ESSENTIAL AUSTRALIAN LAW

Professor David Barker
Dean of the Faculty of Law,
University of Technology, Sydney

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Cavendish Publishing Limited, The Glass House, Wharton Street,
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Foreword

This book is part of the Cavendish Essential Series. The books in the series constitute a unique publishing venture for Australia, in that they are intended as a helpful revision aid for the hard-pressed student. They are not intended to be a substitute for the more detailed textbooks which are already listed in the current Cavendish catalogue.

Each book follows a prescribed format, consisting of a checklist covering each of the areas in the chapter and an expanded treatment of 'Essential' issues looking at examination topics in depth.

The authors are all Australian law academics who bring to their subjects a wealth of experience in academic and legal practice.

Professor David Barker
General Editor
Dean of the Faculty of Law,
University of Technology, Sydney

Preface

This book has been written as the result of the author's experience of teaching introductory law courses over the past 28 years, particularly during the last 12 years in Australia.

The text covers the elements of Australian law, with an emphasis on presenting each topic from a comparative perspective of both the federal and State systems.

Australians are becoming more and more aware of the increasing individuality of their own legal system and of the necessity for understanding how it operates.

The Constitutional Convention held in February 1998 and the subsequent referendum on the republic in November 1999 emphasised the need for a greater knowledge of the Australian Constitution. It is for this reason that a chapter concentrating on Australian constitutional law has been incorporated into the text.

I should like to offer my sincere thanks to the staff of Cavendish Publishing and, as always, to my wife Catherine, both for her encouragement and for her tolerance of yet another intrusion into our family life.

David Barker
July 2000

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1 Introduction

You should be familiar with the following areas:

- the nature of law
- the development and characteristics of Australian law
- classification of law

The nature of law

The term 'law' can be interpreted in many ways. The Oxford English Dictionary, for example, states that it is a 'body of enacted or customary rules recognised by a community as binding'.

When the laws of a State are referred to, 'law' is used in a particular sense whereby it can be defined as 'the body of principles recognised and applied by the State in the administration of justice' (Salmond, JW (Sir), *Jurisprudence*, 12th edn, 1966, Sweet & Maxwell). In order for a group or society to maintain an ordered existence, some rules of conduct must be applied. The law is a collection of such rules, and they are binding upon specified persons, made and amended by certain institutions and enforced by the government and State.

Two principles underlie the concept of law:

- order, in the sense of method of system; and
- coercion, in the sense that, without enforcement of the law, there is no law.

Development of Australian law

Australian law has evolved via many routes:

- customs of the people;
- legislation, that is, the passing of laws;
- case law;
- public opinion.

Classification of law

There are four main categories of law.

Criminal and civil law

Criminal law may be distinguished from civil law, in that the former encompasses certain kinds of wrongdoing as offences against the State, whilst the latter is concerned with the rights and duties of individuals towards each other. The main constituents of civil law are:

- law of contract;
- law of torts;
- law of property;
- law of succession;
- family law.

The main distinction between criminal law and civil law lies in the fact that, in civil law, a legal action is initiated by a private citizen with a view to establishing rights against another, an action in which the State is not involved. By comparison, however, in criminal law, action is pursued on behalf of, or in the name of, the State.

Private and public law

In this context, private law equates to civil law, as explained above, whereas public law encompasses constitutional law, administrative law and criminal law.

Substantive and procedural law

Whilst substantive law comprises those rules which relate to rights and duties amongst citizens, procedural law regulates the stages in the progress of a civil action or criminal prosecution.

Municipal and public international law

Municipal law can be described as the domestic law operative within a State. One aspect of this classification is conflict of laws, otherwise known as *private international law*. This is that body of rules of municipal law which regulates legal relations with a foreign element. In contrast, public international law is that body of legal rules which applies between sovereign States and other entities that have been granted international personality.

Characteristics of Australian law

Australia is a federation with seven constitutions; one for each of the six States and one for the Commonwealth. These constitutions provide for a parliament for each of the States and a parliament for the Commonwealth of Australia. They were given legal form by the Westminster Parliament when the Commonwealth of Australia came into existence in 1901 as a result of the Commonwealth of Australia Constitution Act 1900 (UK), when the six self-governing colonies became States within the Australian Federation.

Australian law may be traced via English law back to Anglo-Saxon times. The system of law practised in Australia is known as common law because it is a combination of customary law and legislation. The most important characteristics of common law are:

- Continuous growth
  The common law has endured for 900 years and has continuously adapted itself to changing social and economic needs.
- Absence of codification
  English common law was formed from the customs of the people. This is in contrast to codification, which was a feature of Roman law and was adopted by certain European countries, notably France, Germany, Austria and Switzerland. Certain parts of Australian law have now been codified, for example, trade practices and corporation law.
- 'Judge made' character of the law
  Whilst judges today may develop the common law within fairly narrow limits, they are mainly concerned with interpreting and applying statute law.
- Independence of judiciary
  Justice requires that a judge be impartial and independent of both parties to a particular legal dispute. This right of independence of the judiciary was incorporated by s 72 of the Australian Constitution.
- Independence of lawyers
  Lawyers are not appointed by the State and are not public servants. Like the judges, they are traditionally independent and their

relations with clients are based on confidence and are protected by privilege.

- Influence of procedure
  This was reflected in the effect of the writ system on the commencement of a legal action in medieval England. Such procedural rules have had a profound effect on substantive law.
- No reception of Roman law
  English common law, as the forerunner of Australian law, was largely unaffected by Roman law, in contrast to the law of other European countries, including Scotland.
- Doctrine of precedent
  In order to achieve some consistency in decisions, the courts developed a practise whereby judgments in higher courts binding those of the lower courts.
- Practical nature of the law
  It has always been a fundamental feature of the common law judicial system that the courts only decide disputes between the parties before them, refusing to pronounce on hypothetical legal situations.

2 Historical Sources of Australian Law

You should be familiar with the following areas:

- the origins of the common law and its reception in Australia
- the history of equity and its influence on Australian law
- the role of legislation in the Australian legal system
- the *Mabo* decision and the recognition of common law native title
- the Native Title Act 1993 (Cth)

Introduction

An appreciation of legal history is fundamental to an understanding of law in Australia. This chapter outlines the historical sources of law in Australia and discusses the courts and other institutions involved in the Australian legal system. The major historical sources of law in Australia are the common law, the law of equity, statute based law and the law concerning native title.

All of the above legal concepts originated from the English legal system. The law and institutions of government in Australia were established (or ultimately authorised) by England and, as such, they formed the starting point of Australia's legal history. English law developed from a number of sources: custom; the rules established by the common law courts and the courts of equity; canon law; the law merchant; and legislation. Moreover, the growth of substantive civil law has, at common law, traditionally been bound up with procedure, since a right existed only if it could be enforced.

Common law

Origins of the common law

The common law in England stems from 1066, when William of Normandy gained the sovereignty of England by right of battle. William and his Norman successors distinguished themselves in many ways. They possessed orderly minds and were efficient administrators. They crushed the rebellious English into submission and established a strong central government.

Feudalism, based on land tenure, was introduced into England. William owned the whole of England; all other persons possessed land either as tenants (not owners) or sub-tenants of the King himself. No immediate change was attempted with regard to the customary laws of the English, for this would have been an insuperable task.

The changes made by William I included the following:

- King's Council (*Magnum Concilium*)
  These were meetings of the barons, lords, bishops and other important figures of the kingdom on whose advice and wisdom the monarch relied. The result of this was a strong central government.
- A new feudalism
  The King owned all the land (in theory), while the barons, lords, bishops and freemen held of him as tenants or sub-tenants. All tenants, whether barons or freemen, were compelled to swear an oath of allegiance to the King himself. Freemen owed allegiance as sub-tenants, not only to a lord of the manor, but also to the King, leading to closer royal control.
- Separation of lay courts and church (or clerical) courts
  Each had a definite jurisdiction. Bishops and clergy were in future to be tried in their own courts and church (or canon) law was to be applied to them.

William and his successors achieved the uniformity of the law, making it the common law, by introducing the *general eyre*. This was a form of central control whereby representatives of the King were sent out from Westminster to all parts of the country to check the local administration in the shires. These representatives made records of the land and wealth of the country, and they collected taxes and adjudicated in disputes brought before them. In time, the general eyre became judicial rather than administrative. In the reign of Richard II, the eyre was abolished, but the important practice of sending members of the Royal Council into the shires continued. These representatives of the King were the original *royal judges* and derived their authority from the King's command by Royal Commissions, namely:

- the Commission of Gaol Delivery, empowering the judges to clear the gaols of untried prisoners;
- the Commission of Oyer and Terminer, empowering the judges to hear (*oyer*) and determine (*terminer*) cases of serious crimes such as treason or felonies;
- the Commission of Assize, which granted the judges jurisdiction over civil matters normally triable in the royal courts at Westminster.

In order to appreciate the significance of the Commission of Assize, it should be remembered that, whenever a plaintiff wished to bring an action in a civil matter against another person, a writ had to be obtained from the Lord Chancellor's Writ Office and served on the opponent. The writ commanded the defendant and plaintiff to attend the royal courts at Westminster on a certain date, unless, before that date (*nisi prius*), the King's justices could hear the case locally, that is, where the action arose. Attendance at Westminster was itself no easy matter in those days: journeys were long, delay in London was likely and witnesses could not always be found to attend. Thus, a local hearing by the royal judges was a useful and attractive expedient, readily utilised by those who could not obtain justice in the manorial court or other local courts, which were frequently corrupt, partial and unfair.

Here, the royal judges, known as itinerant justices, granted better justice, which naturally proved popular with the people. Henry II (1154–89) reorganised the system by dividing the country into circuits and putting the excursions from Westminster on a regular basis.

Judges were originally appointed from the King's Council: they might be bishops, barons or knights. Behind them stood the royal power, as evidenced by the King's Commissions.

The original justices were for the most part untrained in law. When they visited a county court (the shires became counties after the Norman era), they had to ascertain the customs applicable to the local court. The royal judges then applied the law so discovered from the inhabitants. The 12th and 13th centuries saw the introduction of juries. Juries were made up of local people who knew the facts of local cases and the relevant local customs, so that the justices could then enforce these customs in the name of the King.

On completing their circuits, the justices returned to the royal courts at Westminster. There, they discussed the customs ascertained in various parts of the country and their findings. By a process of sifting these customs, they accepted those which were reasonable and rejected those which were not. Thus, by the use of good sense and right reason, they formed a uniform pattern of customary law throughout England.

At the same time, another important practice grew: the judges began to apply the principle of *stare decisis* ('let the decision stand'). Whenever a new problem of law came to be decided, a rule was formed and this rule was subsequently followed by all other judges. By this means, the law became more certain and predictable, and acquired the character of a legal system. So, out of the varied and different customs, there was formed what is now known as *the common law of England*, so called because it is the law common to all parts of England and Wales.

It is estimated that the formation of the common law was complete by about 1250, when Bracton wrote his famous *Treatise on the Laws and Customs of England*, which was the first exposition of a legal system that was destined to reach all parts of the world.

Common law courts

The King's Council, sometimes called the *Curia Regis*, was the central government of the kingdom, performing legislative, executive and judicial functions without distinction. From the King's Council, special courts were instituted to deal with particular kinds of cases in which royal justice was sought. The various courts, staffed by royal judges, developed in the following order:

(a) Court of Exchequer

This was formed during the reign of Henry I, and was primarily a Government department concerned with national revenue. It was named the 'Exchequer' because the method of accounting involved the use of counters which were moved about on a chequered board. The department was split into two branches: one administrative, collecting taxes and dues; and the other judicial, dealing with disputes over taxation. The court extended its jurisdiction to hear common law actions only remotely connected with the royal revenue. The judges of the court were known as Barons of the Exchequer.

(b) Court of Common Pleas

The itinerant or circuit judges were sent out by royal authority to dispense justice in the counties. These judges sat in the communal and feudal courts (for example, manorial courts) and they claimed jurisdiction over disputes, for example, in relation to land. Their justice became popular and a special court called the Court of Common Pleas (so called because it dealt with pleas of the commoners as distinct from royal pleas, that is, criminal cases) was set up to decide disputes between subjects which were of a civil nature. In 1273, the first Chief Justice was appointed. This court administered the common law and survived until the Judicature Acts of 1873–75.

(c) Court of King's Bench

This was the youngest and most durable of the courts to emerge from the *Curia Regis*. It owed its name to its close connection with the monarch, for the King himself used to sit at a bench with the judges to decide disputes. This association with the *Curia Regis* and the King also gave it a unique importance. Its jurisdiction included criminal cases (in addition to those tried by the itinerant justices in the local courts), as well as civil cases concurrent with the jurisdiction of the Court of Common Pleas. The King's Bench had a supervisory jurisdiction over the activities of all inferior courts, which it enforced by means of prerogative writs.

This court survives today in England, and is now known as the Court of the Queen's Bench. It has civil, criminal and supervisory jurisdiction, and is under the control of the Lord Chief Justice, who is assisted (as were the former courts) by *puisne* judges (*puisne* meaning a judge of the English High Court).

Writs

Some mention should be made of legal procedure. In medieval times, criminals were arrested and placed in the gaols until they could be tried, either by the local manorial courts or by the royal judges when they came to the district. In civil cases, however, the procedure was more technical. The proceedings in the common law courts started with the issue of an 'original' writ (so named because it originated the proceedings), which was purchased from the main royal office, the Chancery.

The writ was a formal document addressed to the sheriff of the county where the defendant resided, commanding the officer to secure the presence of the defendant at the trial and setting out the cause of action or ground of claim of the plaintiff. For every civil wrong or cause of action there was a separate writ. Important examples were the writ of trespass, the writ of debt and the writ of detinue (the latter alleged that the defendant detained an article or chattel belonging to the plaintiff and would not return it). The plaintiff had to select the particular writ considered to fit the facts of the case.

The plaintiff attended the Writ Office of the Chancery, where a register of the various writs was kept, and applied for the writ most suitable to the claim. If there was no writ suitable to the civil claim made or the relief required, the plaintiff was at a severe disadvantage. The writ system therefore dominated the civil law, for only where there was a remedy was there a right (this is expressed in the Latin phrase *ubi remedium ibi jus*). Moreover, if the wrong kind of writ was selected by the plaintiff, the common law judges would reject the case and refrain from inquiring into its merits. Under the rigid procedure of the writ system, the remedy available to litigants became more important than the justice of the claim.

