CHAPTER 1

The Australian Legal System

[1.10] This chapter describes the legal landscape in which construction law and projects operate in Australia today. Its primary focus is upon the development and key features today, of the two main sources which make up the landscape: enacted law (legislation) and judge-made law (case law). As will be seen, the "Australian legal system" may more accurately be described as not one but nine legal systems: legislation and case law is made within nine separate (though interrelated) State, Territory and Federal legal systems.

LAW AND LEGAL SYSTEMS

[1.20] Almost every aspect of life in Australia is regulated or influenced by the legal system. Most people living and doing business in Australia are, however, either unaware or have little understanding, of law and justice, the sources of law or the common law system. More would be familiar with the creation of law by legislation and court decisions, and most people would recognise that courts and parliaments are the main legal institutions.

As the law increasingly impinges on the activities of citizens, it is important that they be familiar with the legal system and how it operates. Participants in the construction industry, particularly, need to be aware of the legal system because of the degree to which it controls and regulates their activities.

Nature and definition of law

[1.30] Use of the term "law" will vary according to user and context. The law of the land is the sum total of all the rules by which the legal system regulates society. In a more general context, the law refers to the whole legal system including institutions, machinery, rules and the personnel who operate them. The use made of the term "law" in this text will vary, although, as the title "Construction Law in Australia" suggests, it will be mostly concerned with those rules created within the legal system, and the parts of the system which apply to the processes of, and participants in, the construction industry.

The nature, origin and role of law in any community are dependent upon its socio-political system. In general, the law is an expression of the community's guidelines for acceptable behaviour. The law is a system of rules imposed by a supreme authority in a politically organised society and recognised by the members of that society as governing or regulating their conduct and intercourse, one with another.

Although our society expects the law to operate in a just and fair way, it does not follow that every application of the rules will produce justice. The legal system will always be able to reach a conclusion in a case presented to it for judgment, but the decision will only rest on the applicability of legal principles to the facts of each case. This may not be in accordance with what each litigant, or any outsider, sees as the justice of the situation. The law is concerned with justice, but it would be impossible to simultaneously satisfy everyone's concept of justice in every situation.

Legal systems

[1.40] Legal systems in modern societies of European origin derive from one of two distinct origins: English law and Roman law. Where Roman law applies, the jurisdiction is called a "civil law" country. There, the fundamental source of law is in the written code of laws to which the decisions of judges provide a gloss or overlay but not a binding interpretation. Court procedure in civil law jurisdictions is described as inquisitorial, with the judge controlling the progress of a case, calling and examining witnesses, actively investigating the circumstances to find the truth. Most European countries have civil law systems, as do the countries across the world which developed under disparate European influences.

The English legal system is referred to as a "common law" system and has been adopted in countries having historical ties with England. The fundamental concept of a common law jurisdiction is the "doctrine of precedent", by which a judge's decision will determine or influence the decisions of judges in later cases and inferior courts. The function of a judge during a case is to oversee the adversarial or accusatory nature of the proceedings and to determine those proceedings. The decision is only about those issues before the court, and the judge's role is more like that of an umpire reaching a decision based on the relevant merits of the evidence and the arguments put before the court.

In a common law system, there are two sources of law:

1. *case law*, which consists of the laws evolved through judicial decisions; and
2. *statute law*, which is that created by Parliament by means of legislation passed directly, and by "subordinate" or "delegated" legislation, primarily regulations.

In that Australia inherited its legal system from England, it is a common law system. As with any development in isolation, however, differences have emerged as Australian legislatures and judiciaries assert their independence.

The Torrens system of land title by registration and the strata title system of title to air space (both of which are discussed in Chapter 7) are significant innovations developed in Australia, as was the system of settling industrial disputes by conciliation and arbitration (see Chapter 14). Yet the ties to other jurisdictions are strong, both with the principles of English law and with the

law of other jurisdictions in which they are applicable, mainly other nations of the former British Commonwealth.

In this text, references will not only be made to Federal-level Australian cases but also to cases from all States and Territories of Australia and to those from jurisdictions such as the United Kingdom, New Zealand and Canada. All of these have an influence upon construction law as it applies in the various jurisdictions parts of Australia: for example, a Western Australian Court of Appeal decision will generally bind a trial judge in Victoria. Further, the Australian courts will often look to foreign jurisdictions for guidance where relevant and appropriate within the doctrine of precedent (see [1.200]).

Bearing in mind that, generally, a statute can only apply within the jurisdiction in which it was enacted, a great deal of Australia's legislation is duplicated across the States and Territories. However, far from revealing a coherent picture of regulation, the national legislative blanket is all too often a patchwork displaying pointless and frustrating inconsistency.[1]

LAW IN AUSTRALIA TODAY

[1.50] The applicable law in Australia today is a complex mixture from a number of sources. The original source, and still the basis of our law, is the law of England. A body of case law principles and statute law was transported to Australia along with the convicts and settlers. The British Parliament declared in 1828 that all the laws in force in England at that time (statute and case law) which were applicable to the conditions in the colonies should apply to New South Wales and Van Diemen's Land. The other colonies and the Territories similarly "received" the law of England and established court systems to administer the law with the Judicial Committee of the Privy Council in England as the head of each court system.

As a result, some ancient statutes and principles of English law still apply today. Since the reception of English law, the Australian legal system has developed its own body of case law principles determined by judicial decisions in the State and Federal Courts and its own statutes passed first by colonial, then by State, Territory and Commonwealth, legislatures.

