

CHAPTER 3: THE AUSTRALIAN LEGAL SYSTEM

Background Information



Australia's Legal System

Australia's legal system was inherited from the British Legal System. This system is known as the Westminster system, after the Palace of Westminster in London, where the British Parliament is located. The Australian Parliamentary system structure is set out in a document called the Australian Constitution, which came into effect at the time of Federation in 1901. The Constitution forms the basis of the entire legal system in Australia.

Separation of Powers

The basics of the Westminster System originate from a doctrine called the "Separation of Powers." In our constitutional tradition, separation of powers means that the Parliament, the government, and the courts each have their own separate power or authority. These powers are:

- Legislative power - the power to make new laws or regulations. This power is exercised by the Parliament, made up of members elected by the people, with laws passed assented to by the Governor-General, who is the Queen's representative in Australia.
- Executive power - the power to implement and administer the law. Under the Commonwealth Constitution, the Governor-General exercises this power, but convention demands that it is exercised by the government of the day.
- Judicial power - the power to interpret and enforce the law. The courts exercise this power.

One objective of the Separation of Powers doctrine is to prevent too much power from being concentrated in any one body. Many constitutional systems in other jurisdictions use the notion of separation of powers, although the actual powers and institutions may differ.

Powers of the Commonwealth Parliament

Australia has a federal system of government whereby the country is divided into states. Each state has its own parliament, which can pass legislation regarding specific laws, while other laws are the domain of the Commonwealth (Federal) Parliament. Some law-making powers are shared. As a Justice of the Peace, you should have a basic knowledge of the matters that are Commonwealth powers, those that are State (residual) powers, and those that are shared.

Most of the Federal Powers are listed in section 51 of the Constitution. These are as follows:

- Trade and commerce with other countries, and among the States.
- Taxation; but so as not to discriminate between States or parts of States.
- Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth.
- Borrowing money on the public credit of the Commonwealth.
- Postal, telegraphic, telephonic, and other like services.
- The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.
- Lighthouses, lightships, beacons, and buoys.
- Astronomical and meteorological observations.
- Quarantine.
- Fisheries in Australian waters beyond territorial limits.
- Census and statistics.

- Currency, coinage, and legal tender.
- Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money.
- Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned.
- Weights and measures.
- Bills of exchanging and promissory notes.
- Bankruptcy and insolvency.
- Copyrights, patents of inventions and designs, and trademarks.
- Naturalisation and aliens.
- Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
- Marriage.
- Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.
- Invalid and old-age pensions.
- The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not to authorise any form of civil conscription), benefits to students, and family allowances.
- The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States.
- The recognition throughout the Commonwealth of the laws, the public Acts, and records, and the judicial proceedings of the States.
- The people of any race, for whom it is deemed necessary to make special laws.
- Immigration and emigration.
- The influx of criminals.
- External Affairs.
- The relations of the Commonwealth with the islands of the Pacific.
- The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.
- The control of railways with respect to transport for the naval and military purposes of the Commonwealth.
- The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State.
- Railway construction and extension in any State with the consent of that State.
- Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.
- Matters in respect of which this Constitution makes provision until the Parliament otherwise provides.
- Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.
- The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.
- Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Powers of the State Parliament

Those powers not mentioned in the Constitution are called residual powers, and they are essentially powering of State Governments, although by agreement, some are shared with the Commonwealth. State Governments have powers over matters such as criminal law, police, education, health, and transport. You will notice that laws relating to Justices of the Peace and Commissioners for Declarations are also a state power, hence why there are different rules relating to Justices of the Peace in every state. This also explains why Queensland Justices have limited powers over interstate matters.

The Court System

Because the States have the right to legislate over criminal law, they also have power over the criminal courts. Examples of such courts are the Magistrates Court, the District Court, and the Supreme Court. Other courts, such as the High Court and Family Court, are a Commonwealth responsibility.

Courts typically have a particular jurisdiction, which essentially refers to the right to hear a particular case. Original jurisdiction is the right of a court to hear a case for the first time, while appellate jurisdiction is the court's right to hear an appeal from the same or another court.

As a rule, courts hear either civil cases or criminal cases. In a civil case, legal action is taken by a private individual or organisation against another private individual or organisation. In a criminal matter, the action is taken by the State (usually represented by the police and/or the Director of Public Prosecutions on behalf of all citizens) against an individual. A summary of the court system and the respective jurisdictions appears on the following two pages. It must be noted that the court system, as described, is a system for adults (aged 17 and over). Criminal matters relating to children are heard in a Children's Court, which operates with different procedures and different rules of evidence.