Some attempt to alleviate the harshness of this system was made by the clerks in the Chancery. Where a writ was rejected by the court, or where none existed to found the claim, the clerks endeavoured to accommodate litigants by issuing new writs, thus effectively expanding the rights available. At first, the common law judges tolerated this procedure and accepted some new writs, but later, their attitude stiffened and they refused to accept these writs, since they amounted to new law.

Under the Provisions of Oxford 1258, the King's Council forbade the Chancery clerks from creating new writs without the permission of the Council. As a result, certain wrongs went unremedied merely because they did not fall within the limits of an existing writ. However, some alleviation was attempted by the Statute of Westminster II 1285, which empowered the clerks in the Chancery to issue writs *in consimili casu* ('in like case to'); that is, existing writs could be adapted to fit new circumstances. However, full use was not made of this provision and litigants' claims still went unsatisfied by the ineffectual writ system – the common law did not expand to meet the urgent and growing needs of the community. Complaints to the King and Council regarding the inelasticity of the common law led to the emergence of the Court of Chancery and the special field known as equity.

Reception of common law in Australia

British colonies could be founded in three different ways recognised by public international law. The Crown or Parliament could:

(a) grant, by *charter*, authority for a person, persons or companies to colonise. It was by such authority that the East India Company was able to exercise its influence over vast tracts of India between the 17th and 19th centuries.

The other two methods were:

(b) *conquest*; and

(c) *settlement*, as occurred in Australia.

The distinction between these two latter methods was that, if a colony was acquired by conquest, then the existing laws prior to the conquest subsisted until specifically displaced by subsequent legislation.

If a colony was established by settlement, it received (in the case of colonies established by Britain) the English common and statute law as might have applied to it at the time of settlement. This was the situation with regard to the settlement of Australia.

In most Australian States, this concept of reception of the common law has now been confirmed by statute. New South Wales, Queensland, Victoria and Tasmania are regarded as having received common law upon settlement in 1788, but this was subsequently incorporated by the Australian Courts Act 1828 (UK), which incorporated into Australian law all common law applicable on 25 July 1828. For Western Australia, the date of reception is regarded as 1 June 1829, whilst for South Australia, it is 28 December 1836.

Legislation

It has already been emphasised that the basis of Australian law is the common law, whose principles are to be found today in the case law built up by judges in Australia and England since the Norman Conquest of Britain in 1066. However, legislation, or 'statute law', also plays an increasingly important role in the Australian legal system, having been imported from Britain upon colonisation.

Origins of legislation

Legislation originated from the British royalty. The original role of King and Council was merely to maintain order and peace within the realm and to defend the State against external aggression. In order to keep order and peace, the King amended or altered existing law by issuing ordinances, provisions, assizes and charters, always with the advice of the Council. These ordinances, some temporary and some permanent, were in effect statutes, but their number was comparatively small.

Frequently, the King was required to raise military forces and the money by which he could carry out his duties and maintain his position within the State. This necessitated the taxation of those feudal tenants and freeholders under the King's protection from whom he exacted allegiance. Accordingly, the Norman kings sometimes summoned the great vassals (barons, bishops and lords) to attend a 'Parliament' (*parler*, to speak), a name first used in the 13th century.

In 1265, Simon de Montford summoned a parliament which was famous for containing, for the first time, representatives from the cities and boroughs as well as the shires. The practice of summoning representatives of the important groups in the land continued and, by 1300, the three estates of the realm, namely, the Lords Spiritual (the archbishops and bishops), the Lords Temporal (barons and lords) and the Commons (knights and freemen from the cities, boroughs and the shires), met at Westminster. The Lords and Commons sometimes met together, but more often in private and separate assemblies, to discuss what answers should be given 'in Parliament' to the King's demands for military supplies and money.

The grant of money to the King placed the Commons in a strong bargaining position. Eventually, they began to present petitions, or 'Bills', to the King, requesting a change in the law in return for the grant of money. These petitions were originally requests; some were granted and some were refused. Refusal meant a conflict between the Commons (expressing the will of the people) and the King. But kings do not lightly relinquish their vast powers; many were despotic and claimed to rule by Divine Right.

In the time of the Tudors, Parliament was subjected to the wills of strong monarchs, including Henry VIII and Elizabeth I, who, while not overruling Parliament, ruled as they pleased *through* Parliament.

This uneasy balance of powers came to a head in the 17th century. James II (1685–88) reverted to unwise and arbitrary methods of government, and conflict broke out between the Royalists, who supported the King, and the Parliamentarians, who supported the Commons. James II fled to France and, after the so called 'Glorious Revolution' of 1688, William and Mary were invited to come to the throne of England. The Bill of Rights 1689 meant that the monarch could not in future override Acts of Parliament or exercise the great powers of government without review from the representatives of Parliament. The Commons would grant money to the monarch for one year only, so it became necessary for the monarch to call Parliament together at least once a year.

During the remainder of the 17th century and throughout the 18th and 19th centuries, great constitutional developments took place: first, the growth of political parties; secondly, the rise of Cabinet Government led by a Prime Minister; and thirdly, following the Reform Act 1832, the grant of universal franchise.

Legislation in Australia

Today, Australia has what is described as a constitutional monarchy, the chief characteristic of which is that the monarch is nominally head of the State, being represented in Australia by the Governor General. However, the monarchy has lost practically all of its actual power. By convention, the monarch acts in accordance with the will of the government of the day (headed by a Prime Minister and a Cabinet), which is itself responsible to a parliament composed of representatives of the people elected by popular vote.

Successive governments have interfered increasingly positively with the social, economic and industrial aspects of national affairs. The Welfare State was brought about by legislation, and many areas of the common law (both civil and criminal) have been revoked or reformed. It follows, therefore, that the main source of law today is legislation.

Legislation may take the form of:

- statutes or Acts of Parliament;
- delegated legislation, mainly in the form of statutory instruments.

Law merchant

Mercantile law, or 'law merchant', was described in *Goodwin v Robarts* (1875) as:

> ... neither more nor less than the usages of merchants and traders ... ratified by the decisions of the courts of law which, upon such usages being proved before them, have adopted them as settled law.

History of the law merchant

The law merchant in medieval times was applied in (a) maritime courts found in coastal towns, and (b) local courts found in certain market towns.

Maritime courts

Maritime courts applied the customary maritime law which operated generally in western Europe and which was derived from the Laws of Oleron, the *Consolato del Mare*, the Laws of Wisby and other Mediterranean maritime laws. Their jurisdiction included such matters as the hiring of ships, charter parties, carriage of goods by sea, marine insurance, piracy and crimes on the high seas.

As England became a trading and seafaring nation, the jurisdiction of the maritime courts increased. In 1482, the Lord High Admiral of England appointed on behalf of the Crown a special judge to take over the jurisdiction of the local maritime courts and extended their jurisdiction to include prize matters. Prize jurisdiction determines whether a ship, with its cargo, which is captured during time of war by a belligerent is 'prize', and, if so, how it is to be disposed of.

Local courts

Local courts administering mercantile or commercial law were of two kinds. In towns holding fairs at fixed times and places, courts were constituted on the spot and usually included the mayor, assisted by one local trader and one foreign merchant. Justice was speedy and the unwritten law that was applied was based on the customs of merchants in buying, selling and delivering such things as goods, bills of exchange and negotiable instruments. The courts were sometimes called 'piepowder' courts, because the merchants attending them often came into court with dusty feet (*pieds poudres*).

The second group was known as the Courts of the Staple. These courts were set up in certain 'staple' towns which had a monopoly in trading such staple goods as wool and leather. These courts also applied the law merchant.

In both the local courts and the staple courts, the law had an international flavour. This was because the Crown, wishing to encourage continental trade, gave the foreign merchants and traders the protection of the law which applied to men of their kind generally throughout Europe. Accordingly, justice was administered on the spot by the special courts, consisting of the mayor and one local and one foreign merchant. Merchants and traders moving from one fair to the next could not wait for the justice of either the ordinary English local courts or the royal courts. In any case, the common law of England was inadequate to deal with the contractual disputes of the traders.

Gradually, however, the courts merchant declined in importance as the common law courts became more efficient and reliable and became centralised in London. Moreover, limitations were imposed by statute in 1477 on the jurisdiction of the local courts merchant.

By the mid-18th century, the common law courts had absorbed nearly all the jurisdiction of the courts merchant, except for the maritime law and prize law applied in the maritime courts.

Lord Mansfield, Chief Justice in 1756, was notable for his decisions with regard to the law merchant. He established the principle that, once a judgment had been given on a mercantile custom, that custom became judicially recognised and no further proof of it needed to be given in similar cases in the future. Specially selected juries of merchants ensured continuity in the administration of mercantile law. Mansfield's work was carried on by other judges and resulted in the absorption of this branch of the law into the common law.

Native title

Doctrine of communal native title

It is important to note that the doctrine of colonisation by settlement, applied in Australia by the English courts, was not without challenge from the Aboriginal people, who must be regarded as the indigenous people of Australia. This was considered in *Millirrpum and Others v Nabalco Pty Ltd and The Commonwealth of Australia* (1971), which concerned the conflict between the principles laid down in *Blackstone's Commentaries on the Laws of England* (1765) (2000, Cavendish Publishing) as to the creation of settled colonies and modern understanding of the Aboriginal people. Blackstone envisaged 'settlement' where the land, being desert and uncultivated, is claimed by right of occupancy, on the basis that it is desert and uncultivated, this being taken to include territory in which uncivilised inhabitants live in a primitive society. Conversely, New South Wales, the subject of this dispute, did have, in the light of modern anthropological knowledge, settled inhabitants and highly settled law.

The *Mabo* decision

The two *Mabo* cases (*Mabo v State of Queensland (No 1)* (1988); *Mabo v State of Queensland (No 2)* (1992)) were concerned with the Aboriginal people's rights to land at common law.

The action which gave rise to these two decisions by the High Court came about as the result of proceedings instituted by Eddie Mabo, David Passi and James Rice. All three plaintiffs were members of the Meriam people and the action was brought both on their own behalf and on behalf of their family groups.

The basis of their claim was that the Meriam people had continuously occupied and enjoyed the Murray Islands group, situated in the Torres Strait in the North of Queensland.

Whilst they acknowledged that the Murray Islands were subject to the sovereignty of the Crown, this sovereignty was also subject to the rights of the Meriam people to the land according to:

- their local custom – 'ownership by custom';
- their original native ownership – traditional native title; and
- their actual possession, use and enjoyment of the islands.

In their defence, not only did the Queensland Government deny the plaintiffs' claim on the basis of the *terra nullius* principle, but it also claimed that, if there was any basis to this claim, it had been abrogated by the Land Act 1910 (Qld), s 3 of which stated that:

> ... for the purpose of removing any doubt that may exist as to the application to the islands of certain legislation ... the islands were vested in the right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland ...

In addition, s 5 of the Act declared that no compensation was payable in respect of any rights that existed prior to annexation.

Whilst the High Court decided in *Mabo (No 1)* that the 1985 Queensland statute could extinguish any claim to native title, it nevertheless failed because it contravened the Racial Discrimination Act 1975 (Cth). This was because, as a valid federal statute, it would be regarded as taking preference over the Queensland State legislation.

Subsequently, in *Mabo (No 2)*, the High Court held that there was a concept of native title at common law, arising and being determined as a result of occupation or a traditional connection with the land.

It was also decided that native title could be extinguished by the valid exercise of governmental powers, but that these must contain a clear and plain intention to carry out such an action.

The High Court declared in its order that the Meriam people were 'entitled, as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands'. The court also indicated that, in order for the Aborigines to establish a claim to common law native title, they would need to demonstrate the following:

- an identifiable clan, group or community, the membership of which could be identified;
- that such a group had continued to observe and acknowledge their traditional laws and customs based upon their holding of the land in question; and
- evidence that they had maintained their traditional connection with this land.

The *Wik* decision

In *Wik Peoples v Queensland* (1996), the High Court held that the grant of a pastoral lease had not necessarily extinguished native title.

However, the court did state that any native title rights must yield to the rights of the pastoral lessee.

Commonwealth native title legislation – Native Title Act 1993 (Cth)

The federal Government accepted the judgment of the High Court in *Mabo v Queensland (No 2)* (1993) that the traditional doctrine of *terra nullius* should be rejected, and accepted that native title rights survived settlement, although they should be subject to the sovereignty of the Crown.

The result of this was the enactment of the Native Title Act 1993 (Cth), s 3 of which states that its main objects are:

(a) to provide for the recognition and protection of native title;

(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;

(c) to establish a mechanism for determining claims to native title; and

(d) to provide for, or permit, the validation of a past act invalidated because of the existence of native title.

Recognition and determination of native title

Whilst the main purpose of the legislation is to recognise and protect native title, it also provides a mechanism for determining whether or not native title exists, and what the rights and interests are that comprise that native title (s 10).

Division 3 of the Act (ss 21–25) makes provision for significant protection to native title. Validation of past acts mean that native title is only extinguished in limited circumstances. Only limited acts of governments are able to affect native title.

Bodies corporate

Sections 56–58 are a recognition that native title is a matter concerning group or communal rights. The Act attempts to achieve this by providing that native title will either be held on trust by a body corporate under the control of the native title holders or, alternatively, by making provision for them to be represented by a body corporate who will act as their agent.

Future dealings relating to native title

The legislation reflects the views of Parliament that it is crucial that there is a process whereby native title is recognised by and accommodated into the national land management system. These provisions are contained within Division 3 of Pt 2 of the Act.

An example of a permissible future act would be the grant of a mining lease (s 26(2)(a)). The intention is that, if such grants can be made over freehold land, they can also be made over native land.

The Act contains procedures for facilitating the extinguishment of native title – this can only be done with the agreement of the native title holders (s 21) or where it is the subject of an acquisition compulsorily acquired (ss 23 and 51).