Enacted law – legislation

[1.60] Legislation is law made by Parliaments and persons or bodies acting under the authority of Parliament. This definition points to the two branches of enacted law: Acts of Parliament (which are called "statutes") and regulations of legislative authority (called "subordinate" or "delegated" legislation).[2] Legislation created in Australia emanates from the Commonwealth

1. See, especially, the discussion on "security of payment" at [3.60] and on "proportionate liability" at [6.310].

2. See, further, [1.90]-[1.100].

Parliament, one of the six State Parliaments, or from the Australian Capital Territory or Northern Territory Legislative Assemblies.[3]

Colonial Parliaments were created by the English Parliament, and in their constitutions each was charged with making laws for the "peace, welfare, and good government" (or similar) of the colonies. From 1865, all colonial Parliaments could legislate independently of English laws, although all legislation was, and still is, subject to Royal Assent from the Governor. Theoretically, the British Parliament still could pass legislation validly applicable to Australian States until 1986, when, by agreement of each State, the Commonwealth and the United Kingdom, independence was achieved.

In 1901, the colonies federated to form the Commonwealth of Australia, to which they ceded certain legislative powers. As States, they retained residual legislative authority over matters other than those specifically granted to the Commonwealth. It is not uncommon for the constitutional validity of a statute to be challenged in the courts. If the legislation lies within the competence of the legislature enacting it, then it is binding and cannot be altered except by the same legislature. If Parliament has gone outside its powers in making a law, it can be declared void in whole or in part. In those matters where both State and Federal Parliaments may legislate, to the extent to which a State law is inconsistent with a Federal law, the State law is inoperative.

The Commonwealth of Australia was created with the power to make laws on a specified range of subjects enumerated in s 51 of the Commonwealth *Constitution*, itself an Act of the British Parliament. Legislative independence from Britain was guaranteed by the *Statute of Westminster 1931* (Imp), but all legislation must have "Royal Assent" from the monarch's representative: the Governor-General for Commonwealth legislation; in the case of the States, the State Governors; or, for the Northern Territory, the Administrator. There is no equivalent office-holder in the Australian Capital Territory, where acts come into force when they are "notified" in the Legislation Register by the authorisation of the Chief Minister. In practice, as is the case with the giving of Assent to legislation in the United Kingdom by the Queen, such a step is nowadays a mere formality in practice, though it has important and abiding historical significance.

Some powers are exercised exclusively by the Commonwealth, but most are exercised jointly or concurrently with the States and Territories. Many of the exclusive Commonwealth heads of power under the *Constitution* cover subjects which would clearly be the responsibility of a national Government, such as overseas trade, defence, foreign affairs, immigration, currency and interstate trade. The Commonwealth may also legislate over areas such as marriage and divorce, social welfare allowances, bankruptcy and insurance.

3. Unless otherwise stated, references to Australia's "Territories" in this text are to the Australian Capital Territory and Northern Territory, not to the various "external" Territories (including the Australian Antarctic Territory, Christmas Island and Norfolk Island).

Since 1901, the Commonwealth has been able to extend its jurisdiction beyond the specific legislative powers in various ways. Interpretation of the Australian Constitution by the High Court has often been favourable to greater Commonwealth power, for example, over industrial matters, or by the use of the foreign affairs powers in The Tasmanian Dams Case, *Commonwealth v Tasmania*.[4] Commonwealth legislation based on the "corporations" and "interstate trade" powers under the *Constitution* has expanded its intervention into areas previously regarded as within the province of the States (for example, the 2005 and 2010 industrial relations workplace reforms).[5] This process is likely to expand and, in the interest of legislative consistency, might well be encouraged, see, for example, the role of the Building Ministers Forum at [3.60] and [3.100].

As well, the *Constitution* may be formally altered by referendum, though Australians have rarely voted to accept such change to the extent required under the amendment mechanism: this requires that a majority of electors in a majority of States vote in favour of the amendment and that overall there is a majority in favour across the nation (including those voting in the Territories).[6] The States may also agree to transfer their powers (as occurred with the power to raise income taxes during World War II) or to pass uniform legislation modelled on Commonwealth Acts, or through agreement to pass uniform legislation: for example, the introduction of the National Construction Code (NCC) developed by the Australian Building Codes Board (ABCB)[7] and the reforms of occupational health and safety law and consumer law.

Through the allocation of funds in the budget, the Commonwealth may also extend its control into areas otherwise the preserve of the States, for example, education, health and public works capital expenditure. The Northern Territory and the Australian Capital Territory now have power to make statute law, albeit limited, which has reduced the sphere of Commonwealth power.

Harmonisation – uniformity

[1.70] To facilitate coordinated action by the Commonwealth and State/Territory governments and to drive reform by greater consistency in law and administration across all Australian jurisdictions and with New Zealand, the Council of Australian Governments (COAG) was established in 1992 and its councils and other intergovernmental councils of ministers collaborate in working towards uniformity in legislation and to reduce complexity and red tape for the private sector. One initiative of COAG has been the introduction of the NCC based on the Building Code of Australia (BCA). The Council

4. *Commonwealth v Tasmania* (1983) 158 CLR 1.
5. See [3.240].
6. *Constitution* s 128.
7. See, primarily, [3.120].

of Attorneys-General (CAG) established by COAG has similar objectives, with a focus on law reform. There are a number of aspects of the law which impact upon the construction industry which require attention by these bodies, particularly the Building Ministers Forum. The critical issues include the development of consistent and effective regulation of building compliance, proportionate liability and security of payment. These issues are addressed at [3.100] and [6.310].

The parliamentary system

[1.80] Legislation in Australia is made by, or with the authority of, Parliaments. Parliaments are an expression of the democratic form of government practised in this country, which also has the distinguishing features of being a federation and a constitutional monarchy. Australia follows a Westminster style of government with ministerial responsibility (meaning that Ministers, including the Prime Minister, must be elected to Parliament and answerable to it)[8] and to some extent a separation of the legislative, executive and judicial functions of government.

