- Fair Work Commission (formed to set award pay rates and conditions, to help employers and employees work towards cooperative and productive workplace relations and to help workplaces prevent and resolve disputes)
- Family Court of Australia (§1-140)
- Federal Circuit Court of Australia (§1-070)
- Federal Court of Australia (§1-110), and
- High Court of Australia (§1-130).

The system of federal courts and tribunals has brought about a big change in the Australian legal system. These courts and tribunals were superimposed on the existing three-tier state court system (§1-060), which originated in the pre-federation Australian colonies.

Other federal courts (the courts of the ACT and the Northern Territory) were created to administer justice in the two federal territories.<sup>15</sup>

The Australian Constitution sets out the authority for the federal courts. It empowers parliament to create federal courts or to give a state court federal jurisdiction.<sup>16</sup> In other words, questions arising by virtue of federal laws (for example, prosecution for breach of customs regulations) can be dealt with in a federal court or in state courts at any of the three tiers.

## [§1-110] The Federal Court of Australia

<[www.fedcourt.gov.au](http://www.fedcourt.gov.au)>

The Federal Court of Australia covers areas of Commonwealth (federal, national) jurisdiction, such as administrative law, bankruptcy, competition and consumer law, corporations law, federal tax, industrial law, intellectual property and native title.<sup>17</sup>

<sup>14</sup> *A presidential farewell* (2008) 82 ALJ 507.

<sup>15</sup> Constitution s 71; §1-460; §1-475.

<sup>16</sup> Constitution s 77(iii).

<sup>17</sup> *Federal Court of Australia Act 1976* (Cth). The Federal Court was created in 1976 under Constitution s 71 (§1-460; §1-475).

## Full Court of the Federal Court

Appeals can be made to the Full Court of the Federal Court (appellate jurisdiction) from decisions of the Administrative Appeals Tribunal (AAT), the Federal Circuit Court, a single judge of the Federal Court and the Supreme Courts of the two federal territories (the ACT and the Northern Territory).

The creation of the Federal Court has also eased the work of the High Court by taking on certain areas like taxation appeals. These can now only be taken to the High Court by special leave.

In practical terms, judgments of the Federal Court now dominate Australian business law.

## [¶11-130] The High Court of Australia

<[www.hcourt.gov.au](http://www.hcourt.gov.au)>

The senior court in the Australian judicial system is the High Court of Australia, which consists of seven judges. The High Court was created by the Commonwealth Constitution:

- (1) to exercise an original jurisdiction (civil and criminal).

The court's original jurisdiction is wide, and includes indictable offences against the laws of the Commonwealth.

Exclusive jurisdiction includes matters in which the state and Commonwealth are parties, matters involving residents of different states or matters between the states themselves.<sup>18</sup>

- (2) to serve as the final Court of Appeal (civil and criminal) in the Australian legal system and to hear appeals from state and territory Supreme Courts.

As an appeal court (its appellate jurisdiction), the High Court can hear appeals from:

- (a) single judges of the court
- (b) cases from state and territory Supreme Courts (with special leave), and
- (c) appeals from the Federal Court and the Family Court (with special leave or approval).

- (3) to act as guardian and interpreter (arbiter) of the Australian Constitution.

The High Court is well known for its high level interpretations and its awareness of current issues. As a result, it is no surprise that there have been some 'radical' decisions in the development of the Australian common law (¶11-010)<sup>19</sup> in areas such as native title (*Mabo*: ¶3-425) and environmental law, unconscionability and the famous words of the High Court supporting the right to protest: 'Mr Neal is entitled to be an agitator'.<sup>20</sup>

<sup>18</sup> Constitution s 75(iv).

<sup>19</sup> Eg, JL Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006).

<sup>20</sup> *Neal v The Queen* [1982] HCA 55 [14] (Murphy J).



## [¶1-140] Family Court of Australia

<[www.familycourt.gov.au](http://www.familycourt.gov.au)>

The Family Court of Australia was set up to help work out complex legal family disputes. It administers the *Family Law Act 1975* (Cth) following a major update of the then fault-based divorce laws with the introduction of no-fault divorce.

The Family Court's jurisdiction in the business area includes financial cases such as settlement of financial relationships between the parties to the marriage and third parties, including such matters as winding up of family companies, partnerships and trusts.

Its jurisdiction includes the transfer to the Family Court of proceedings commenced in the Federal Court relating to bankruptcy, income tax appeals, consumer protection provisions under the Australian Consumer Law (ACL: formerly *Trade Practices Act 1974*) and proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The Family Court has jurisdiction in family bankruptcy matters (¶13-630).

## [¶1-150] Abolition of Privy Council appeals

The final abolition of appeals from Australian courts to the Privy Council in London was from state Supreme Courts exercising state jurisdiction based on the Crown prerogative (right) to decide disputes (an appeal to 'Her Majesty in Council') in 1986. This followed the earlier abolition of appeals in federal matters including taxation in 1968, and the abolition of appeals from the High Court in 1975.

## [¶1-160] Challenging the bureaucracy: administrative tribunals

Governments sometimes set up specialist administrative tribunals to allow for review of government (administrative, bureaucratic, executive) decision-making.

### Administrative tribunals

Administrative tribunals provide:

- *merits review* — like alternative courts — to reconsider decisions and stand in the shoes of (ie, exercise the same discretions as) the original decision-maker.

Administrative agencies like ASIC (ASIC: ¶9-380) and the ATO often include a mix of the three branches of government under the doctrine of the 'separation of powers' (the legislature, the executive, the judicature: ¶1-475).

Many administrative agencies can:

- (1) make rules
- (2) administer and manage the rules, and
- (3) investigate, prosecute, hold hearings and make rulings on alleged breaches of the rules — 'its' law rather than 'the' law.

Administrative tribunals give the right to appeal from this internal and non-public decision-making to independent, external and publicly accountable administrative review tribunals and then to the courts.