Because of the traditional manner in which it has been acquired, native title cannot be alienated by its native title holders. However, s 21 provides for a procedure whereby, in order to take advantage of the commercial value of such land, native title holders are able to surrender their title in exchange for the grant of a statutory title. Similarly, this procedure can be used for the granting of other interests in land which are subject to native title.

Tribunal and court process

Introduction

In order to provide the most effective means of dealing with issues of native title, the Act has established a new body, the National Native Title Tribunal (NNTT). It has also given the Federal Court jurisdiction in these matters.

Role of the National Native Title Tribunal

Part 6 of the Act sets out the role of the NNTT in respect of claims to native title and claims for compensation. Application is made to the Native Title Registrar. The NNTT is able to deal with uncontested claims to native title and compensation, and is also empowered to mediate contested claims. If the mediation is unsuccessful, it must be referred to the Federal Court (s 74).

Role of the Federal Court

Section 81 provides for the Federal Court to hear contested claims for determination of native title or for compensation. It will also hear appeals on questions of law from the NNTT. Determinations of the NNTT must be registered with the Federal Court (s 166), whereby they have the effect of an order of the court (s 167).

Assessors

These may be appointed to assist the court. Section 218 provides that, as far as is practicable, assessors should be persons selected from Aboriginal peoples or Torres Strait Islanders.

Process of Federal Court and NNTT

Sections 82 and 109 provide that both of these bodies must provide a determination mechanism that is fair, just, economical, informal, prompt, and which takes account of the cultural concerns of Aboriginal peoples and Torres Strait Islanders.

State and Territory bodies

States and Territories are permitted to set up bodies to hear native title claims and compensation claims. If these bodies comply with the criteria and standards set out in s 251, they will be recognised by the responsible Commonwealth minister. Where they are recognised, a claimant has a choice of initiating a claim in either that body or the federal system.

3 Primary Sources of Law

You should be familiar with the following areas:

- judicial precedent and its mode of operation within the Australian judicial system
- the relationship between common law and legislation
- forms of legislation
- interpretation of statutes

Introduction

In Australian law, substantive rules of law derive their authority from judicial precedents, legislation, certain ancient textbooks and, to a very limited extent, local custom. These are called the primary sources of law.

Judicial precedent

The essentials of good law are certainty, uniformity and consistency. Common law was judge made, that is, the judges moulded or created out of the original customary rules the common law of England and, subsequently, the law of Australia, whose principles are today found in case law.

Once a regular system of law reporting had developed, judges began to be guided by decisions in previous cases; eventually, it became established practice that judges were bound to follow the decisions of higher courts in similar cases. The general rule, established in the 19th century and consistently followed since, was that of binding precedent.

The doctrine of *stare decisis* ('to stand by past decisions') is the technical name given to the rule that judges must follow the precedents and principles of law declared by superior courts. The hierarchy of courts in this matter is set out below.

Australian courts and precedent

The situation with regard to Australian courts is that a court which is lower in the State hierarchy must follow a decision of a higher court; conversely, a higher court may overrule a decision of a lower court. State Supreme Courts must follow a decision of their own full court, whilst the Supreme Court of New South Wales must follow a decision of its Court of Appeal or Court of Criminal Appeal. They, in turn, are required to follow a decision of the High Court.

The question of whether the High Court should follow its own decisions was considered by that court in *Queensland v Commonwealth* (1977) and, more recently, in *John v FCT* (1989). It is clear from these cases that the High Court will depart from its previous decisions, but only in exceptional circumstances. Factors that the court will consider in deciding whether to depart from a previous decision include the inconvenience caused by the decision, whether it was unanimous and whether any important principles were overlooked.

State Supreme Courts have varied in their willingness to depart from their own previous decisions, whilst the decisions of other State Supreme Courts, although not binding, will still be regarded as being strongly persuasive.

English courts and precedent

Whilst the decisions of the English courts do not bind Australian courts, the High Court stated in *Cook v Cook* (1986) that they would be useful in terms of the 'degree of persuasiveness of their reasoning'.

The most persuasive decisions for Australian purposes are those of the English House of Lords, the Court of Appeal and the Queen's Bench Divisional Court.

Case law: advantages and disadvantages

The advantages of case law could be said to be:

- certainty;
- possibility of growth;
- the great wealth of detailed rules;
- the practical character of these rules.

The disadvantages are:

- rigidity – 'the binding force of precedent is a fetter on the discretion of the judge';

- the danger of illogical distinctions – 'a judge will often avoid following a rule which works hardship in a present case by laying hold of minute distinctions. Moreover, rules which are logically inconsistent with each other are sometimes developed along distinct lines of cases which ultimately meet and come into conflict';
- bulk and complexity – there are over 1,000 volumes of law reports, containing some 400,000 cases. These may be regarded as cumbersome and the legal rules difficult to learn and apply.

These points emphasise the need to achieve certainty and ensure flexibility. While the former tends to make the law rigid, the latter renders the law uncertain and vague, but does allow for development to meet the changing needs of society.

Judges of the superior courts may, on appeal, overrule a decision, reverse a decision or disapprove of a previous decision. Sometimes, alterations can only be made by a statute which revokes previous law and reshapes the law to meet the changing conditions of people and society.

Overruling occurs where a higher court (for example, the High Court) decides a similar case on the basis of a different legal principle. The previous rule laid down (by, for example, the New South Wales Supreme Court) is then said to be overruled.

Reversal occurs where an appeal court reverses a decision given in a lower court from which the appeal emanated. Thus, in the hypothetical case of *A v B*, a Supreme Court may give judgment for A, while, on appeal, the High Court gives judgment for B.

Disapproval occurs where a superior court, in the course of its judgment, expresses doubt as to the validity of some previous rule but does not expressly overrule it.

Ratio decidendi

Ratio decidendi is a technical phrase meaning the principle or reason for a decision. This portion of a judgment of a court is binding in similar cases subsequently tried by lower courts. It is a vital part of a judgment and must be distinguished from *obiter dicta* ('things said by the way'), meaning those words delivered by a judge which are not essential to the decision. Thus, a judge might discuss a hypothetical situation: 'If, however, A had done this and B had done that ... I should have been obliged to find that A and B would be jointly responsible ...' These words are said *obiter* (by the way) and are not binding. They might, however, be 'persuasive': if the situation envisaged by the judge arose in fact at some later time, those words could have an influence on the judge trying the later case.

As already explained, judges of the lower Australian courts are absolutely bound by the decisions of the High Court where those decisions are clearly in point. Such precedents are called *binding* precedents. All other precedents are called *persuasive* precedents; these include decisions or principles laid down by another State Supreme Court and decisions of the English and British Commonwealth courts or the United States Supreme Court.

Frequently, there will be no relevant decided case for a judge to turn to. Notwithstanding the many volumes of law reports and the thousands of cases reported, representing a 'wealth of detailed rules', there may be no certainty of the rule to be applied. The judge must declare what the rule should be by arguing from analogous cases. Since the common law is 'complete' and is capable of providing a remedy for every wrong, then, where there is no apparent rule, the judge is expected to act creatively in deciding what that rule should be, using the common law, equity or jurisprudence.

Obviously, no two cases are identical. This fact enables a judge to point to some material difference which is justification for refusing to apply a rule of law previously laid down. The judge distinguishes the present case from the earlier one, thereby avoiding any hardship or injustice which was not envisaged when the earlier judgment was announced.

Law reports

The judicial precedents considered above are to be found in the law reports.

The records of Anglo-Saxon laws (or 'dooms') and actual cases are few. Similarly, there are scant records of cases in the Norman period, and it must be remembered that the common law was not completely formed until around 1250.

The first treatise on the English common law was written by Henricus de Bracton, who lived in the early 13th century during the reign of Henry III. The work, comprising in part a collection of cases, became the forerunner of the later law reports and was entitled *de legibus et consuetudinibus Angliae*.

Year Books

These contained fragmentary reports of cases heard in the period 1289–1535. They were written in Anglo-Norman, were technical and procedural in content (covering points of practice) and dealt with civil law rather than the criminal law.

Abridgments

These were shortened versions of the Year Books, and appeared in the 16th and 17th centuries. They contained reports of cases, some of which were written by judges and counsel.

Private publications

Some notable 16th century lawyers and judges prepared private publications of reports on contemporary and earlier cases. Some were copied from imperfect manuscripts and contained much trivial detail. However, by the 16th century, pleadings in civil cases were written down, so it was possible thereafter to cite a case in support of a particular argument. The notable reports during this period were Plowden's Reports (1550–80), Coke's Reports (1572–1616), Bridgman's Reports (1614–21) and Lord Raymond's Reports (1694–1732).

The first regular reports were known as Term Reports and were published by Durnford and East (1785–1800). Once the reporting of cases became systematic and regular, reports became authorised; that is, they were accepted by the courts as accurately representing the judgment made. Nevertheless, the system of reporting was expensive, the standard of reporting deteriorated and there were often lengthy delays between a judgment and the appearance of its report.

English Council of Law Reporting

Because of the multiplicity of law reports in the 19th century, the Council of Law Reporting was set up in 1865 and barrister reporters were appointed. A series of authorised reports was established under the control of the legal profession.

The Council of Law Reporting is a quasi-official body, whose representatives consist of English barristers and solicitors. The Council employs an editor and a staff of reporters (who are barristers) and produces a uniform series of reports of cases in all the superior courts. Not all cases are reported: a selection is made by the editor. Where it is decided to report a case, a copy of the report is passed to the judge, who has an opportunity to revise the wording of the judgment. The reports so produced are known as the Law Reports. They include counsel's argument.

In 1953, the Council of Law Reporting introduced a weekly series, known as the Weekly Law Reports.

The Council has no monopoly in the field of law reporting. Certain commercial companies produce reports – the All England Reports, begun in 1936, are an important example in this field. Additionally, *The Times* newspaper in England publishes summary reports of important cases the day after judgment, and weekly journals such as The Solicitors' Journal (established in 1857) and Justice of the Peace (established in 1837) contain summary reports of cases.

Where various reports of the same case reveal differences in wording, the Law Reports are taken to be the most authoritative, since they are semi-official.

Law reports in Australia

Early law reporting in Australia was equally as haphazard as in the UK. From 1860 onwards, private publishers of the law reports were gradually replaced by newly formed Councils of Law Reporting, which published authorised law reports in each Australian colony.

Reference to reports

The title (or name) of the case is derived from the names of the parties. In a civil case, the plaintiff is cited first and the defendant second.

The citation of a case involves the title of the case, as well as a reference to the number (where applicable), year, abbreviation and page of the law report where it is found.

An example of a citation in an Australian law report is:

- *Dennis v Beaudesert Shire Council* [1989] 2 Qd R 12.

This indicates that the report will be found in the second volume of the Queensland Law Reports of 1989, at p 12. Dennis is the plaintiff and the Beaudesert Shire Council is the defendant.

Because the date is essential in this series of reports, it is cited with square brackets. In some series, where the reference is by volume and the date is ancillary, the date of the case will be in round brackets.

An English law report citation looks like this:

- *Brown v Smith* [1968] 1 QB 334.

This indicates that the report will be found in the first volume of the Queen's Bench Division Reports of 1968, at p 334. 'Ch' indicates Chancery Division Reports, while 'P' indicates those of the former Probate, Divorce and Admiralty Division. 'Fam' denotes the Family Division.

Reports of decisions of the Court of Appeal appear with the reports of the division from which the appeal was made. 'AC' indicates an appeal case heard in the House of Lords or by the Privy Council.

Where cases are determined by a court at first instance (that is, where they are heard for the first time), the proceedings are cited thus:

- civil case – *Brown v Jones* (1969) – Brown is the plaintiff; Jones is the defendant;
- criminal case – *Regina* (or *R*) *v Smith* (1969) – *Regina* (the Queen) is the prosecutor; Smith is the defendant.

Appeal

If Jones and Smith decide to appeal against these decisions, the appeal cases will appear as follows:

- *Jones v Brown* (1969);
- *Smith v Regina* (1969).

Jones and Smith are known as appellants; Brown and the Crown are the respondents.

Legislation

The sovereignty of Parliament means that Parliament is legislatively supreme and can make and unmake (that is, repeal) laws to any extent that it wishes. This concept is subject to control by the High Court, which can declare such legal enactments as being of no effect.

Any Act passed by Parliament which is of general application is absolutely binding on all persons within the sphere of Parliament's jurisdiction. However controversial a particular statute may be, a judge is bound to enforce its provisions.

Statutes

A statute may be defined as an express and formal enactment of a rule or rules of conduct, to be observed in the future by persons to whom the statute is expressly, or by implication, made applicable. A statute and a court decision may be contrasted thus:

Statute	Judgment
Creates new law	Disclaims any attempt to create new law
Lays down general rules for the guidance of future conduct	Applies an existing law to a particular set of circumstances
Is imperative	Gives reasons

The making of a statute

The Australian Federal Parliament comprises the Queen (or the Crown), acting through the representative for the Australian Commonwealth, the Governor General, and the legislature itself, with two chambers: the Lower House (the House of Representatives) and the Upper House (the Senate).

In the individual States, the situation is similar, except that the Crown's representative is the Governor and Queensland has only one chamber.

Although legislation may be introduced in both chambers, the most effective body is the House of Representatives, from which most legislation springs.

The Government is formed by the party which gains a majority of members in the House of Representatives. A Prime Minister is appointed to lead the Government, which then forms a Cabinet from the important members of the party and appoints junior officials to various posts in the Government.

The Cabinet forms its policies of government and turns to legislation as the means of bringing the policies into effect, for example, the Industrial Relations Act 1988 (Cth).

Stages in legislation

The first step in legislation is the drafting of a Bill. This is a skilful and sometimes long process, requiring the services of lawyers known as parliamentary draftsmen or counsel.

Once drafted, the Bill passes through the following stages in order to enable Parliament to consider and reconsider its provisions as thoroughly as possible:

- Presentation and first reading
  This is a formality. The Bill may be read a first time as a result of the House agreeing to a motion for leave to introduce it. The Bill is then printed and published.