Australia remains a constitutional monarchy. This means, somewhat anachronistically, that the monarch for the time being of the United Kingdom is also the Head of State of Australia (as she is of several other former British Dominions). The Queen or King does not, however, have absolute power. The monarch reigns but governs only with the advice and consent of Parliament. However, as was noted above, all legislation in Australia must obtain the "rubber stamp" of Royal Assent from the Queen, through her Vice-Regal representatives (the Governor-General, State Governors or Northern Territory Administrator), before it becomes effective.[9]

Houses of Parliament. Australia has a Federal Parliament, six State Parliaments and two Territory legislatures. Most Parliaments are bicameral, having an "upper" and "lower" house. At Federal level these are the Senate and the House of Representatives. The Senate was designed as a States' house with equal representation from each State, and now also representation from the Territories. The House of Representatives is elected from single member constituencies on a direct franchise. Legislatures at the State level consist, with the exception of Queensland, of a Legislative Council, which acts as a house of review, and a Legislative Assembly or House of Assembly. Members of upper houses are appointed or elected; the lower houses are elected either by direct or proportional representation. The Territory legislatures, and that of Queensland, are unicameral.

The government. When elections are held for Australian parliaments, the party (or a coalition of parties) commanding a majority of seats in the lower house will be asked by the Queen's representative to form a government. The

8. *Constitution* s 64.

9. As to the ACT, see [1.60].

leader of that party becomes the Prime Minister, Premier or Chief Minister. The policies of the majority party (or, where a party is unable to command a majority in its own right, as happened at Federal level in 2010, those of the party which has the support of sufficient minor party and independent members) will form the basis of legislation enacted during the life of the Parliament. Frequently the majority party in the lower house does not command majority support in the upper house, which can act as a brake on the implementation of the government's legislative program. Since 2016 the Federal government has had a bare majority in the House of Representatives and a minority in the Senate.

The Cabinet and Ministers. From the ranks of elected representatives of both the Upper and Lower Houses, the leader of the majority party appoints Ministers of the Crown, who are placed in charge of government departments, and forms a Cabinet, comprising some or all Ministers. Individual Ministers are responsible to the Parliament for the operation of their portfolio, that is, answerable for their actions and those of their public servants. A major administrative function of a department is to prepare legislation for the Parliament, and the delegated legislation, the detail of regulations necessary to execute the broad outlines of legislation created by Parliament.

Creation of statutes

[1.90] A statute usually implements Government policy, determined by Cabinet and based on the party policy and departmental advice. Public and media pressure may lead to legislative change, or it may follow recommendations of law reform commission reports, or reports by other government- or parliamentary-initiated inquiries. An individual member of Parliament may also propose a "private member's Bill", although these rarely progress to become legislation. Such bills can occur more often where neither major party has a majority and the Government controls the "hung" Parliament with the support of minor parties and independent members.

The procedure for creating a statute is essentially the same in both the Federal and State Parliaments and in the Territory Legislative Assemblies. Once Cabinet decides on a proposed law, the relevant Minister is responsible for drafting the Bill. This is done by parliamentary drafters, with advice from the department and, where appropriate, community consultation. The Bill is drafted in the form of numbered clauses and schedules.

The Minister introduces the Bill, commonly in the chamber in which he or she sits. It must undergo three "readings" and where it is debated and may be amended by either chamber of the legislature. When the Bill (as amended) has been agreed to by both houses (or single house, in the case of the Australian Capital Territory, Northern Territory and Queensland), it is submitted (other than in the ACT – see [1.60]) to the Governor-General, Governor or Administrator for Royal Assent. Once assented to (or, in the

ACT, notified), the Bill becomes an Act, the clauses become "sections" and statute law has been created.

Subordinate or delegated legislation

[1.100] Whilst legislation enacted by Parliament is an important and ever increasing source of law in the Australian legal system, the more voluminous source is subordinate or delegated legislation. The names given to such legislation varies. They include Ordinances, Regulations, By-laws, Schemes, Rules, Statutory Rules, Ministerial Directions and Orders-in-Council, but subordinate legislation extends to guidelines, statements of principles, notices, directives and codes of practice and standards. In practice, the construction industry is significantly influenced by delegated legislation, for among the activities controlled by it are building regulations, including the NCC, construction safety regulations, traffic regulations and offences, industrial awards governing conditions of employment and the activities controlled by local government. Much of the law applicable to the construction industry, both in what may be built and where, and the manner in which it is built, is to be found in delegated legislation.

The validity of delegated legislation will depend upon the authority granted by Parliament to the particular council, Minister, department, commission or body from which the regulations emanate and whether the legislation is within the powers of the body creating it or if it is *ultra vires* or outside the body's powers.

Whatever the form, the creation of delegated legislation must begin with the grant by a legislature to a competent authority of the power to make regulations within some defined scope. Usually, power is given to the Governor- (or Governor-General)-in-Council and to Ministers of the Crown, government departments, local government councils and other statutory authorities. If delegated legislation is made within the limits of the powers granted, it is as effective in law as laws passed by Parliament.

Procedures for making delegated legislation will vary with its source, although some general approaches are followed. Consultation with the citizens who will be affected by the regulations often occurs, and indeed some Acts make this procedure essential. Regulations concerning industrial arbitration or conditions in shops, factories or on building sites are usually made in consultation with both employer and employee organisations. Industrial awards are forms of delegated legislation, and they are made only after hearings involving the parties to the award. Town and country planning schemes or local environmental plans generally will become effective only after a process of publicity, lodging of objections and review, involving interested parties.

Consultation with experts is also a major source of the contents of regulations. There may be advisory committees or boards whose functions are to assist and make recommendations to the regulation-making authority,

for example, the ABCB, which since 1994 has had national responsibility for developing and maintaining consistency in the application of the NCC across Australia.

Delegated legislation may incorporate other documents by reference, a procedure frequently used for codes of practice established by non-government bodies, or standards approved or adopted by a designated body. Examples applicable to the construction industry are the standards published by Standards Australia which are incorporated into the NCC.

