



THE LAW IN AUSTRALIA
An Overview

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In Australia, the law consists of:

- ◆ Acts passed by the Federal Parliament acting within the scope of its powers under the Australian Constitution
- ◆ Ordinances made in respect of the Territories
- ◆ Acts passed by State Parliaments and the Legislative Assemblies of the Northern Territory, the Australian Capital Territory and Norfolk Island
- ◆ So much of the common or statute law of England that was received and remains unrepealed, and
- ◆ The Australian common law, which developed from the English common law and is interpreted and modified by the Courts.

The Parliamentary System

Australia has a federal system of government. Powers are distributed between a federal government (the Commonwealth) and State & Territory governments (the six States - New South Wales, South Australia, Queensland, Tasmania, Victoria and Western Australia). There are ten Territories, which are directly subject to Commonwealth law making powers.

The Commonwealth and each State are governed by elected Parliaments. In all except Queensland this consists of two houses, the upper house being intended essentially as a house of review. A State Parliament may make laws on any subject of relevance to that State. However, valid Commonwealth law may override State law (within the powers defined by the Constitution).

Overview of the Constitution

The Australian Constitution has properly been described as 'the birth certificate of a nation'. It also provides the basic rules for the government of Australia. Indeed, the Constitution is the fundamental law of Australia binding everybody including the Commonwealth Parliament and the Parliament of each State. Accordingly, any action, including legislative action, is invalid if it is contrary to the Constitution.

Creation of the Commonwealth of Australia

On the commencement of the British Act on 1 January 1901, the Commonwealth came into being and the six colonies became the six States of Australia (covering clauses 4 and 6).

The Federal Structure

The Constitution establishes a federal system of government. It is for this reason that the establishment of the Commonwealth in 1901 is often referred to as 'Federation'. Under a federal system, powers are distributed between a central government and regional governments. In Australia, that distribution is between the Commonwealth and the six States.

Separation of Powers

Chapters I, II, and III of the Constitution confer the legislative, executive, and judicial powers of the Commonwealth on three different bodies that are established by the Constitution - the Parliament (Chapter I), the Commonwealth Executive (Chapter II), and the Federal Judicature (Chapter III). Legislative power is the power to make laws.

Executive power is the power to administer laws and carry out the business of government through such bodies as government departments, statutory authorities and the defence forces. Judicial power is the power traditionally exercised by courts such as the conduct of criminal trials and determining disputes in relation to such things as contracts and motor accidents.

Commonwealth Legislative Powers

The Constitution does not confer on the Commonwealth Parliament the power to make laws on all subjects. Instead, it lists the subjects about which the Commonwealth Parliament can make laws. Most of these subjects are listed in sections 51 and 52. They include taxation; defence; external affairs; interstate and international trade; foreign, trading and financial corporations; marriage and divorce; immigration; bankruptcy; and interstate industrial arbitration.

The States and their Legislative Powers

Under the federal system created by the Australian Constitution, the six former colonies became the six States of Australia. Before Federation, each of the six colonies had its own constitution. These constitutions regulate, among other things, the Legislature, the Executive Government, and the Judiciary of the States. The Australian Constitution expressly guarantees the continuing existence of the States and preserves each of their constitutions. However, the Australian Constitution binds the States.

Under the constitutions of each of the States, a State Parliament can make laws on any subject of relevance to that particular State. Subject to a few exceptions, the Australian Constitution does not confine the matters about which the States may make laws. Accordingly, the State Parliaments can pass laws on a wider range of subjects than the Commonwealth Parliament and for this reason important areas such as education, criminal law, and roads are regulated primarily by laws of the States rather than by laws of the Commonwealth Parliament.

The Relationship Between Commonwealth and State Powers

Although the State Parliaments can pass laws on a wider range of subjects than the Commonwealth Parliament, the Commonwealth is generally regarded as the more powerful partner in the federation. One of the principal reasons for this is section 109 of the Constitution, which provides that if a valid Commonwealth law is inconsistent with a law of a State Parliament, the Commonwealth law operates and the State law is invalid to the extent of the inconsistency. Accordingly, the Commonwealth can, within the subject matters conferred on it by the Constitution, override State laws. As a result, many subjects of Commonwealth power are regulated almost entirely by Commonwealth law, for example, bankruptcy, marriage and divorce, and immigration.