- Second reading
  Here, the minister or member in charge of the Bill explains its purpose and the main issues of policy involved. The debate is limited to the purpose of the Bill and the means proposed for giving it effect. The House votes on the Bill. If the Bill survives the vote, it passes to the next stage.
- Committee stage
  At this stage, the Bill is dealt with by (a) the House or main committee; (b) a select committee; or (c) a standing committee. A select committee is a committee constituted on a party basis, while a standing committee is composed of 20–50 members appointed to examine public Bills, which, after a second reading, are not passed to the House, main committee or select committees. The purpose of the committee stage is to consider the details of the Bill clause by clause.
- Report stage
  Having passed the committee stage, the Bill is formally reported to the House by the chairman of the committee. At this stage, the amendments made in the committee are considered by the House, which may make any additional amendments.
- Third reading
  At this stage, the Bill in its final form is reviewed. The debate is confined to verbal amendments only; the principles of the Bill must not be questioned.

After its third reading in the House of Representatives, the Bill is sent to the Senate, where it goes through a procedure similar to that in the House of Representatives. The Senate is the second tier in the legislative process which allows for reflection on the merits or faults of the Bill and for criticism from different points of view. If the Bill is amended in the Senate, it is returned to the House of Representatives for consideration of the amendments. These may be accepted or rejected, though attempts are made to reconcile differing points of view. If agreement is impossible, this could eventually lead to a double dissolution of both Houses under s 57 of the Constitution. A money Bill must originate in the House of Representatives and may not be amended by the Senate.

Royal assent

Having passed through the Senate, the Bill is ready for the royal assent, which is given by the Governor General signing specially printed copies of the Bill. A Bill is duly enacted if the royal assent is notified to each House of Parliament, sitting separately, by either the Speaker or the acting Speaker of that House. The royal assent is now simply a formality. Once it is given, the Bill becomes an Act of Parliament and takes effect immediately (unless some future date is specified in the Act).

Private Members' Bills

At the beginning of a Parliamentary Session (a session normally lasts up to one year), the Cabinet lays down its legislative programme. It is still possible for a private member of either House (that is, an MP who is not a member of the Government) to introduce a Bill on some matter of importance to him. The most notable Private Members' Bill to pass both houses was the Commonwealth Electoral Bill 1924, introduced by Senator Payne from Tasmania. This legislation resulted in voting being made compulsory.

Conflict with common law

Because Parliament is omnipotent in the field of law, it follows that a statute may abolish any rule of common law.

Consolidation and codification

By 'consolidation' we mean the combination of all the statutes relating to a given matter, such statutes being incorporated into one consolidating Act. The statute law in relation to the given matter is, therefore, readily accessible in one Act.

Whereas 'consolidation' means the combination of statute law only, 'codification' is a term which means the enactment of a statute incorporating all previous statute law and case law on a particular subject. The Queensland Criminal Code and the Tasmanian Criminal Code are examples of codification in Australian criminal law.

Of course, codification can mean a complete statement of all the law of a given State, and not, as in Australia, certain parts only. The French Civil Code is one example, and Germany and Switzerland have similar codes.

Delegated legislation

In strict legal theory, Parliament ought to retain in its own hands the power and duty to enact all the laws and the rules affecting the State. In practice, Parliament cannot discharge this duty, chiefly because it has so much to do and so little time in which to do it. It overcomes this difficulty by resorting to delegated legislation, sometimes called subordinate legislation, whereby it entrusts some of its law making powers to some other person or body. Delegated legislation will arise where legislation of both the federal and State Parliaments lays down general principles of policy and leaves the working out of the administrative details to subordinate authorities who are responsible for carrying the legislation into effect.

Forms of delegated legislation

Delegated legislation comprises:

- Orders in Council
  In the UK, Orders made by the Queen in Council have been described as the most dignified form of subordinate legislation. In practice, the minister of a Government department usually drafts and makes the Order in the name of the Queen, whose approval 'in Council' is a formality.
- Statutory instruments
  Rules and Orders are normally made by ministers in charge of Government departments, but such rules must be submitted to Parliament for approval.
- Bylaws
  These are made by local authorities, railways, water boards and other such bodies, and, like statutory instruments, draw their authority from Acts of Parliament. Bylaws require the approval of the appropriate minister before they have legislative force.

Government of a country of some 17 million people is a highly complex matter. The most that federal Parliament can manage in the legislative field is between 60 and 70 Acts of Parliament per session (one year), with the State Parliaments enacting a similar number. On the other hand, there are nowadays more than 1,000 statutory instruments issued each year.

All of the forms of subordinate legislation noted above are enforced equally with statutes, provided that the order or bylaw is not *ultra vires* (beyond the powers of) the minister or local authority.

Growth of delegated legislation

The following reasons are advanced for the growth of delegated legislation:

- Lack of Parliamentary time
  The legislature has insufficient time to deal with and debate all necessary measures for efficient government.

- Urgency
  Parliament is not always in session, and its legislative procedures are slow. When emergencies and urgent problems arise, delegated legislation is the best means of meeting such situations.
- Flexibility
  A statute requires elaborate and cumbersome procedures for its enactment. It can be revoked or amended only by another statute. A ministerial order or statutory instrument can be made speedily; if it proves unworkable or impracticable, it can be quickly revoked.
- Technicality of subject matter
  Modern legislation tends to be technical and detailed, for example, road traffic legislation, which may deal with 'special type' vehicles, building regulations and dangerous drugs regulations. Such legislation is best dealt with by ministers (who are advised by experts familiar with the technical or scientific problem) rather than MPs, who may be inexpert and unfamiliar with the technicalities involved.
- Future needs
  Parliament cannot foresee the difficulties which may arise, particularly when major new schemes (such as Medicare) are launched. Future difficulties are better dealt with by delegated legislation rather than statutes.

Criticism of delegated legislation

The processes of government and, in particular, the making of statutes, are continuously subject to critical examination and analysis. Among the criticisms frequently levelled against delegated or subordinate legislation are:

- Matters of principle
  Because matters of principle are the primary concern of the legislature, ministers ought not to be entitled to legislate by means of Orders in respect of such matters.
- Delegation of taxing power
  The UK Parliament fought for years for the sole and exclusive right to tax. History shows that this right can be abused and should not be yielded to subordinate authorities or ministers.
- Inadequate publicity
  The press usually reports the effect of new statutes, but there is frequently inadequate publicity given to the numerous statutory instruments made by ministers (over 1,000 annually). A person

who is charged with an offence under a statutory instrument of whose existence they were unaware has only a limited defence, since ignorance of the law is usually no excuse.

Control of delegated legislation

The main forms of control over the power of a minister to make delegated legislation are consultation of interests; control by the courts; and control by Parliament.

Consultation

In practice, ministers consult experts both within and outside their own departments, and take the advice of various interests and bodies likely to be affected by proposed legislation. Thus, road traffic legislation would involve consultation with local authorities, surveyors, the police, the NRMA, the RVAC, motor manufacturers and others likely to be directly affected.

Control by the courts

Rules and regulations made by ministers and other administrative bodies under statutory authority are liable to be subject to challenge in the courts on two grounds: (a) *ultra vires*; and (b) unreasonableness. While a court cannot invalidate an Act of Parliament, it may declare that statutory instruments, rules or bylaws are void on the ground that they are *ultra vires*, that is, beyond the powers conferred by the Act under which they were made. In practice, ministerial rules and orders are only rarely challenged on this ground, because great care is usually taken by the legal advisers of the minister on such matters.

Bylaws may be challenged on the ground of unreasonableness, that is, that they are partial and unequal in their operation as between different classes. If rules are manifestly unjust, if they disclose bad faith or if they involve 'such oppressive or gratuitous interference with the rights of those subject to them as can find no justification in the minds of reasonable men, the court might well say Parliament never intended to give authority to make such rules' (*Kruse v Johnson* (1898), *per* Lord Russell).

Control by Parliament

- Parliament (both federal and State) may revoke or vary the delegated power.
- Certain Acts require that regulations made under them shall be laid before Parliament. This enables parliamentary representatives to know what has been done or what is proposed by the minister.

- A Federal Standing Committee on Regulations and Ordinances was set up by the Senate in 1932 to scrutinise all subordinate legislation made by the Federal Executive Government under delegation from Parliament. This Committee, which consists of four Government and three non-Government Senators, meets every week and, with the assistance of an independent legal adviser, checks every item of delegated legislation which is tabled in the Senate. The function of the Committee is to ensure that all delegated legislation complies with the following principles:
  - that they are in accordance with the Statute;
  - that they do not trespass unduly on personal rights and liberties;
  - that they do not unduly make the rights and liberties of citizens dependent upon administrative decisions to the exclusion of a review by a judicial or other independent tribunal;
  - that they do not contain matter which is more appropriately dealt with by Parliamentary legislation.

Publication

The Australian Government Publishing Service publishes lists of dates of issue of Federal statutory instruments; a similar procedure is followed by the various State Government printers.

Interpretation of statutes

Statutes are drafted by parliamentary draftsmen. These are lawyers who are skilled in this highly important area. Despite the great care taken to ensure that all statutes are clear and exact, it is nearly always the case that, in due time, legal actions arise on points of doubt and the courts will be called upon to interpret the meaning and to adjudicate.

The rules adopted by the judges to discover the meaning of an Act may be classified as (a) statutory definitions, and (b) common law rules.

Statutory definitions

The Acts Interpretation Act 1901 (Cth) is a general federal statute which brings together legislation regarding the construction of Acts of Parliament and provides definitions and rules of construction. This means that, unless there is anything to the contrary:

- words importing the masculine gender include females;
- words in the singular include the plural and words in the plural include the singular;
- the expression 'person' includes a body corporate;
- expressions referring to writing are construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form.

Modern federal statutes and statutory instruments frequently include a section expressly incorporating the Acts Interpretation Act 1901 (Cth).

Equivalent statutes within the States and Territories are: Interpretation Act 1987 (NSW); Interpretation of Legislation Act 1984 (Vic); Acts Interpretation Act 1931 (Tas); Acts Interpretation Act 1915 (SA); Acts Interpretation Act 1954 (Qld); Interpretation Act 1984 (WA); Interpretation Ord 1967 (ACT); and Interpretation Ord 1979 (NT).

In 1981, s 15AA was added to the Acts Interpretation Act 1901 (Cth). This important provision (and its equivalents in State and Territory interpretation legislation) essentially instructs courts to consider the purpose or object for which the legislation was passed, and to interpret the legislation in a way that will promote this purpose or object.

A statute usually contains an interpretation section which explains the meaning of words in that statute. Thus, s 4 of the Workplace Relations Act 1996 (Cth) contains the following definition of 'premises':

> In this Act, unless the contrary intention appears, 'premises' includes any land, building, structure, mine, mine working, ship, aircraft, vessel, vehicle or place.

A preamble is an introductory statement which appears immediately below the official title of a statute and sets out the purposes of the Act. Judges may refer to the preamble as an aid to interpretation.

Common law rules

Where a statute is not clarified by reference to the above statutory guides, a judge may look to common law rules, as detailed below.

Literal rule

This requires that words be given their literal, grammatical meaning. Words in old statutes are given the meaning they had when the statute was passed, for example, the Statute of Treason 1351 (UK). Words appearing more than once must usually be given the same meaning throughout the Act. The duty of the court is to interpret the words that the legislature has used. If a statute so interpreted is clear and produces hardship, the remedy is a new statute; it is not the duty of a judge to fill in the gaps.

Golden rule

This rule requires that a judge should construe the statute in its grammatical and ordinary sense:

> It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself or leads to any manifest absurdity or repugnance, in which case, the language may be varied or modified so as to avoid such inconvenience, but no further [*Becke v Smith* (1836), *per* Parke B].

Mischief rule

Also known as the rule in *Heydon's* case (1584), the mischief rule states that the court must look at the Act to see what 'mischief' or defect in the common law the Act was passed to prevent.

Four questions should be considered:

- what was the common law before the Act was passed?;
- what was the mischief and defect for which the common law did not provide?;
- what remedy had Parliament resolved to provide?;
- what was the true reason for the remedy?

Judges were enjoined to make such construction 'as shall suppress the mischief and advance the remedy'.

Ejusdem generis *rule*

Where general words follow specific words, the general words must be construed as applying to the persons or things of the same class (*ejusdem generis*) as those already mentioned. Thus, 'other person', 'other cattle' and 'other animals' are vague, and a reference in an Act to 'dogs, cats, and other animals' was held not to include lions and tigers, for 'other animals' meant those *ejusdem generis* with dogs and cats, that is, domestic animals (*Evans v Cross* (1938)).

Expressio unius est exclusio alterius

This rule ('the express mention of one thing implies the exclusion of another') means that where specific words are used in a statute and are not followed by general words, the statute applies only to those things mentioned.

Noscitur a sociis
('The meaning of a word can be comprehended from its context.') Ambiguous or doubtful words may be determined by reference to those words appearing in association with them. Thus, in *Prior v Sherwood* (1906), it was held that a prohibition on bookmaking in any 'house, office, room or place' did not extend to a public lane. Although a 'place' is a word of potentially wide ambit and could possibly cover a public lane, it was read in that context to mean a place which was similar to a house, office or room.

Presumptions

Certain presumptions or rules must also be borne in mind. These presumptions apply to the construction of a statute, unless there are express words to the contrary. The following examples are some of the more important presumptions in law:

- An act does not make a person guilty unless that person's mind is guilty of a criminal offence
  This is expressed in the Latin maxim, *actus non facit reum nisi mens sit rea*. Proof of criminal intent is generally necessary to secure a conviction. Thus, a motorist involved in a road accident of which he or she was unaware could not rightly be convicted of 'failing to report the accident to the police within 24 hours', since the motorist was unaware of involvement and the law does not compel the impossible (*Harding v Price* (1948)).
- Against the ouster of jurisdiction of the courts
  Where a particular statute provides that tribunals be set up to determine questions arising in administration and excludes the jurisdiction of the courts of law expressly, then the terms of the statute will be applied. Where no such express terms exist, the jurisdiction of the courts is not ousted.
- A statute does not alter the general principles of the common law, unless expressly so stated.
- Against the infringement of international law.
- Against the deprivation of property
  Statutes empowering the acquisition of private property will be strictly construed. Where private property is taken away from an owner, the law infers that compensation will be paid unless there are clear words in the statute to the contrary.
- Against arbitrary conduct and abuse of a power given by statute.
- Against retrospective operation of legislation.