The process of bringing delegated legislation into effect will vary. All Australian jurisdictions have procedures whereby delegated legislation is tabled or laid before each House of Parliament, which may then disallow any of the regulations. In practice, the level of scrutiny varies between legislatures and depends upon the type of delegated legislation involved. Parliaments do not always take careful interest in this method of law making, although committees to review regulations exist within some legislatures. Publication of the new delegated legislation is required. Some, such as Regulations, Orders and Statutory Instruments are effected by printing in the *Government Gazette*. Some subordinate legislation is subject to a sunset clause or a staged repeal program, which ensures that it is regularly reviewed so as to remain current and avoid over-regulation.

Local government

[1.110] The third tier of government in Australia is the local council, of a city, county, town, municipality, shire or district. Local government does not have a separate constitutional foundation or autonomy; each council is created by a statute of State or Territory Parliament, and an elected council may be dismissed by the Local Government Minister. The exception to this is the Australian Capital Territory, in which the Territory government is responsible not only for Territory-wide functions but also for those which elsewhere are devolved to local government, such as waste disposal.

In Australia, local government generally does not play as important a role in government as does its English counterpart, on which it was modelled. Australian local government has no authority over police, education or the provision of housing, for example, but in both countries has wide responsibilities for the local area, particularly in planning and environmental matters. Many of the functions of local government directly affect the building and construction industry. Almost all councils are required or permitted to provide health and sanitary services, maintain public works and services (roads, drainage, recreation facilities, car parking) and administer town and environmental planning, including development approvals, sub-divisions, zoning and some pollution controls.

With the exception of New South Wales, where Ordinances are made at departmental level and issued by the Governor, most Local Government Acts give local councils power to make their own by-laws, though these may

require authorisation by the Governor-in-Council. This means that councils are empowered to make delegated legislation. The legal consequences of this position are that councils must follow the procedures laid down by the Act for making by-laws and must operate only within the field specified by statute or risk challenge in the courts as to the validity of their regulations. Practical consequences make understanding local government law a cumbersome operation, as one must wade through and apply an intricate web of law contained within the Local Government Act and the by-laws for a particular council area, which are usually lengthy, frequently amended, infrequently published and subject to interpretation in a multitude of judicial and administrative decisions.

There are about 600 local councils in Australia. All are representative bodies, elected by local residents and ratepayers. The day-to-day administration of the council is carried on by a permanent staff of officers, including planners, engineers, inspectors and clerks. Revenue comes mainly from rates, but also from charges and State and Federal grants.

Un-enacted law – case law

[1.120] "Judge made" or "case" law is created when the decisions of the judiciary are recorded and then used to assist decision-making in subsequent cases. Out of this practice, a body of legal rules made quite independently of Parliament has developed. The rules are applied on the basis of the doctrine of precedent by which judges follow the decisions of earlier judges in cases presenting similar fact situations.

The phrase "common law" is used in at least three major contexts, and it can be confusing unless the sense in which it is being used is understood:

1. Reference has already been made to England and Australia being "common law countries"; this is a classification of the legal system as a whole.
2. The common law is to be distinguished from statute law, a distinction based on the source of the legal rule. Common law is that pronounced by judges in the course of deciding cases and for convenience is called "case law" in this section.
3. In a more restrictive sense, the expression "common law" also refers to the laws developed by the judges of the common law courts, to distinguish the laws from those derived in other courts, particularly the Court of Equity (Chancery).

Equity case law developed along a parallel and supplementary path to the common law and arose to take account of the inflexible nature of the common law rules, where a plaintiff could only seek a remedy if the cause of action lay in a known category. The Court of Equity (Chancery) applied rules of equity, fairness and a good conscience to a situation which might otherwise be decided on the basis of only the common law rules. Thus equity could take account of factors such as accident, fraud, breach of promise,

delay in seeking a remedy or any unconscionable conduct which ought to be considered. Equitable remedies may be given against persons to prevent them enforcing a common law right.

Historically, the common law and equity systems both depended on case law and the doctrine of precedent which developed independently in each. Since 1875 in England, and now in all Australian jurisdictions, the administration and application by courts of the rules of common law and equity is concurrent. Where there is a conflict, the rules of equity prevail.

The origins of case law in Australia lie in judicial decisions from the English legal system. In the 19th century, each colony developed an independent court system of "superior" and "inferior" courts.[10] Judges decided cases at first on the basis of English law, and then progressively on their own determinations. After 1901, provision was made in the *Constitution* for a federal court system with limited jurisdiction; however, the State systems continued to function as separate entities, although all recognised the High Court of Australia and the Judicial Committee of the Privy Council as the superior courts of appeal: for example, see [6.30] and following in relation to the law of negligence and [5.530] as to the development of the law of restitution and unjust enrichment.

Australian judicial independence from the authority of judicial decisions made in English Courts was gradually exerted. Appeals to the Privy Council were abolished from the High Court of Australia in 1975 and from State Supreme Courts in 1986. As is discussed in this text, the High Court has forged its own path in the development of the law in many areas. A particular example is the contrasting position on the law of penalties in the Supreme Court in the United Kingdom, see *Cavendish Square Holding BV v Talal El Makdessi*[11] and in the High Court in Australia, see *Paciocco v Australia and New Zealand Banking Group Limited*.[12] A recent example of the development of the Australian approach is *Grocon Constructors (Qld) Pty Ltd v Jupiter Developer No 2 Pty Ltd*.[13]

Courts in Australia

[1.130] Like Australia's Parliaments, courts in Australia were created on the English model. They have, however, developed new forms and display individual differences in constitution and procedure to a far greater extent than do legislatures. There are two systems within the Australian Federal system, operating side by side and interrelated.

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10. See [1.140].
11. *Cavendish Square Holding BV v Talal El Makdessi* [2016] AC 1172; [2016] BLR 1.
12. *Paciocco v Australia and New Zealand Banking Group Limited* (2016) 258 CLR 525 and see Tiverios N, "A Restatement of Relief Against Contractual Penalties" (2017) 11 J Eq 1.
13. *Grocon Constructors (Qld) Pty Ltd v Jupiter Developer No 2 Pty Ltd* (2016) 32 BCL 259.