Federal Judicature

Chapter III of the Constitution provides for the establishment of the High Court of Australia. One of the High Court's principal functions is to decide disputes about the meaning of the Constitution. For example, it is the High Court that ultimately determines whether an Act passed by the Commonwealth Parliament is within the legislative powers of the Commonwealth. The power that the High Court has to interpret the Constitution means that it is a very important body. The High Court is also the final court of appeal within Australia in all other types of cases, even those dealing with purely State matters such as the interpretation of State criminal laws.

An Australian 'Common Market'

The Constitution contains provisions regulating, among other things, trade and commerce throughout Australia. The desire to have a single trade area throughout Australia was one of the main reasons for the movement by the Australian people towards federation. To achieve this, Australia needed both uniform customs duties and the abolition of protectionist burdens on interstate trade. The Constitution achieves the first of these objectives by requiring the Commonwealth Parliament to impose uniform customs duties and by prohibiting the State Parliaments from imposing customs duties. It achieves the second objective primarily by providing in section 92 that trade and commerce between the States shall be 'absolutely free'.

Rights

The Constitution has no equivalent to the Bill of Rights found in the United States Constitution, which prevents a legislature from passing laws that infringe certain basic freedoms and rights such as freedom of speech. Some express protections, however, are given by the Constitution against legislative or executive action by the Commonwealth, but not by the States.

Amending the Constitution

The Constitution provides a mechanism by which it can be altered, called a referendum. Before there can be any change to the Constitution, a majority of electors must vote in favour of the change. In addition, there must be a majority vote in a majority of States, that is, in four out of the six States. Ordinarily, before a matter can be the subject of a referendum, both Houses of the Commonwealth Parliament must pass the proposed law containing the suggested amendment of the Constitution.

The Process of Law-Making

The process of making federal laws is that these laws are introduced as Bills into the federal Parliament but, when passed by that Parliament, require Royal Assent before those laws can come into operation. The Queen is represented throughout the Commonwealth of Australia by the Governor-General. The Governor-General is empowered to give the Royal Assent on behalf of the Queen.

Both Houses of Parliament must pass Commonwealth Acts before being presented to the Governor-General for assent. In exercising statutory powers and functions and many Constitutional powers and functions, the Governor-General acts on the advice of the Federal Executive Council. Acts can also provide for the making of subordinate legislation, such as regulations, which are made by approval of the Governor-General without the need for introduction into the Parliament.

The Court System

In Australia each of the Federal and State systems incorporates the three arms of government: legislative, executive and judicial. The High Court of Australia, however, is the final court of appeal in respect of all matters, whether decided in Federal or State jurisdictions, and the Federal Parliament is empowered under the Constitution to invest State courts with Federal jurisdiction.

The Judiciary

The independence of the judiciary and its separation from the legislative and executive arms of government is regarded as of great importance in Australia and it is taken for granted that judges in interpreting and applying the law act independently of the Government. In the case of federal judges, their security of tenure is guaranteed by the Constitution. In the States and Territories, legislation provides security of tenure for judges.

Commonwealth Courts

The High Court of Australia

The Australian Constitution provides that the judicial power of the Commonwealth of Australia is to be vested in a 'Federal Supreme Court, to be called the High Court of Australia'. The Constitution requires that there shall be a Chief Justice and not less than two other Justices of the High Court. Today there are six other Justices.

All residual constitutional links between Australia and the United Kingdom of Great Britain and Northern Ireland, including the avenue of appeal from State courts exercising State jurisdiction to the Privy Council, were abolished by the Australia Act 1986.

The High Court is also the Court of Disputed Returns in relation to disputes about the validity of federal elections. The High Court is the final court of appeal in Australia.

The Federal Court of Australia

The Federal Court of Australia was created by the Federal Court of Australia Act 1976 and sits as required in each State and Territory (ACT and NT).

The Court original jurisdiction in relation to matters in bankruptcy, corporations law, industrial relations, taxation and trade practices law. The Federal Court of Australia has appellate jurisdiction in relation to the decisions of single judges of the Court, decisions of the respective Supreme Courts of the Australian Territories and certain decisions of State Supreme Courts.