Reference to statutes

There are three methods of referring to a federal Act of Parliament: by its short title; by its official reference; or by its full title.

Short title

When we refer to an Act such as the Workplace Relations Act 1996, we are using its short title.

Official reference

This shows the calendar year in which the Act was passed and the number of the Act passed in that year. For example, No 60 of 1996 is the official reference to the Workplace Relations Act 1996.

Long title

This gives the official reference and a short description of the object of the statute. For example, the long title of the Workplace Relations Act 1996 is The Workplace Regulations and Other Legislation Amendment Act 1996. A similar procedure is adopted for State legislation.

It is normal to indicate the jurisdiction of each piece of legislation in the citation of a statute, viz, Workplace Relations Act 1996 (Cth). This means that the legislation has been enacted by the federal Parliament and applies to the whole of the Australian Commonwealth.

Other abbreviations are:

- NSW – New South Wales;
- Vic – Victoria;
- Qld – Queensland;
- SA – South Australia;
- WA – Western Australia;
- ACT – Australian Capital Territory;
- NT – Northern Territory.

Reference to statutory instruments

The most common form of delegated legislation is the statutory instrument. Each statutory instrument is allocated a number, and reference to the instrument is by the year of issue, followed by the number so allocated. For example, Statutory Rules 1998 No 1 relates to the Workplace Regulations 1996.

The printing of federal Bills, Acts of Parliament and statutory instruments is done by the Commonwealth Government Printer. Such documents are on sale to members of the public at various offices of the Australian Government Publishing Service.

Law revision and reform

The law is open to the criticism that, in general, it is conservative. Many statutes are outdated and relate to a bygone era, whilst some common law offences are inappropriate today. Furthermore, it is argued that legal procedures are unduly formal and slow, and that the system of courts needs overhauling and remodelling.

Some of these criticisms may seem fair and reasonable, but it is clear that reform of the law and the machinery of the courts are matters which require careful planning. Nevertheless, law is a living thing and reform is continual. The agencies through which revision or reform is mainly effected include the bodies discussed below.

Commonwealth Law Reform Commission and various State Law Reform Commissions and Committees

These consist of full and part time commissioners whose duty it is to keep the law as a whole under review, with a view to its systematic development and reform, including, in particular, its codification, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and, generally, the simplification and modernisation of the law. The Commissions undertake the examination of particular branches of the law and the formulation, by means of draft Bills, of proposals for reform. They all issue an annual report, which is laid before their respective Parliaments.

Royal Commissions

These are appointed by the Crown on the advice of a minister who names a chairperson. The membership of each Royal Commission varies, but it usually reflects expert, professional and lay opinions. The duty of a Royal Commission is to investigate some matter of public importance, to take evidence and to make recommendations. On receipt of its report, the Government, either federal or State, may give legislative effect to the recommendations.

Committees appointed by ministers or Parliament

Committees of experts may be appointed to consider particular aspects of the law for the purpose of revising it.

Private Members' Bills

These may reform existing law in important respects.

Textbooks

The first important work on the English common law was Glanvil's *tractatus de legibus et consuetudinibus Angliae*, produced in the 12th century. This work was followed by Bracton's *de legibus et consuetudinibus Angliae*, written in the 13th century and described by Maitland as 'the crown and flower of English medieval jurisprudence'. It contained references to decided cases.

Later works included Littleton's *New Tenures* (1481), Sir Matthew Hale's *History of the Common Law and Pleas of the Crown* (1730), Sir Edward Coke's *Institutes* (1628–41), Sir William Blackstone's *Commentaries* (1765) and Sir Michael Foster's *Crown Law* (18th century).

These, and other early works written when law reporting had barely begun, are accepted as books of authority and, therefore, as original sources of common law.

The modern textbook is not a source of law, and not a book of authority. However, such works may have persuasive authority: counsel may adopt the view of a distinguished academic writer and the court may accept that view of the law. In this way, the writer is influencing the law. Works by Cheshire, Dicey, Winfield, Fleming, Zines and Lane have often been referred to in this way, particularly on points which are not covered by authority or where there is some doubt about the authority. As RJ Walker has commented, 'on the whole, the persuasive authority of a standard textbook is of considerable weight'.

Similarly, articles in legal journals such as the Law Quarterly Review, the Australian Law Journal and the Sydney Law Review have been referred to in the courts.

4 The Courts Today

You should be familiar with the following areas:

- the distinction between the federal and State/Territory courts
- differences between civil and criminal jurisdiction
- the role administrative tribunals
- the role of laypersons in the judicial system

Federal courts

High Court of Australia

The High Court of Australia stands at the apex of the judicial system and is the final court of appeal in civil and criminal matters. It is composed of seven justices, including a Chief Justice.

Jurisdiction

Section 71 of the Constitution states that: 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia.' The Constitution did not actually establish the Court; this was done by the Judiciary Act 1903 (Cth).

In constitutional matters, the High Court has both an original and an appellate jurisdiction. Its original jurisdiction includes the right to hear any cases in which the Commonwealth is a party. It also has the right to hear cases involving a State and a resident of another State, or cases between residents of different States. This is known as 'diversity jurisdiction'.

It also has a general jurisdiction to hear appeals from State Supreme Courts in both civil and criminal matters. However, an appellant does not have an automatic right of appeal; appeal will only be available if special leave is granted by the High Court itself.

Most High Court hearings take place in Canberra, where the current court buildings were opened by Elizabeth II in 1980. When there is sufficient business to warrant it, the court will also sit in Adelaide, Brisbane, Hobart and Perth, whilst applications before a single judge can be heard in Melbourne and Sydney, as well as Canberra.

Federal Court of Australia

The Federal Court of Australia was established by the Federal Court of Australia Act 1976 (Cth). One of the reasons for the creation of the Court was to relieve the High Court of some of its original jurisdiction, thereby enabling it to concentrate on interpretation of the Constitution.

The Federal Court, which commenced operations on 1 February 1977, originally had two divisions, the General Division and the Industrial Division, with both an original and an appellate jurisdiction. The Industrial Relations Division become a separate Industrial Relations Court, but now has again been merged into the Federal Court. The Federal Court is a superior court of law and equity, with jurisdiction throughout Australia and judges resident in every State except Tasmania. It is composed of 28 judges, including a Chief Judge. It deals with a variety of federal matters, including bankruptcy, trade practices, taxation and industrial property. In its appellate jurisdiction, the Court sits as a Full Court and hears appeals from a single judge of the court, from Supreme Courts of the Territories and from State courts exercising federal jurisdiction.

Legislation has now been enacted to provide for a Federal Magistrates' Court (Federal Magistrates' Court Act 1999 (Cth)). It is anticipated that it will have a major impact on family law matters.

Family Court of Australia

This court was established under the Family Law Act 1975 (Cth). It is composed of 46 judges, including a Chief Judge and senior judges. Like the Federal Court, the Family Court has both original and appellate jurisdiction. The original jurisdiction relates to matters of family law, marriage, divorce and associated areas such as custody and property settlements. The court's jurisdiction in matters arising out of marriage has now been extended throughout most of Australia to include matters arising out of *de facto* relationships.

The Full Court of the Family Court hears appeals from magistrates on family law matters and from single judges of the Family Court.

One of the purposes of the Act was that every attempt should be made to achieve conciliation between the parties before a case is referred to the court. This means that members of staff of the court are designated to engage in assisting the parties to negotiate a settlement.

State courts

Each State and Territory system contains a superior court, called the Supreme Court. In New South Wales and Victoria, the court consists of three divisions, namely, Common Law, Equity and Commercial, each of which is presided over by a chief judge. Below this court, each State and Territory usually has two further levels of courts, operating at what are known as 'inferior' and 'intermediate' levels. The only exceptions to this are Tasmania, the Australian Capital Territory and the Northern Territory, which have only a two tier system.

State and Territory Supreme Courts

In most States and Territories, the Supreme Court has both an unlimited original jurisdiction (which is why it is described as a 'superior' court) and an appellate jurisdiction. The only exceptions in respect of the latter are New South Wales, Queensland and Victoria, which have specialist Courts of Appeal composed of the Chief Justice, a President and a specific number of Judges of Appeal.

The original jurisdiction of any Supreme Court will generally be exercised in criminal cases by a judge sitting with a jury of 12. It will only deal with the more serious criminal charges. Juries are sometimes used in civil cases concerned with matters involving large sums of money or more complex legal problems.

Each Supreme Court consists of a Chief Justice and a number of other judges who, in some States, carry the title of *puisne* judge (meaning judge of a superior court other than the Chief Justice).

The Supreme Courts also deal with a variety of probate, admiralty and equity matters. The New South Wales Supreme Court was established in 1824 and is the largest and oldest in Australia. It is divided into two main divisions: the Common Law Division and the Equity Division. Within each of these divisions are a number of specialised lists. The professional negligence, possession, bails/criminal and administrative law lists fall within the Common Law Division. Commercial, construction, admiralty, adoptions, probate and the protective lists fall within the Equity Division.

Drawing on its power as a superior court, a Supreme Court will also have the power to review the decisions and supervise the conduct of all lower courts and tribunals in its State. It will also be responsible for supervising the admission and conduct of all lawyers, both barristers and solicitors, within its jurisdiction.

State and Territory intermediate courts

Again, these courts are given various titles:

- New South Wales: district courts – civil and criminal jurisdiction;
- Queensland: district courts – civil and criminal jurisdiction;
- South Australia: local courts – civil jurisdiction; district criminal courts – as the title implies, criminal jurisdiction;
- Tasmania: only one tier of courts, called 'inferior' courts;
- Victoria: county courts – civil and criminal jurisdiction;
- Western Australia: district court – civil and criminal jurisdiction;
- Australian Capital Territory: only one tier of courts, called 'inferior' courts;
- Northern Territory: only one tier of courts, called 'inferior' courts.

Criminal jurisdiction

In its criminal capacity, an intermediate court has jurisdiction over indictable offences and offences triable either way (minor indictable offences) for which a defendant has been committed by a magistrate for trial by either the Supreme Court or an intermediate inferior court. An example of this is where the magistrate has found the accused guilty but has insufficient powers to deal adequately with him or her.

Finally, the intermediate court acts as an appeal court to hear appeals from inferior courts. In most jurisdictions, there are provisions under which either the defendant or prosecutor can appeal on a point of law direct to the relevant Supreme Court. This applies to appeals from either an intermediate court or an inferior court, with the exception of Queensland, where an inferior court must direct its appeal to the intermediate court (in this case, a district court).

Civil jurisdiction

The jurisdiction of an intermediate court in civil matters extends principally to personal actions in which damages or specified ('liquidated') claims are made. This could be constituted, by, in the former case, an action in tort (injuries arising from negligence, etc), or, in the latter, a claim for breach of contract for non-supply of goods. The maximum claim for such actions varies from State to State; currently, it is $750,000 in New South Wales.

There is considerable diversity between the States as regards the method and route of appeal in civil matters. Whilst an appeal from an inferior court goes direct to a single judge of the Supreme Court in New South Wales, South Australia, the Northern Territory and the Australian Capital Territory, it is heard by the intermediate court in Victoria, Queensland and Western Australia.

State and Territory inferior courts

These courts are given various designations, which vary from State to State. These are:

- New South Wales: local courts – civil and criminal jurisdiction;
- Queensland: magistrates' courts – civil and criminal jurisdiction;
- South Australia: courts of summary jurisdiction – criminal jurisdiction only;
- Tasmania: court of petty sessions – criminal jurisdiction; local courts – civil jurisdiction;
- Victoria: magistrates' courts – civil and criminal jurisdiction;
- Western Australia: court of petty sessions – civil and criminal jurisdiction;
- Australian Capital Territory: magistrates' court – civil and criminal jurisdiction;
- Northern Territory: courts of summary jurisdiction – civil and criminal jurisdiction; local courts – civil jurisdiction.

Magistrates' courts

The first justices were appointed in Britain in 1327 as 'conservators of the peace'. For more than 600 years, their successors, now known as justices of the peace or magistrates, have performed the duties of enforcing the common law and statute law and preserving the public peace and good order.

In Australia, there are two kinds of magistrate:

- justices of the peace (lay magistrates); and
- magistrates.

The clerk of the court is the official of each magistrates' court. He or she makes a record of evidence and prepares depositions (that is, statements sworn on oath in the presence of an accused person) made by witnesses in cases sent forward for trial at the intermediate court. The clerk also performs the administrative work of the court, such as preparing informations, summonses and warrants granted by magistrates, and collecting fines.

Criminal jurisdiction of magistrates' courts

The jurisdiction of these courts falls under three main headings:

(a) as a court of trial;

(b) as a court of preliminary investigation;

(c) miscellaneous.

Court of trial

This jurisdiction is exercised by a stipendiary magistrate, who may be limited as to the maximum punishment that he or she can impose for any one offence. Criminal offences can be divided into three classes:

- Offences triable only on indictment
  Offences will fall into this class if there is no express statutory provision to the contrary. They are triable by judge and jury in the intermediate court. An indictment is the document used in jury trials which states the offences and gives particulars.
- Offences triable only summarily
  Offences which can only be tried summarily, that is, in a magistrates' court, include traffic and parking offences, public health offences and being found drunk and incapable on the highway. A statute must expressly provide for such a trial or prescribe a procedure for determining the matter.
- Offences triable either way
  Many offences are triable either way, that is, summarily or on indictment, and are sometimes known as minor indictable offences or indictable offences triable summarily. The magistrate must offer the defendant the choice of trial either in the intermediate court or by the magistrate. If the latter is chosen, the magistrate will try the case there and then, that is, summarily. If the defendant chooses to be tried at the intermediate court, the magistrate will sit as a court of preliminary investigation.

The agenda of a typical magistrates' court reveals a wide variety of offences: petty theft, criminal damage, common assault, drunkenness, driving a motor car without a driving licence, failing to obey traffic signs, parking offences, driving without due care and attention, etc.

Court of preliminary investigation
In this capacity, the magistrates' court is called upon to determine whether an accused person who is brought before it by means of a summons or by arrest shall be committed to stand trial at the intermediate court.