State and Territory courts and tribunals have jurisdiction over matters within their boundaries.

Federal Courts and Tribunals have jurisdiction over Federal matters wherever they occur within Australia, and over constitutional matters.

For convenience, but to complicate an analysis of the court system, many matters of a criminal or civil nature under the Federal law are dealt with in State courts exercising Federal jurisdiction. Further, as a result of the enactment of various cross-vesting legislation from 1987 onwards, State and Territory courts in different jurisdictions are able, where appropriate, to adjudicate on proceedings strictly outside the jurisdiction of the Court concerned. However, all Australian court systems have in common the features described below.

Courts generally

[1.140] Courts are charged with enforcing the laws. In pursuance of this, judicial officers perform two functions. Within the "criminal" jurisdiction, courts deal with persons who have offended against the criminal laws and who are prosecuted by society in the name of the Crown. Judicial officers (or, in certain cases, a jury of laypeople) determine the guilt or innocence of persons accused of committing a crime and order punishments involving fines, non-custodial orders or imprisonment.

The court's other function concerns the determination of disputes arising between citizens or between citizens and the State, and the regulation of citizens' rights, obligations and activities. This is the "civil" jurisdiction, in which citizens institute court action wherever they feel aggrieved or are obliged to do so (for example, in applications for adoption or probate). The remedies which the court uses in civil matters most often involve relief or compensation in the form of money "damages" or a court direction to act or refrain from acting (known as "injunctions" – see, generally, [5.490] and [6.280]).

The Australian court system has inherited the concept of a hierarchy of courts from the English system, recognising that minor matters should be settled quickly and cheaply, while major matters deserve more serious attention. Although a hierarchy is common practice, no two States and Territories have identical arrangements, names, judicial limits or procedures. However, there is a general scheme according to the relative importance of the matter in dispute. Each State and Territory has a "superior" court created by statute with jurisdiction in all matters except as have been expressly allocated to other or "inferior" courts with jurisdiction over matters expressly given to them.

Flowing consequentially from a hierarchical system of courts is the general principle that disappointed litigants and convicted persons have, in appropriate circumstances, a right of appeal to a higher tribunal. In the interests of fair administration of justice for all, some limits are placed on the right of

appeal, so that a final decision is made at a level commensurate with the seriousness of the offence, the nature of the property in dispute and the importance of the question of law to be decided. Rarely will the appeal be heard as a full re-trial. The decision on appeal is usually made concerning the validity of the judgment at the original trial. The usual practice is not to overturn findings by juries on facts or damages.

Tribunals

[1.150] There has been a trend for legislatures to create judicial and quasi-judicial bodies in addition to courts in the traditional structure. These special courts and tribunals usually handle matters in specialised areas such as industrial relations, compensation for workers' injuries, licensing of premises, strata title disputes, consumer claims, review of administrative decisions, local government and environmental matters and the licensing and registration of builders.

The existence and operation of these bodies reflects a recognition that the legal system ought to provide our society with a more efficient and effective resolution of disputes by widening access to the judicial process and de-formalising it. The procedures and constitution of these special courts or tribunals are generally less formal than regular courts. Specialist judges or adjudicators may be appointed; legal representation may be restricted; proceedings may be by way of mandatory mediation, conciliation or arbitration, rather than by the adversarial process.

Examples of such tribunals which concern the construction industry include the New South Wales Civil and Administrative Tribunal (NCAT), the Queensland Civil and Administrative Tribunal (QCAT) and the Victorian Civil and Administrative Tribunal (VCAT). Each of these has building lists or divisions and deal with a range of related disputes, mainly involving residential building disputes. These tribunals can also deal with licensing of construction professionals and practitioners.

State and Territory systems

[1.160] Although not uniform in name, detail or jurisdiction, the courts in each State and Territory generally follow a pattern of a three-tiered structure, consisting of magistrates or local courts, an intermediate court level of district or county courts and superior Supreme courts with an appellate court (known variously as a "Court of Appeal" or "Full Court") at the head of the State/Territory system. All State and Territory systems have the High Court of Australia as the ultimate court of appeal.

Magistrates courts. The lowest civil courts are known as "Local Courts" in New South Wales, Western Australia and the Northern Territory and "Magistrates Courts" elsewhere. Courts at this level also have an extensive criminal jurisdiction; for this purpose in Tasmania they are called "Courts of Petty Sessions". As the common name suggests, these courts are usually

presided over by a magistrate (a professional, stipendiary or special magistrate) though in some jurisdictions a Justice of the Peace (JP) may preside in certain cases.

The physical location of courts is widely spread around each State and Territory, in cities and larger regional centres. The practice is to hear matters which have arisen in the local area, although hearings may be transferred where convenient to parties for the administration of the law.

Magistrates or Local Courts exercise both civil and criminal functions within specific limits. In civil matters, they have jurisdiction over personal actions for claims up to a specified maximum. These range from $5,000 in Tasmania up to $100,000 in New South Wales and the Northern Territory. The criminal function is two-fold. All criminal matters begin with a hearing before a magistrate. Minor crimes automatically, and less serious crimes on request, will be heard and dealt with summarily, that is by the magistrates sitting alone, who are limited as to the maximum penalties which they may impose.

The most common encounter an individual is likely to have with a court of law is a magistrate summarily trying parking or traffic offences. For more serious crimes, known as "indictable offences", the magistrate is an initial court of inquiry to determine whether the evidence establishes a prima facie case which would warrant the accused being committed for trial in a superior court. In this circumstance, the magistrate will also decide whether the accused should remain in custody pending the full trial or be released on bail.

Intermediate courts. All jurisdictions except Tasmania and the Territories have an intermediate level court. These are called the "County Court" in Victoria and "District Court" elsewhere. These Courts exercise both civil and criminal jurisdiction. A judge presides, usually with a jury in more serious criminal matters and, on rare occasions, in civil matters. The Courts sit in the capital city and throughout at major regional centres in the State or Territory.