You may also notice the concept of simple (or summary) offences and the concept of regulatory offences. A simple offence will not proceed to trial before a judge or jury and will be heard in a Magistrates Court.

Regulatory Offences are dealt with in the *Regulatory Offences Act 1985* (Qld) and include such matters as unauthorised dealing with shop goods of a value less than \$150, leaving a restaurant, hotel, motel, or boarding house without paying a bill of \$150 or less or causing unauthorised damage to property to the value of \$250 or less. Such offences are also dealt with in a Magistrates Court.

Name of Court	Administered by	Who makes the decision?	Original Jurisdiction	Appellate Jurisdiction
Magistrates Court	State	<p>Magistrate sitting alone - makes all decisions and judgments. Referred to as “Your Honour.”</p> <p>One or two Justices of the Peace (Qualified) can hear a bail application.</p> <p>Two Justices of the Peace (Qualified) or two Justices of the Peace (Magistrates Court) or a combination, can hear certain types of Domestic Violence Protection order applications and bail applications for children.</p> <p>Two Justices of the Peace (Magistrates Court) can hear (on a guilty plea) a range of simple and regulatory offences and certain serious offences that are listed under section 552 of the <i>Criminal Code Act 1899</i> (Qld). This section of the code is wide-ranging in its scope.</p>	<ol style="list-style-type: none"> 1. Less serious criminal cases (summary/simple and regulatory offences) - e.g., parking & traffic fines, drink driving, shoplifting, wilful damage, and other minor criminal matters. 2. Committal proceedings for more serious criminal cases - a decision is made whether enough evidence exists to commit the accused for trial in a higher court - if enough evidence exists for committal, then a decision is made whether to release the accused on bail or to remand the accused in custody. 3. Civil cases where the amount subject to dispute is between \$7 500 and \$150 000. Amounts smaller than \$7 500 are heard by the Queensland Civil and Administrative Tribunal (QCAT). 	Can enforce orders made in a Queensland Civil and Administrative Tribunal (QCAT) hearing.
District Court	State	District Court Judge presides over all cases. The judge usually sits alone in deciding civil cases and is usually assisted by a jury of 12 people who determine guilt or innocence in criminal cases. Judge is referred to as “Your Honour.”	<ol style="list-style-type: none"> 1. All indictable criminal offences (those that require guilt or innocence to be determined), except those determined to be the most serious. 2. Civil cases where the amount subject to dispute ranges from \$150 000 to \$750 000. 	Hears appeals against decisions made in a Magistrates Court.
Supreme Court - Trial Division	State	Supreme Court Judge presides over all cases. The judge usually sits alone in deciding civil cases and is usually assisted by a jury of 12 people who determine guilt or innocence in criminal cases. Judge is referred to as “Your Honour.”	<ol style="list-style-type: none"> 1. Indictable criminal offences which are determined to be the most serious, e.g., murder, attempted murder, and major drug offences. 2. Civil cases where the amount subject to dispute exceeds \$750 000. 	Nil
Court of Appeal (Separate division of the Supreme Court)	State	Three to five judges of the Supreme Court. They make decisions based on “majority rules.”	Nil	Hears appeals regarding. <ol style="list-style-type: none"> 1. Decisions made, and sentences given in a District Court 2. Decisions made, and sentences given in the Supreme Court (Trial Division)

				3. Appeals from a range of tribunals.
Federal Circuit Court (was Fed Magistrates Court until April 2013)	C 'wealth	Federal Magistrate sitting alone	Deals with lower-level matters that the Family Court or Federal Court would usually handle. These might include family law, administrative law, copyright, bankruptcy, human rights, migration, industrial law, and trade practices.	Nil
Family Court and Federal Court	C 'wealth	One judge sitting alone makes all decisions.	Family Court deals with higher-level matters related to consent to marry, custody of children, divorce, access to children, etc. Federal Court deals with higher-level matters pertaining to administrative law, copyright, bankruptcy, industrial law, immigration, trade practices, and other federal laws.	A "full bench" (three judges) hears appeals of any decisions made by single judges of the Federal or Family Court, respectively. These courts also have the jurisdiction to hear appeals of judgments made by the Federal Circuit Court.
High Court	C 'wealth	2 to 7 High Court Judges make decisions based upon "majority rules."	(1) As per section 75 & 76 of the constitution. (2) Matters involving the constitution or its interpretation (3) Matters where the principles of law involved are of major public importance.	Hears appeals regarding. 1. Decisions regarding the original jurisdiction of the High Court. 2. Decisions made by the full bench of either the Federal Court or the Family Court 3. Decisions made by the Supreme Court (Court of Appeal) in States and Territories. No further appeal avenues exist.