The prosecution calls its witnesses and produces exhibits (for example, a gun or knife). The evidence of the prosecution witnesses is taken down in writing in the presence of the accused, and the document (called a deposition) is signed by the witness (called a deponent) and by the magistrate present at the hearing. The accused may give evidence, call witnesses in support, or may reserve defence until the actual trial. Usually, defence is reserved by the accused.

After hearing the evidence, the magistrate decides whether the prosecution has made out a *prima facie* case. (A *prima facie* case is one which appears 'at first sight' or 'from the first impression' to be an offence.) If it has done so, the accused and the witnesses are bound over to attend the trial at the intermediate court. These proceedings are known as *committal proceedings* and, although they may be taken before one justice, in practice, two or more lay magistrates usually preside over this important step in the judicial process. A stipendiary magistrate acts alone.

If the prosecution has not made out a *prima facie* case against the accused, the magistrate must order a release. An accused committed for trial may either be remanded in custody (that is, to a prison to await trial) or remanded on bail (that is, released on condition that an appearance is made at the trial court at a later date when the case will be heard).

There is also a procedure known as the 'hand-up brief'. This provides that, in certain circumstances, an accused person may be committed for trial on written statements alone.

Most State jurisdictions provide for a restriction on the publication of reports of committal proceedings to purely formal matters, that is, the identity of the court and magistrates, the names of the parties and the nature of the charges. The object is to avoid prejudicing the accused by pre-trial publicity. However, the reporting restrictions can be lifted on application by the accused or one of the accused.

Civil jurisdiction of magistrates' courts
The civil jurisdiction of inferior courts is similar to that of intermediate courts, but is concerned mostly with cases concerning money claims of a limited nature. Usually, matters of a more complicated nature, such as disputes relating to wills, title to land or copyright cases, are removed to an intermediate court.

There is also some jurisdiction relating to matters arising under statute where the legislation specifically provides that such matters will be dealt with by an inferior court. These may concern landlord and tenant disputes, custody of children or disputes relating to boundary fencing.

Children's courts

Certain magistrates attached to a court of summary jurisdiction deal with offences committed by children (that is, persons under 14) and young persons (that is, persons over 14 and under 17). The press must not disclose the identity of the child or young person unless the court, in exceptional cases, permits.

In addition, the children's court hears applications under child welfare legislation in relation to abused and neglected children or where there is a breakdown in the parent/child relationship.

Coroners' courts

The office of coroner and the coroner's inquest (or inquiry) are of ancient origin. The first coroners were appointed in the reign of Richard I in 1194. Originally, they had wide powers concerning local administration and the criminal law, but these have now been shed; today, the main duties of the coroner are to investigate:

- sudden deaths;
- violent deaths;
- unnatural deaths (that is, against the course of nature);
- deaths of prisoners;
- deaths of persons in mental institutions where there is no satisfactory medical evidence; and
- deaths involving the police.

The coroner may, however, hold an inquest into any death.

An inquest may be held in any place (for example, a court or private house). Proceedings are carried out in a formal manner. The public are admitted to the court except where this would be prejudicial to national security.

The purpose of the inquest is to enable the coroner to ascertain the identity of the deceased person and the place and cause of death. If some person has already been arrested and charged with the murder, manslaughter or infanticide of the subject of the inquest, the coroner must adjourn the inquiry until any criminal proceedings are ended.

Other courts

Courts-Martial Appeal Court

This was established by the Courts-Martial Appeals Act 1955 (Cth) and hears appeals from convictions by court-martial on matters of military discipline. There is provision for further appeal from the tribunal to the High Court on a matter of law.

Industrial Relations Commission

This is a federal body, established under the Industrial Relations Act 1988 (Cth), as amended by the Industrial Relations Reform Act 1993 (Cth) and the Workplace Relations Act 1996 (Cth), to arbitrate in industrial matters which extend beyond State and Territory boundaries. This is in accordance with the restrictive power granted to the Federal Parliament under s 51(xxxv) of the Australian Constitution, which states that Parliament can make laws 'with respect to ... industrial disputes extending beyond the limits of any one State'.

In accordance with the 1988 Act, the Commission has the task of promoting industrial harmony in Australia by providing a structure for the prevention and settlement of industrial disputes through conciliation and arbitration. It should be noted that the Commission does not make an award on conditions and pay for all the workers in a particular industry. It can only make an industrial award for those workers who are in dispute with their employers and who, in addition, come before the Commission to ask for an award. In accordance with the legislation, there must be both a specific dispute and proceedings which settle the dispute.

Specialist courts

There is a wide variety of courts dealing with all manner of miscellaneous matters. In particular, there are separate licensing courts with jurisdiction over the granting of liquor licences and permits; mining (warden's) courts which deal with mining claims and other ancillary disputes; the Land and Environment Court (NSW) has jurisdiction relating to town planning matters such as the zoning of land for a specified use – in other States, these matters are resolved by the Planning Appeals Board; and courts of disputed returns, whereby, in each State, the Supreme Court or a Supreme Court judge exercises jurisdiction over the resolution of election disputes. In Commonwealth elections, this function is exercised by the High Court.

Administrative tribunals

In his book, *Freedom Under the Law* (1968, Stevens), Lord Denning refers to administrative tribunals as:

> .... a separate set of courts dealing with a set of rights and duties. Just as in the old days, there were ecclesiastical courts dealing with matrimonial cases and the administration of estates, and, just as there was the Chancellor dealing with the enforcement and administration of trusts, so in our day there are the new tribunals dealing with the rights and duties between man and the State.

In the last 50 years, successive governments have been concerned with regulating the social life of the community. Legislation for improving the general well being has continued to be introduced. Although the collective good and welfare are admirable aims, the effect of much legislation is that, while promoting the public interest, it also circumscribes the rights of the private individual.

Many disputes occur between a private individual seeking to protect their own private rights and a minister, government department or other person to whom authority has been given by law to administer a particular Act.

It may be argued that disputes of this kind ought to be decided in the traditionally impartial and fair atmosphere of a court of law which follows a known procedure and applies a known system of law – common law or statute. Such disputes are frequently decided by special tribunals, not on the basis of law, but on grounds of policy and discretion. Moreover, the tribunals endeavour, as far as possible, to reconcile the rights of the individual with those of the public, in whose general interest the particular legislation may have been passed.

The position occupied by administrative tribunals and the type of law applied therein, known as administrative law, is a matter of great importance. At this stage, therefore, some of the reasons advanced for their creation will be examined, as well as the advantages and disadvantages which administrative tribunals display.

The advantages of administrative tribunals are said to be as follows:

- decisions are quick as compared with court proceedings and delays are avoided;
- the procedure is cheaper than court proceedings;
- the informal atmosphere and straightforward procedure suit the litigant;
- they have wide discretionary power. This avoids the rigidity which the doctrine of precedent imposes on the courts of law;

- matters involving the public service are best administered by specialists in this service. Thus, tribunals are often staffed by experts; for example, doctors on medical tribunals determine complaints about other doctors;
- tribunals ensure efficient administration of social or economic policies found in statutes, while courts of law sift facts and decide on the basis of established rules of law different in character from social policy.

The disadvantages are the following:

- administrative tribunals are sometimes held in private and lack publicity. Suspicion may be aroused as to 'administrative justice';
- the parties are sometimes prohibited from being represented by lawyers. The inarticulate person is therefore at a disadvantage in explaining their case. Legal aid is frequently unavailable;
- reasons for decisions are not always published;
- technical experts and administrators are not always capable of acting impartially or of sifting the facts;
- tribunals sometimes include a public servant of the ministry which is directly involved in the dispute. Such a person is, therefore, not sufficiently independent or impartial to give a just decision;
- rights of appeal are limited in some cases;
- the discretion of a tribunal is sometimes so wide as to make decisions inconsistent and unpredictable.

Examples of tribunals

- Trade practices tribunal – reviews decisions of the Trade Practices Commission concerning trade related matters such as price agreements.
- Social security appeals tribunal – resolves disputes relating to claims in respect of pensions and allowances from the Department of Social Security.
- Remuneration tribunal – reviews salaries of federal judges and parliamentarians.
- Broadcasting tribunal – reviews the issue of broadcasting and television licences.
- Residential tenancies tribunal – resolves disputes between landlords and tenants.

- Small claims tribunal (for example, the Consumer Claims Tribunal in New South Wales) – resolves disputes between consumers and traders relating to the supply of goods and services.
- Victims compensation tribunal – hears claims by victims of crime for compensation for injuries, pain and suffering and pecuniary (monetary) loss.

Judicial control of administrative tribunals

A tribunal is another name for a court, but, to avoid confusion, the term is applied to those bodies possessing judicial powers which operate outside the traditional courts of law. The essential purpose of a tribunal is to adjudicate in a dispute, to follow proper procedures, to act fairly and impartially and to reach a decision. Many of the tribunals have very wide powers indeed; therefore, their judgments must be subject to the supervisory control of the courts of law.

As a rule, Parliament leaves the tribunals to form their own rules and procedures in relation to maintaining control of their membership. Only in exceptional cases will the courts of law interfere with these. But, where the administration of a statute, the exercise of powers under it and the setting up of tribunals to decide disputes are entrusted to a minister, Parliament generally requires that certain rules be framed to ensure fairness in the administration of the statute and in tribunals set up thereunder. Nevertheless, injustices do occur, and the purpose of this section is to examine the grounds on which the courts of law exercise their supervisory jurisdiction and the procedures that are followed.

Where a tribunal acts judicially, it must follow certain unwritten rules of common law, known as 'natural justice'. Natural justice embraces two sub-rules: the rule against bias (no person may be a judge in their own cause); and *audi alteram partem* ('hear the other side').

Rule against bias

A true judicial decision can be reached only if the judge himself is impartial. This is an obvious requirement in a court of law or a tribunal. In *R v Rand* (1866), it was held that a judge will be disqualified where (a) there is a direct pecuniary interest, however small, in the subject matter in dispute; or (b) there is a real likelihood that the judge would have a bias in favour of one of the parties.

For example, if a judge is related to, or is a friend of, one of the parties to a dispute, there will be a real likelihood of bias. It is immaterial whether a judicial decision is in fact biased, for, as was said by Lord Chief Justice Hewart in *R v Sussex Justices ex p McCarthy* (1924): 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done.' An example of pecuniary bias may be found in *Dimes v Grand Junction Canal* (1852). Cottenham LC made decrees in a Chancery suit in favour of a canal company. He held several shares in the company. It was held by the House of Lords that the decrees be set aside on the ground of pecuniary interest. No bias was proved in fact, nor could it be shown that Lord Cottenham was in any way influenced by the fact of his shareholding.

An example of likelihood of bias may be found in *Stollery v Greyhound Racing Board* (1972). Stollery was the subject of an inquiry by the Board in relation to an alleged attempt by him to bribe a Mr Smith, who was a member of the Board. Mr Smith gave evidence at the inquiry, and was present during, but took no part in, its deliberations. The Board determined that there were grounds for charging Stollery with an offence, and, after some consideration, convicted him and disqualified him from the racing industry for 12 months. Smith was again present but took no part in the deliberations. It was held that, as Smith was in the position of the accuser, it could be reasonably inferred that he was in a position to influence the result of the Board's deliberations against Stollery. His continued presence during these proceedings therefore gave rise to a reasonable likelihood of bias, and Stollery's appeal was allowed.

Audi alteram partem

The second rule of natural justice is that a person has the right to be heard in their own defence:

> It is contrary to the spirit of our laws that anyone should be convicted without having an opportunity of being heard in his own defence [*R v Benn and Church* (1795)].

The rule embraces the proposition that the party sued or prosecuted should have the opportunity to:

- know the case against them; and
- state their case (orally or in writing).

In the English case of *Ridge v Baldwin* (1964), the chief constable of Brighton was dismissed from the police force by the watch committee. The chief constable was not present at the meeting of the committee; nor was he given an opportunity of stating his case. The Court of Appeal held in favour of the defendants. Ridge appealed to the House of Lords, which overruled the Court of Appeal. It was held that, first, there were disciplinary regulations which laid down the procedure to be followed in dismissals, and, further, natural justice required that a hearing should have been given before the watch committee exercised its power. The failure to give a hearing as required by natural justice invalidated the dismissal.

A further rule is that parties have a right to be informed of the reason for the decision. The courts of law follow strict procedural rules, which have evolved over the centuries, in order to ensure fairness. Administrative tribunals, however, are not bound to follow these rules meticulously but must apply the general principles of justice, as shown above. To a certain extent, statutes establishing tribunals frequently prescribe the procedures which they must follow.

Supervision by the High Court, Federal Court and Supreme Courts

The control exercised by these courts originates from the Queen's Bench Division of the High Court (UK) and is conducted by means of prerogative orders of: (a) mandamus; (b) prohibition; and (c) certiorari.

Mandamus

This is an order commanding (*mandamus* – 'we command') a person or body to perform a duty imposed by common law or statute. The order is available to enforce administrative duties, for example, to compel a local authority to produce its accounts for inspection by a ratepayer; or judicial duties, for example, to compel a tribunal to hear and determine an appeal or magistrates to decide a case in a court of summary jurisdiction.

Prohibition

Prohibition is an order prohibiting an inferior court or tribunal from continuing to exceed, or threatening to exceed, its jurisdiction. Thus, the order may be directed to recorders, magistrates, coroners and all statutory tribunals.

Certiorari

A certiorari order removes the decision of an inferior judicial body into the court to have its legality inquired into. The word 'certiorari' means 'to be informed'. The order may be used:

- to secure an impartial trial;
- to review an excess of jurisdiction;
- to challenge an *ultra vires* act;
- to quash a judicial decision made contrary to natural justice;
- to correct errors of law on the face of the record.

An order of certiorari will lie 'wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority' (*R v Electricity Comrs* (1924), *per* Lord Atkin). Thus, it can be issued to magistrates' courts, administrative tribunals, disciplinary tribunals of the police and fire service and to arbitrators.