The civil jurisdiction of District or County Courts in most States and Territories is limited by statute, with a range of monetary limits of up to $750,000 in New South Wales (or larger amounts if the parties agree to the District Court hearing the matter). For certain types of claims, for example, personal or motor vehicle injury claims, such courts may be given unlimited jurisdiction, as in Victoria and New South Wales, respectively. The Court's jurisdiction, for example in equity, may also be limited by statute. The criminal jurisdiction handles all but the most serious criminal offences at first instance and cases on which there is an appeal from a decision in a Magistrates Court.

Supreme Courts. There is a Supreme Court in each State and Territory, being a superior court of general jurisdiction, responsible for the supervision of the State or Territory's law and legal system. The Court may hear all matters in State and Federal law except those expressly excluded by statute or those which must be brought in a federal court or a special tribunal. In practice, the Supreme Court in its original jurisdiction will try serious crimes and

decide important civil cases. The Supreme Court sits generally in the State/Territory capital but may go "on circuit" to regional centres.

Although Supreme Courts are unified, for administrative convenience some have specialised divisions. In New South Wales, the common law and equity divisions are each presided over by a Chief Judge. The common law division includes criminal matters. Within the Equity Division are commercial and technology and construction lists and separate lists for administrative law, admiralty, probate and protective actions.

Some Supreme Courts do not have a separate equity division as does New South Wales, which only as recently as 1970 adopted the joint administration of the rules of common law and equity. The Court is always constituted in its original jurisdiction by a judge sitting alone. All Supreme Courts have an appellate jurisdiction from intermediate courts and single judges of the Supreme Court, although varying rights of appeal and procedures apply. In most States an appeal is heard by a Full Court of three of the judges. New South Wales, for example, has a permanent specialist Court of Appeal for civil matters and a Court of Criminal Appeal of any three or more judges of the Supreme Court.

Some Supreme Courts have adopted specific administrative procedures for dealing with building or related proceedings. In Victoria, there is a specialist Commercial Court and a Technology Engineering and Construction List presided over by an allocated judge. In Queensland, there is a Trial Division without specialist lists. In New South Wales, the Supreme Court Technology and Construction List is presided over by judges of the Equity Division, and there is also a Construction List in the District Court.

The purpose of such lists is to overcome many of the problems which are particularly applicable to building cases such as the complexity of details in dispute, slow pre-trial preparation which does not necessarily disclose the real issues and long and expensive trials. The presiding judge gives directions at the commencement of proceedings in order to identify the issues in dispute and to make any orders to expedite the preparation for and resolution of the dispute. In New South Wales, Part 20 of the *Uniform Civil Procedure Rules 2005* provides a significant facility for the speedy resolution of proceedings by enabling specific issues to be referred to technically qualified expert referees for hearing and report to the Court.[14]

Other courts and tribunals. Outside the main hierarchy of State and Territory Courts and the consumer and building tribunals, there are numerous specialist Courts, Tribunals, Commissions and Boards. They are often constituted as separate entities but may be operated within the administrative structure and by the personnel of existing courts. These tribunals deal with matters of specialised administrative law subjects and often have prescribed

14. See [14.160].

procedures, in many cases more informal than that in ordinary courts. Some States have, for instance, drug courts, family violence courts or specially constituted panels which deal with indigenous offenders and disputes.

In recent years, some jurisdictions have established specialised building tribunals with exclusive jurisdiction over residential building disputes. The forms vary and are frequently subject to change. The Domestic Building Tribunal was created in Victoria in 1995 which, since 1998, has been a Domestic Building List operating as part of VCAT. The Queensland Building Tribunal, which operated for some years, has recently been absorbed into QCAT. In New South Wales NCAT has substantial jurisdiction over domestic building residential disputes up to $500,000 and general jurisdiction in consumer claims up to $25,000.

The Land and Environment Court in New South Wales (which has the same status as the Supreme Court) has jurisdiction in relation to planning and local government appeals, environmental control and prosecutions and valuation disputes arising from compulsory acquisition of land.[15] The Environment Resources and Development Court of South Australia and the Planning and Environment Court in Queensland have similar jurisdictions. These matters are dealt with in different ways in other jurisdictions, by special divisions or tribunals associated with Supreme Courts or by separate specialist tribunals.

To facilitate the resolution of disputes concerning relatively small amounts of money, goods or services, each jurisdiction has provision for various forums to hear small claims. These adopt less formal and less adversarial procedures, and participants avoid incurring the time and expense of taking action in the formal court system. As well as NCAT, VCAT and QCAT, separate tribunals exist in several jurisdictions to hear disputes arising between landlords and tenants of residential properties and, in some instances, of retail tenancies. Typically, there are Licensing Courts or Commissions for the granting of liquor licences and permits. Specialist Children's Courts operate, as do Coroner's Courts, with responsibility to investigate by means of an inquest the causes of violent or unnatural deaths and fires, both usually presided over by a magistrate.

Throughout Australia there has been a varying range of Boards, Courts, Commissions and Tribunals administering an industrial jurisdiction including the operation of a system of conciliation and arbitration for the regulation of industry and employment. Structures and systems vary across the country. There is a Federal industrial system, since 2013 under the Fair Work Commission, and separate State-based systems. In New South Wales, Queensland and South Australia there are Industrial Relations Commissions. In New South Wales the former Workers Compensation Court for many years addressed claims for compensation by injured workers, which are

15. See, further, [7.290]

now addressed by the Workers Compensation Commission and the Dust Diseases Tribunal.