The Family Court of Australia

The Family Law Act 1975 introduced a new law dealing with the dissolution and nullity of marriage, custody and welfare of the children, maintenance and the settlement of property between the parties to a marriage. The Act created the Family Court of Australia as a specialist court dealing only with matrimonial and associated proceedings. The Family Court's jurisdiction has been expanded significantly in recent years, including a wider federal jurisdiction in matters such as bankruptcy, administrative law and taxation appeals.

The Family Law Act also deals with the settling of disputes in respect of their property and for maintenance of spouses. The Child Support Agency administers the Child Support Scheme, by which maintenance is assessed and payment of court ordered maintenance is enforced by allowing for deductions to be made directly from salaries and wages.

Industrial Relations Court of Australia

The Industrial Relations Court of Australia was established in March 1994 to deal with a range of industrial relations matters, such as the interpretation and enforcement of industrial awards and certified agreements and the regulation of various matters relating to unions.

Legislation that came into force in May 1997 transferred the jurisdiction of the Industrial Relations Court to the Federal Court.

The Federal Magistrates Service

The Federal Magistrates Service was established at the end of 1999 by the Federal Magistrates Act 1999. The service is an independent federal court under the Constitution. The Federal Magistrates jurisdiction includes family law and child support, administrative law, bankruptcy law and consumer protection law. This jurisdiction is shared with the Family Court of Australia and the Federal Court of Australia and in some areas state courts also.

State and Territory Courts

Australian State and Territory courts have original jurisdiction in all matters brought under State or Territory laws and in matters arising under federal laws, where jurisdiction has been conferred on the courts by the Commonwealth Parliament. Most criminal matters, whether arising under Commonwealth, State or Territory law, are dealt with by State or Territory courts. Each State and inhabited Territory has its own independent system of courts consisting of a Supreme Court, in most jurisdictions an intermediate court - generally known as the District or County Courts - and local courts of summary jurisdiction.

Some States have also established specialist courts exercising jurisdiction limited by subject matter. Some examples are the Land and Environment Court and the Compensation Court in New South Wales, and the Local Government Court in Queensland.

State and Territory Supreme Courts

The Supreme Courts are the highest State and Territory courts and deal with the most important civil litigation and the most serious criminal cases. They also exercise appellate jurisdiction from the lower State courts. A Full Court of a Supreme Court can hear appeals from a decision of the Supreme Court when constituted by a single Judge.

State and Territory Intermediate Courts

The intermediate courts, which are presided over by a single Judge, decide the great majority of serious criminal offences where a jury is required to decide the facts of a case. They also deal with civil litigation up to certain monetary limits. The names given to these courts vary. For example, in Victoria, they are known as County Courts and in New South Wales are known as District Courts.

State and Territory Courts of Summary Jurisdiction

The courts of summary jurisdiction are presided over by a Magistrate and deal with most of the ordinary (summary) offences, such as traffic infringements, minor assaults and street offences. Magistrates also conduct committal proceedings in respect of the more serious offences to determine whether there is a prima facie case to be determined by a Judge and jury, either in an intermediate court or a Supreme Court. Juries are not used in courts of summary jurisdiction.

In most jurisdictions, these courts also deal with civil litigation for debt recovery, smaller claims by one citizen against another or against a company, as well as certain maintenance, custody and property disputes under jurisdiction conferred by the Family Law Act.

Small Claims Courts

Small claims courts and tribunals have been established in all States and Territories to enable minor legal disputes to be dealt with quickly, cheaply and informally. Procedures have been simplified in these courts and tribunals to facilitate small claims.

Bodies Other than Courts

Industrial Bodies

Both the Commonwealth and the States have specialised tribunals to deal with industrial matters. These bodies are principally concerned with the making of awards to cover employment in particular industries and the settling of disputes.

Review of Administrative Decisions

A number of Commonwealth and State tribunals and other bodies have been established to deal with review of administrative decisions and actions taken by Government officials. Some of these are specialised, for example, federal tribunals dealing with review of decisions relating to payment of social security benefits and State bodies concerned with environment

and town planning. There are also bodies with more general jurisdiction for review of a wide range of administrative action.

The Administrative Appeals Tribunal

The major Commonwealth tribunal for review of decision-making is the Administrative Appeals Tribunal. This Tribunal, established by the Administrative Appeals Tribunal Act 1975, is empowered to review on the merits an administrative decision made in the exercise of a statutory power. An application for review may be made by or on behalf of any person whose interests are affected by an administrative decision.