Administrative Appeals Tribunal Act 1975 (Cth)

This Act established the Administrative Appeals Tribunal (AAT), an independent body with authority to review a variety of administrative decisions made by ministers, officials and authorities under approximately 300 specific Commonwealth statutes. The AAT functions through district registries in each State and Territory. It currently has a membership of 88 members, including 23 presidential members and nine judges of the Federal Court, one of whom serves as the president of the tribunal.

The AAT was established as a result of the Kent Committee Report of 1971. The Committee's terms of reference were to resolve the perceived failure of other systems for the review of administrative decisions which had existed until the early 1970s.

The jurisdiction of the AAT is either expressly prescribed in Commonwealth statutes or set out in the Schedule to the Administrative Appeals Tribunals Act itself. The Annual Report of the AAT provides an up to date list of the decisions reviewable by the tribunal as at 30 June of each year. A decision by the Commissioner of Taxation to disallow a taxpayer's objection to an income tax assessment would be reviewed by the AAT, as would a decision by the Minister for Immigration and Ethnic Affairs to deny someone resident status.

Arbitration

Arbitration is the settling of a dispute by an independent person, known as an 'arbitrator', whose decision is binding on the parties. Arbitration is commonly used as an alternative proceeding to litigation. So, instead of bringing an action in a court of law, the parties may agree to submit a dispute to arbitration. This form of commercial arbitration is regulated by State legislation, which is essentially uniform throughout Australia (Commercial Arbitration Act 1984 (NSW); Commercial Arbitration Act 1984 (Vic); Commercial Arbitration Act 1986 (SA); Commercial Arbitration Act 1985 (WA); Commercial Arbitration Act 1986 (Tas); Commercial Arbitration Ordinance 1986 (ACT); Commercial Arbitration Act 1985 (NT)); Commercial Arbitration Act (1990) (Qld)).

Subject to the arbitration agreement between the parties, the arbitrator can conduct proceedings in such manner as he thinks fit. Contracts often include a clause for arbitration in the event of disagreement between the parties, and a clause is often incorporated in partnership agreements should disputes occur among partners. A clause may provide for the appointment of (a) a sole arbitrator, or (b) two arbitrators (one may be appointed by each party to a dispute). Where the appointment of two arbitrators is expressly provided for, it is implied that, on appointment, they should appoint an umpire to take up the reference in the event of the arbitrators failing to agree.

The advantages of arbitration are said to be as follows:

- Privacy
  The dispute which may involve private and personal matters or confidential commercial matters is not debated in open court.
- Convenience
  The arbitration is held at a place and time convenient to the parties and the arbitrator(s).
- Speedy settlement
  Delays met in litigation are overcome. 'Time is money' to business persons.
- Informality
  Technical procedural rules of a court of law are not rigidly applied.
- Expert knowledge
  The arbitrator may be appointed because he or she is an expert in the matter under dispute. Frequently, the matter is purely a factual one not involving law at all.

- Enforceability
  Where contracts involve a foreign element (see above, p 2), foreign courts may be more likely to enforce the arbitration award (as opposed to a court order) when the parties have clearly agreed to arbitration.
- Expenses are generally less than litigation fees.

The disadvantages are said to be:

- Arbitrators' lack of specialist knowledge
  The dispute may hinge on difficult points of law. An arbitrator may not have the requisite expertise.
- Doctrine of precedent does not apply
  Each case is decided on its merits and is therefore no guide to future similar cases.

Unless the parties have agreed otherwise, the case must be decided according to the normal rules of Australian law and procedure. The parties often agree to dispense with strict rules of evidence. The arbitrator has power to order the production and inspection of documents and to examine witnesses, etc.

After hearing the evidence, it is usual for the arbitrator to notify each party when a decision has been reached, and payment of fees may be required before publishing the award. The losing party may be required to pay the costs of the arbitration proceedings, including the arbitrator's fees.

This procedure is subject to only limited control by the courts. The parties may, if they wish, agree to exclude any rights of recourse to the courts by means of an 'exclusion agreement'.

Juries

Criminal jury

This consists of 12 persons of either sex. It is the normal method of trying indictable (that is, serious) offences triable in superior and intermediate courts (see below, p 220). Juries are not used in magistrates' courts. The sworn duty of the jury is 'to faithfully try the defendant and give a true verdict according to the evidence'. In jury trials, it is the judge who decides the law and the jury which decides the facts.

Both the accused and the prosecution have a right to challenge (that is, object to) a number of jurors without giving any reasons. The number of such peremptory challenges varies according to the charge and the State in which the matter is heard. Both parties also have an unlimited right to challenge any of the jurors 'for cause'. Possible reasons for doing so may include suspicions of partiality or bias on the part of the juror, or knowledge that the juror has been disqualified from, or is ineligible for, jury service. It is also possible to make a challenge to the whole panel of jurors. This is called a 'challenge to the array' and is made on the basis that the summoning officer has not made a disinterested selection.

In criminal trials, the verdict of a jury has to be unanimous or, in some States, by a specified majority.

Civil jury

This may consist of four or six persons in superior and intermediate courts. Due to the expense involved, civil juries are now a rarity. A jury may, however, be ordered on the application of either party in common law cases, although some States, such as New South Wales, exclude motor accident cases. Juries are not used in actions involving equitable principles.

In coroners' courts, the composition of the jury varies, viz, New South Wales (six); Tasmania (four to six); and Western Australia (three). Coroners' juries have been abolished in South Australia, Victoria, the Australian Capital Territory and the Northern Territory.

Questions of law and fact are decided by a judge sitting without a jury.

Qualifications of jurors

The basic qualification requirement is that of citizenship, evidenced by inclusion in the electoral register. Anyone between the ages of 18 and 65 who is registered as an elector becomes liable for jury service. Payments in respect of jury service for travelling and subsistence are made to jurors.

Ex-prisoners are disqualified from serving on a jury. Senators, judges, MPs, clergymen, barristers, solicitors, medical practitioners, members of HM's Forces and police officers are among the persons exempt from jury service. Mentally ill persons are ineligible.

The advantages of trial by jury may be said to be as follows:

- a finding of fact is better left to several persons than to one person;

- juries represent the verdict of ordinary people;
- there is public confidence in jury trials.

The disadvantages of trial by jury are:

- 18 year old jurors may be too inexperienced for jury service;
- jurors are not required to pass any practical or educational test for their task;
- jurors may be too easily impressed and swayed by advocacy of experienced counsel;
- juries are prone to leniency to an accused in certain cases, for example, those involving death caused by negligent driving;
- local prejudice may exist in certain trials, and this may be reflected in local jurors;
- the possibility of corrupt influences, threats and intimidation from outside parties;
- jury trials are almost invariably longer and can therefore cause inconvenience to jurors, who may suffer financially. The cost to the State will also be correspondingly higher.

Legal aid and advice

The establishment of the Australian Legal Aid Office in 1973 replaced the previous provision allowing for people of limited means to obtain legal help. However, because of difficulties due to the lack of a clear statement of aims, questions of independence and local opposition, it was replaced by a co-operative scheme of Legal Aid Commissions being established in each State. Although they are funded by both federal and State governments, they operate independently.

The legal aid services provided by each State commission include legal advice; legal assistance; education; information regarding the law; and often the provision of a 'duty lawyer service', whereby lawyers on duty at local courts assist and appear for people who would otherwise be unrepresented.

Community legal centres

These are local centres with solicitors employed on a full time basis, who may be able to handle a person's case free of charge from start to finish, including representation in court or at a tribunal if necessary.

The client may have to pay counsel's fee in some cases. Finance for the centres is provided from various sources. Some are staffed by community social workers, who deal with special social problems which are best settled through social or community means rather than by legal action.

Voluntary legal centres

These centres give advice. If the applicant needs further help, advice will be given on where to go, for example, to a solicitor operating under the community legal centre and/or legal aid scheme, who will be able to devote adequate time to the applicant's case. Some operate in conjunction with a citizens' advice bureau or its equivalent.

Laypersons in the courts

As to the administration of the law today, the part played by laypersons should be noted. They may be: (a) justices of the peace; (b) jurors; and (c) lay assessors, who assist a professional judge or lawyer acting judicially in the special courts and administrative tribunals (see above).

Justices of the peace

While some justices of the peace have, at some stage, been involved in the exercise of summary jurisdiction in all the Australian States, this has in no way matched their role in Britain, where there are some 21,500 lay justices regularly adjudicating on a wide variety of matters and performing numerous administrative duties. These justices deal with more than 98% of the criminal cases.

Lay justices in Australia are now mostly concerned with attesting documents, signing warrants and granting bail.

Juries

A detailed description of the different kinds of juries is given above, pp 57–59. It should be borne in mind that juries are composed of laypersons who have responsibility for the final determination of verdicts in criminal cases.

Lay assessors in special courts

Examples of this form of participation are found in the following courts:

- Courts of marine inquiry
  These make use of nautical assessors when inquiring into wrecks and maritime accidents including collisions at sea, etc.
- Trade Practices Commission and Trade Practices Tribunal
  Both of these federal bodies are involved with the administration of trade practices legislation, the latter in an appellate capacity, and are reliant on lay members who are appointed for their professional experience in law, economics or business.
- Administrative tribunals
  These have an increasingly important part to play in the lives of all people, and mention may be made of the AAT, the Australian Broadcasting Tribunal, the Small Claims Tribunal and the Residential Tenancies Tribunal.

Although the constitution of each may vary in detail, the common factor is the presence of laypersons, usually drawn from bodies such as local authorities, employers' organisations and employees' organisations. Usually, the chairmen are legally qualified, but the presence of the laypersons ensures that tribunals have the benefit of industrial or other experience.

5 The Judiciary, Law Officers and the Legal Profession

You should be familiar with the following areas:

- the status of the various members of the judiciary
- the roles of Attorney General, Solicitor General and Director of Public Prosecutions
- distinctions between barristers and solicitors

Chief Justice and Justices of the High Court

Section 72 of the Commonwealth of Australia Constitution Act 1900 (UK) states that:

> The Justices of the High Court and of the other courts created by the Parliament:
>
> (i) shall be appointed by the Governor General in Council;
>
> (ii) shall not be removed except by the Governor General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
>
> (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

A proposed appointee to the High Court is recommended by the Attorney General (who should consult with the States) to the Federal Cabinet. If approved by Cabinet, the appointment is made by the Governor General in Council. The decision to make a particular appointment is a collective decision of Cabinet and does not require the agreement of the Governor General.

As a result of an amendment to the Australian Constitution in 1977, all justices appointed since then are required to retire at the age of 70. Prior to this, High Court justices were appointed for life. Provisions such as this and s 72(ii), which relates to misbehaviour or incapacity, seek to ensure the independence of the judiciary.

The Chief Justice, as head of the High Court, ranks sixth in order of precedence in Australia; a status which reflects the importance of the office.

Federal judges

Judges of both the Federal Court of Australia and the Family Court of Australia are appointed in a similar manner as the Justices of the High Court, their appointment and dismissal being governed by s 72 of the Australian Constitution. The Chief Judge is the head of each court.

State and Territory Superior Court judges

The appointment of judges within the States is, like the appointment of Federal judges, the responsibility of the executive, with the formal appointment being made by the Governor in Council. However, s 72 of the Constitution Act 1900 (UK) does not apply to either the judges of Territory courts (although there is tenure comparable to that of Federal judges) or of the States, where the position varies from State to State. Whilst State Supreme Court judges are appointed during good behaviour, it does not appear that the removal of a judge on an address of Parliament is conditional upon misbehaviour or incapacity, as provided for in s 72 of the Australian Constitution. The only exception is New South Wales, where the Judicial Officers Act 1986 (NSW) created a Judicial Commission with the power to examine complaints against judicial officers. A judicial officer cannot be removed from office unless the Conduct Division of the Commission reports that the conduct of the officer could 'justify Parliamentary consideration of removal' on the grounds of proved misbehaviour or incapacity.

Intermediate and inferior court judges and magistrates

The role and jurisdiction of these judges and magistrates was examined in Chapter 4, above. Whilst also being appointed by the State executive, they do not all enjoy the same security of tenure as superior court judges. In Victoria, for example, they enjoy the same security of tenure; in New South Wales, they do not. However, there is now a trend for creating greater security of tenure and increased status of these judges and magistrates. This may be illustrated by the enactment of legislation such as the Judicial Officers Act 1986 (NSW) (see above).

Masters and prothonotaries of the Supreme Court

Masters are salaried officials and lawyers of some years' standing, whilst the prothonotary is an administrative officer. They adjudicate on all matters preliminary to a trial. These preliminaries are known as 'interlocutory matters'. Thus, one party may wish to inspect documents in the possession of an opponent or may wish to put questions to them in order to clarify certain points in issue. In these circumstances, application may be made to a master for an order for discovery or an order for interrogatories, commanding the opponent to produce the required documents or to answer on oath written questions. Disputes may arise as to the most convenient time or place of trial, or as to whether the trial should be with or without a jury. Such disputes may be decided by a master, from whose decision appeal lies to a judge in chambers. They are also responsible for the checking, determining and levying of costs to be paid by parties to the trial when the court so directs.

Attorney General and Solicitor General

These appointments are made at both federal and State levels.

Attorney General

The Attorney General is a member of Cabinet. His or her duties comprise the following:

- representing the Crown in the courts in civil matters where the public interest is concerned, as well as having a general oversight of cases in the criminal courts;
- advising the Cabinet and Government departments on important legal matters affecting the public interest, for example, the administration of charities;
- responsibility for judicial appointments, administration of the court system and law reform.

Solicitor General

The Solicitor General is not a Member of Parliament, but an independent public servant whose main function is to represent the Crown in important cases, for example, those of constitutional significance.

Director of Public Prosecutions

The office of the Director of Public Prosecutions is found at both Commonwealth and State levels. The Director is an independent legal officer who is responsible for the conduct of criminal prosecutions and also appeals on behalf of the Crown in the higher courts. His or her role is to present the case against the accused in a manner that is fair and just, rather than to seek a conviction at all costs. At both Commonwealth and State levels, the Director of Public Prosecutions operates independently of the Attorney General and the political process. This ensures that key decisions in relation to criminal law are made on an objective and professional basis, without the fact or appearance of political involvement.