Federal courts

[1.170] Prior to the establishment of the Federal Court of Australia in 1977 and the Family Court of Australia under the *Family Law Act 1975* (Cth), the State Supreme Courts exercised jurisdiction in most Federal matters. The Federal Court assumed the jurisdiction of the former Federal, Industrial and Bankruptcy Courts. Its jurisdiction was initially limited to matters arising under Federal law, including trade practices, intellectual property and Federal administrative matters including appeals from the Administrative Appeals Tribunal.

The Federal Court's jurisdiction grew substantially, both as a result of jurisdiction granted to it under various amending statutes, and the accrual of jurisdiction for matters under common law or State law where there was a related Federal issue which could not be separated from the proceedings. The State Supreme Courts could not, as a general rule, exercise jurisdiction in matters involving a claim under Federal law. The Federal Court also hears appeals from the Supreme Court of Norfolk Island.

Since 2000, the Federal Magistrates Court, now the Federal Circuit Court, has had jurisdiction over less complex Federal matters. The Family Court of Australia has responsibility for divorce proceedings, proceedings involving property of a marriage and custody disputes. These matters had formerly been dealt with in the State Supreme Courts' family divisions and Family Courts. As at mid-2018 there are proposals for the amalgamation of the Federal Circuit Court in its family law jurisdiction with the Family Court and the transfer of the appellate jurisdiction of the Family Court to the Federal Court.

Like the States and Territories, the Commonwealth has created other judicial and quasi-judicial bodies concerned with administration of specific pieces of legislation, or general areas of the law. Prominent among these are the Administrative Appeals Tribunal (AAT) which now incorporates the Migration and Refugee Review Tribunals and the Social Security Appeals Tribunal. Others are the Australian Competition Tribunal, Copyright Tribunal of Australia and the National Native Title Tribunal. The AAT has substantial jurisdiction in appeals or reviews of decisions of other tribunals and revenue disputes.

Cross-vesting

[1.180] The establishment of the Federal Court to some extent exacerbated existing interstate jurisdictional conflicts and created jurisdictional problems as between itself and the State Supreme Courts. Difficulties were also seen to exist as between the jurisdiction of the Family Court and the State Supreme Courts. As a result of agreement between the State and Federal governments,

cross-vesting legislation was introduced in 1987 to overcome jurisdictional conflict and to define jurisdiction as between the Federal Court and the State (and, later, Territory) Supreme Courts. The scheme allows litigants to choose the forum for their dispute, having regard to the issues involved and the court which it is considered is more appropriate to deal with those issues.

The cross-vesting scheme also permits the transfer of proceedings from one court to another, such as between State/Territory Supreme Courts and as between the Federal Court and the State/Territory Courts. The Federal Court retains limited exclusive jurisdiction in some matters relating to trade practices and certain industrial matters. Since 1994, the Federal Industrial Relations Court has presided over industrial law in the Federal context, within the administration of the Federal Court.

High Court of Australia

[1.190] The major court of the Commonwealth system is the High Court of Australia. It has a permanent home in the national capital, Canberra, but continues to sit regularly in most State capitals. It is both a Federal and a national court. It has limited original jurisdiction, mainly in the areas of disputes between the residents of different parts of Australia, constitutional matters and those involving foreign countries.[16] Its most important function, in terms of regulating Australian law generally, is to act as a general court of appeal from the State and Territory Supreme Courts and the Federal and Family Courts.

To reduce the workload of the Court, since 1984, appeals to the High Court "as of right" no longer exist and are only permitted by special leave or permission of the Court itself. Sitting as a Court, the High Court consists of any number of judges from three to a full complement of seven. Judges of the High Court are generally drawn from the Supreme and Federal Courts and from among the senior ranks of practising lawyers. They perform an important task in unifying case law originating in the separate State and Territory systems.

The Judicial Committee of the Privy Council traditionally operated as the final court of appeal for those members of the British Commonwealth who wished to avail themselves of its position, including Australia. It remains the ultimate court of appeal for some Commonwealth countries. In 1986, the last remaining possible appeals to the Privy Council from the High Court were abolished by the *Australia Acts*.

The doctrine of precedent

[1.200] The development of case law and its acceptance as a method of law making depended greatly upon judges being willing to follow a consistent

16. *Constitution* ss 75-76.

approach and judge similar circumstances in the same way as had been previously. This process is known as "stare decisis" – standing by the decision – and is the basis of the doctrine of precedent. Good reasons exist for such a doctrine: for fairness and equality, to allow people to plan their actions with certainty as to their legal consequences and to protect citizens against the naked abuse of power.

Judges decide cases on the basis of arguments presented by counsel which rely on decisions made in other courts. The rules of the doctrine of precedent require that, depending upon the court in which the judge presides, some principles must be considered binding, and others will be of varying persuasive value, or merely influential, having regard to the weight and authority of the court in which those decisions were originally made.

What, then, is "binding judicial authority"? It is the principles on which the case is decided which are to be found in the reasoning of the judge (or judges) who decided the case. The judge writes or delivers a judgment which contains the reasoning and the expression of the principles of law relevant to the decision. However, not everything a judge expresses in a judgment involves the legal principles necessary to reach the decision. For convenience, lawyers speak of the "ratio decidendi" and "obiter dicta". *Ratio decidendi* literally is the reason for deciding, or any statement or proposition of law on which the judge relies to justify the decision. That is what is binding.

In the course of coming to a decision, the judge may discuss propositions or make observations which do not directly relate to his or her decision making. These are *obiter dicta*, or "by the way". Obiter is not binding but is used by counsel in other cases to advance their arguments when a new situation arises, or when they wish to show that the facts in the new case are to be distinguished from those in the previous case, and so the judge ought not to consider a previous decision as binding but be swayed by obiter opinions. A ratio or principle of law is rarely stated in absolute or complete terms but rather as a general principle to which exceptions may apply.

The practice of precedent, where principles of law established in previous decisions are followed or applied to the facts of a new case, suggests that the common law is relatively rigid. In reality, however, arguments will be presented to the judge to distinguish the facts of a subsequent case and so create an exception to the general principle, or extend the operation of a principle to reflect novel situations or changing social attitudes. A judge may cite with approval a previously stated principle, further explain it or doubt its accuracy. A principle may be rejected or even overruled where it is considered to be wrong. These approaches allow flexibility in un-enacted law, and thus common law principles evolve. An example lies in the general principle of negligence enunciated in *Donoghue v Stevenson* (see [6.40]), which has been discussed in numerous cases since, as judges define and refine the extent of responsibility to one's neighbour.

The doctrine presupposes a hierarchy of courts. The basic principles which apply to this hierarchy are:

- Every court is bound to follow the decisions of courts superior to it in the same court hierarchy.
- The decisions of courts lower in the hierarchy are persuasive but not binding, as are decisions of courts in other hierarchies.
- The weight and authority of such decisions will depend on the status of the court in which they are given, and the proximity of those courts.
- Most superior courts are reluctant to depart from decisions made by judges within their own court – they are considered binding, but not immutably so.

Within the Australian court system, the doctrine of precedent operates to specific formulations. In Magistrates Courts the decisions do not create precedents, and novel questions of law do not commonly arise. Usually a magistrate will apply statements of law made in the superior or Supreme Court in that hierarchy. At the intermediate court level, the judges will be more aware of previous judicial propositions and entertain submissions of conflicting principles but will rarely find themselves exercising a lawmaking function. They are bound to follow principles expounded in the superior court of their hierarchy, but judgments of fellow judges are persuasive only.

At the level of the Supreme Court, there are both original and appellate jurisdictions. A single judge exercising an original jurisdiction is not in fact, but will usually be in practice, bound by decisions of fellow judges sitting alone. The judge will consider the full legal arguments presented in the light of his or her own understanding of the legal principles. Decisions at this level are recorded and publicised in law reports, although they do not form the final authority. Any High Court or Court of Appeal decision binds a single judge at Supreme Court level.

Courts of Appeal at Supreme Court and High Court level constitute in practical terms the highest levels in the hierarchy. Decisions made in them will become binding authority on all Courts below them in the jurisdiction. It is here that the most thorough consideration of legal principles is made and the decisions are reported in law reports. State and Territory Supreme Courts are bound by decisions of the High Court. Decisions of State and Territory Courts of Appeal are generally binding on Courts at similar level in other jurisdictions. A decision as to the interpretation of Federal or uniform legislation is binding unless the Court considers that the earlier decision is plainly wrong, in which case it needs to explain why: see *ASC v Marlborough Gold Mines Ltd*[17] and *Cargill International SA v Peabody Australia Mining Ltd*.[18] The High Court has declared that it may reverse one of its own decisions if it is

17. *ASC v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.
18. *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533.

subsequently persuaded that it has itself erred in a decision. The High Court is no longer bound to follow Privy Council decisions.

Decisions of courts outside the hierarchy will be of relevance in deciding cases. Decisions of the Privy Council, the United Kingdom Supreme Court (until 2009, the Law Lords within the House of Lords), the English Court of Appeal and the High Court of England will be of great persuasive value, and until recently Australian courts were quite prepared to follow their decisions. Lately, however, the High Court of Australia has shown a disinclination to follow the approach taken by the English courts, particularly in the areas of negligence. For example, in *Bryan v Maloney*,[19] for example, the High Court expressly did not follow the House of Lords in *D & F Estates Limited v Church Commissioners for England*[20] and *Murphy v Brentwood District Council*[21] in relation to the duty of a builder to a subsequent purchaser of a house. The High Court has since refined the law further, in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,[22] and further still in *Brookfield Multiplex Ltd v Owners Corp SP 61288*.[23]

Judges in Australian courts will entertain arguments based on the decisions of foreign jurisdictions such as New Zealand, the United States and Canada but generally give lesser weight to those principles. They often are highly influential, however, in the reasoning of the High Court which strives to take due account of relevant developments in the law around the world. Therefore, if a foreign development is adopted by the High Court, it filters down into inferior Federal and State/Territory courts.

Relationship between case law and statute law

[1.210] It is a general principle of the Australian legal system that enacted law prevails over un-enacted or case law. The supremacy of Parliament's authority can be seen in its right to alter any rule of the common law. Some Acts have even altered the fundamental rule that the prosecution in a criminal case must prove the guilt of the accused beyond reasonable doubt. Parliament may nullify the effects of a judicial decision by introducing legislation which implements an alternative law or, for example, closes a loophole created as a result of judicial interpretation of a tax statute.

In practical terms, however, the concept of Parliament's supreme authority must be modified to take account of the functions of the judiciary. Judges are called upon to review legislation, interpret the meaning of statutes and apply them to particular situations. In doing this, they may in fact alter the

19. *Bryan v Maloney* (1995) 182 CLR 609.
20. *D & F Estates Limited v Church Commissioners for England* [1989] AC 177.
21. *Murphy v Brentwood District Council* [1991] 1 AC 398.
22. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.
23. *Brookfield Multiplex Ltd v Owners Corp SP 61288* (2014) 254 CLR 185 and see further, [6.50]. See also [1.120] as to other differences.

originally intended meaning of a statute, or widen or restrict its application. The High Court of Australia's varied interpretations of the Commonwealth's industrial and corporations powers are cases in point.

More significantly, the judiciary has the power in Australia's Federal system to determine the constitutional validity of any piece of legislation. In recent years the High Court has flexed a judicial independence, for example, in the Mabo and Wik decisions in its determination as to the existence and extent of operation of native title in *Mabo v Queensland (No 2)*[24] and *Wik Peoples v Queensland*,[25] and its determinations based on implied rights in the *Constitution*, most notably freedom of political speech, about which the relevant cases are summarised in, for example, *Hogan v Hinch*.[26]

24. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
25. *Wik Peoples v Queensland* (1996) 187 CLR 1.
26. *Hogan v Hinch* (2011) 243 CLR 506.