The legal profession

There are two branches of the legal profession in Australia: (a) barristers; and (b) solicitors of the Supreme Court. In New South Wales, Victoria, South Australia, Western Australia and Tasmania, persons admitted to practise law are permitted to practise both as barristers and solicitors, although the convention is that lawyers enter practice as barristers or solicitors.

Solicitors

The modern solicitor is the successor of three former ancient professions, namely, attorney (or representative), solicitor and proctor. These assisted judges in the former English King's Bench in the early stages of litigation or carried out the less skilled work in the ecclesiastical and Admiralty courts.

The regulations of each State Law Society provide for:

- the scales of remuneration and fees of solicitors;

- the terms and conditions of articles of clerkship for new entrants in some States;
- the discipline of all solicitors.

A person who has served articles to a solicitor (or is exempted) and who, in some circumstances, is required to complete a course of practical legal training may be admitted as a solicitor by having his or her name enrolled. He or she thereby becomes an officer of the Supreme Court and receives a certificate to practise, which is renewable annually.

Duties of a solicitor

Most solicitors are employed in private practice, either alone or in a partnership, with the right to incorporate with limited liability. Others are employed in the public service, industry and commerce.

Practising solicitors are consulted by, and receive instructions from, lay clients on a wide variety of matters, both civil and criminal, for example, the making of wills, administration of estates, family matters, formation of companies, drawing up of documents, conveyancing, civil claims and criminal offences of all kinds. In cases of unusual difficulty or where a trial is to take place in the superior courts, the solicitor takes instructions from the client, prepares a brief and approaches a barrister (counsel) to give an 'opinion' or represent the client at the trial.

In some States, for example, Victoria, solicitors have an unlimited right of audience in the courts, which can be limited to inferior courts in other States, for example, New South Wales.

The relationship between solicitor and client is based on professional confidence, and a solicitor cannot normally be compelled to disclose in court communications made in a professional relationship, although this may be qualified by legislative exceptions. Nor is a solicitor liable for defamation in respect of statements made in court during the course of a trial. A solicitor is, however, liable to be sued for damages for negligence in professional conduct, for example, where documents entrusted to him or her have been carelessly lost. In certain situations, it has also been held that a solicitor might owe a duty of care in tort to a third party (*Ross v Caunters* (1980); *Al-Kandari v JR Brown & Co* (1987)).

Barristers

Anyone wishing to become a barrister must qualify for the 'call to the Bar' by passing the appropriate law examinations. After doing so, a barrister intending to practise must undertake some form of pupillage in chambers. After a period of time, there is a right of audience in any court of law of the State of admission and, with leave, many other States. As noted above, instructions may normally only be taken from a solicitor, not directly from a lay client, although this rule is now being abolished in some States.

Duties of a barrister

A barrister intending to practise often chooses to specialise in a particular area of law. A barrister is essentially an advocate whose task is to present a client's case effectively in court. Duties include the drafting of opinions on difficult points of law, the settling of pleadings and advice on evidence and procedural matters.

The difference between the two branches of the profession may be summarised as follows:

- barristers are advocates; solicitors are not necessarily so;
- barristers have the right of audience in all courts; solicitors may only have a limited right;
- barristers specialise in certain branches of the law; solicitors tend to be general practitioners;
- barristers deal with legal affairs; solicitors may be consulted on wider aspects of legal matters, for example, family, business or financial concerns;
- barristers are instructed by solicitors, who are instructed by the lay client;
- in some States, barristers cannot sue for their fees; solicitors can do so in all States;
- barristers may not be liable for negligence in the conduct of a case; solicitors may be so.

Queen's Counsel

In some States, when a barrister has acquired a substantial practice, application may be made to 'take silk', that is, become Queen's Counsel. If the applicant's request is granted, letters patent are issued and, from then onwards, a silk gown may be worn. This practice has already been abolished in New South Wales and replaced by the term 'Senior Counsel', appointments being made by the Head of the Bar.

With this new status, the successful applicant will expect to attract more important cases and command higher fees. Pleadings or similar documents will no longer have to be drafted. A Queen's or Senior Counsel is distinguished by the letters QC or SC after their name, is referred to as a 'leader' and may be assisted by junior counsel.

6 Australian Constitutional Law

You should be familiar with the following areas:

- the origins of the Australian Constitution
- the structure of the Constitution
- the separation of powers doctrine
- the division of powers between the Australian Commonwealth and the States
- the role of the High Court and its characterisation

Nature of constitutions

Constitutions are the laws that govern the governors. They may be distinguished from other laws and policies made by governments during their normal course of business, in that they serve as 'the system or body of fundamental principles, according to which a nation, State or body politic is constituted and governed'.

Constitutions vary with the nature of the nation State to which they apply. There are two main types of nation States: federal and unitary.

Federal

A federal State is a group of constituent units, each with its own government, whose aim is to reconcile national unity and power with the maintenance of individual State rights. In a federal State, power is divided between:

- a central or federal government, which has responsibility for matters of common concern, such as defence or external affairs, and is supreme over the whole country; and
- State governments, which are sovereign within their powers, but those powers are circumscribed or limited in some way by the existence of the central or federal government.

Citizens who live under a federal system are subject to both the central or federal laws and the laws of the State, province, canton or whatever else the place in which they live happens to be called. Australia is a federal State. Australians are subject to both federal and State laws.

Unitary

In this type of State, the sovereign power of government operates at one level only, power is concentrated in one body and the various departments of government are centralised in one institution. The UK is an example of a unitary State.

History of the Australian Constitution

Colonial settlement

The foundation of the Commonwealth of Australia had its origins in the creation of the Australian colonies. The early settlement of New South Wales in 1788 was followed by Tasmania (1825), South Australia (1836), Victoria (1850) and Queensland (1859). Western Australia was established independently in 1829.

Early steps to federation

There were several attempts by the UK Government to achieve some form of customs union between the States, such as the introduction by the British Colonial Secretary, Earl Grey, of the Australian Colonies Government Act 1850 (UK), which provided for a limited central authority. However, the first substantive move was the meeting between representatives of the six Australian colonies and those from New Zealand and Fiji at a Convention in 1883. As a result of this meeting, the UK enacted the Federal Council of Australasia Act 1885 (UK), which gave certain powers to the colonies for naval defence and limited control over external affairs.

Commonwealth of Australia

While the Federal Council never appeared to have any tangible achievements during its existence between 1885 and 1899, it could be regarded as the forerunner of the three National Constitutional Conventions of 1897 and 1898 and the subsequent successful referendum of 1899 in favour of a draft federal constitution. This led to the passing of the Commonwealth of Australia Act 1900 (UK) and the creation of the Commonwealth of Australia and the Australian Constitutions.

Elements of the Australian Constitution

The Australian Constitution is set out in a schedule of the Commonwealth of Australia Constitution Act. This is a statute of the Imperial Parliament at Westminster. It was enacted in 1900 and came into force on 1 January 1901.

The Constitution contains 128 sections, divided into eight chapters. The chapters cover the following principal topics:

- Chapter I –Parliament
  Its composition – House of Representatives and Senate; its membership; the relationship of the two houses; its powers to make laws. The major powers of the federal Commonwealth are set out in s 51 of the Constitution (refer to the enumerated powers doctrine, discussed below).
- Chapter II – Executive Government
  The Governor General as the Crown's representative; its establishment, headed by ministers of the Crown who must be Members of Parliament.
- Chapter III – Judicature
  Creation of the High Court of Australia; provision for the creation of other federal courts; granting jurisdiction over federal matters to State courts. The High Court has general jurisdiction to hear appeals on all matters decided in State and federal courts on State or federal law.
- Chapter IV – Finance and trade
  Questions of protection of local industries and free trade were most important in the pre-federation debates. The Constitution provides that there can be no customs or excise barriers to inter-State trade, and only the federal Parliament can impose taxes on the production or importation of goods.

- Chapter V – States
  The Constitution acknowledges that the pre-federal colonies become States. The States' powers are reduced only to the extent that some are surrendered to the federal Commonwealth. State and federal Parliament share the power to make laws on many topics. Where State and federal laws conflict, the federal law prevails.
- Chapter VI – New States
  A procedure is established for creating new States and arranging for their representation in federal Parliament. No new States have been created.
- Chapter VII – Miscellaneous
  Deals with a diversity of subjects, such as the seat of government and power of Parliament to make laws for federal Territories (for example, Australian Capital Territory and Antarctica).
- Chapter VIII – Alteration of Constitution
  The formula for changing the Constitution is found in s 128.

Separation of powers

Separation of powers doctrine

The doctrine of the separation of powers is particularly associated with the French liberal philosopher, Montesquieu. He stated that the three functions of government (that is, legislative, executive and judicial) should be discharged by separate bodies and that, to prevent misgovernment, no two functions should be entrusted to the same person. Therefore, the power of making laws should not be exercised by the same persons who execute or interpret them. The separation of the three institutions (legislature, executive and judiciary) enables each to act as a check on the others.

Separation of powers in Australia

To a large extent, the effect of the first three chapters of the Australian Constitution, in dividing government powers between a federal

Parliament, executive and judicature, reflects the separation of powers doctrine. The separation is not as complete, however, as it is in the United States Constitution. The Australian Constitution is a compromise, in that the executive Government is headed by Cabinet ministers who must be Members of Parliament (s 64). The judiciary enjoys almost complete independence, with the exception that judges are appointed by the executive.

Although not in the sense used by Montesquieu, powers are further separated, or perhaps diffused, between the federal and State Parliaments.

Enumerated powers doctrine

The federal Parliament only has the power to make laws within the areas specifically granted to it by the Constitution, that is, powers enumerated in the Constitution. The most prominent grant of power is in s 51 of the Constitution, which grants Parliament the 'power to make laws for the peace, order and good government of the Commonwealth' with respect to numerous matters, including: (i) international and inter-State trade and commerce; (ii) taxation; (vi) defence; (xiii) banking; (xviii) intellectual property; (xx) corporations; (xxi) marriage; (xxiii) invalid and old age pensions; (xxiiiA) unemployment and medical services; (xxvii) immigration; and (xxix) external affairs. As the Constitution refers to the specific grants of power to the Commonwealth, it is regarded as a restrictive constitution. In contrast, the constitutions of the States have their powers granted in general terms. For example, s 5 of the Constitution Act 1902 (NSW) states that the State Parliament of New South Wales has the 'power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever'.

Conflict between federal and State legislation

As has already been explained, the State Parliaments have power to make laws on a general basis, whilst the federal Parliament is restricted to a limited number of subjects. Nevertheless, there are many areas in which both the State and federal Parliaments can make laws. This raises the question of what happens where both Parliaments make laws on the same subject and those laws are in conflict.

Such a conflict was anticipated by s 109 of the Constitution, which states that: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' This means that, provided the federal law is valid, it will prevail over the State law. In addition, it means that, in the few areas where the federal Constitution grants exclusive jurisdiction to its Parliament, such as s 90 (customs and excise), the States have relinquished their law making power.

Constitutional amendments

Section 128 of the Constitution makes provision for the method whereby it may be amended.

The process for amendment is commenced in Parliament, where each House is required to approve the proposal by an absolute majority. After this has been achieved, then, not less than two months or more than six months after approval has been given, it must be submitted to the electors of the States and the federal Territories in a referendum.

Should one House reject the amendment, a further rejection after an interval of three months gives the Governor General a discretion to submit it to the electors, as set out above.

On completion of the voting in both the States and Territories, the votes are then counted to see if two separate majorities are attained.

First, the votes are counted on an 'Australia-wide basis'. Should the proposed amendment fail to achieve a majority, the proposal will lapse. In the event of the majority of the electors in the country giving its approval, the amendment then proceeds to the second phase.

In the second phase, the votes of the Territories are disregarded. The votes of the States are then analysed. If the proposed amendment achieves a majority in at least four of the six States, as well as an Australia-wide majority, it becomes law.

By its very nature, this procedure for amendment makes it relatively difficult to change the Constitution. Since the creation of the federation in 1901, there have been 19 referendum days, on which a total of 43 proposals have been considered, resulting in eight proposals being approved, with a total of nine amendments being made to the Constitution.

Power of the Australian Parliament

Since the creation of the Australian Constitution in 1901, the influence of the UK over the government of Australia has been further diminished by the Statute of Westminster 1931 and the Australia Act 1986.

Statute of Westminster 1931

The main purpose of the Statute of Westminster was to remove certain constitutional disabilities under which the Australian Commonwealth Parliament (and other Dominion Parliaments) had previously operated. Section 2 removed the inability to amend or repeal UK legislation that was intended to apply to Australia; s 4 terminated the legal power of the UK Parliament to legislate for Australia; and s 3 permitted the federal Parliament to legislate extraterritorially.

The Statute of Westminster was passed by the Imperial Parliament in 1931. It was adopted in Australia by the passing of the Statute of Westminster Adoption Act 1942 (Cth). By this Act, the Statute of Westminster became operative in Australia retrospectively from 3 September 1939, the date that the Second World War commenced.

Australia Acts 1986

The Australia Act 1986 (Cth) and its counterpart, the Australia Act 1986 (UK), removed the last vestiges of control by the UK Parliament over both Australian federal and State constitutional institutions. The Australia Act gave the State Parliaments power to repeal or amend UK legislation (s 3), and also gave the States power to legislate extraterritorially (s 2).

Power of the High Court

The Australia Act 1986 (Cth) abolished the right of appeal from State courts to the Privy Council, thereby making the High Court the final court of appeal in Australia (s 11).

In accordance with s 71 of the Constitution, the High Court has the judicial power to interpret the Constitution in cases brought before it.

In interpreting the Constitution, the High Court in *Australian National Airways Pty Ltd v The Commonwealth* (1945) stated its view of the Constitution in the following terms:

> It is a Constitution we are interpreting, an instrument of government to endure and conferring powers expressed in general propositions wide enough to be capable of flexible applications to changing circumstances. We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications [*per* Dixon J].

The High Court tests federal laws for constitutional validity by a process known as 'characterisation'. It characterises a Commonwealth law by assessing whether or not it is supported by the powers given to the federal Parliament by the Constitution. As part of the process of characterisation, the High Court considers both the direct and indirect effects of the law.

In cases of conflict between Commonwealth and State laws, pursuant to s 109 of the Constitution, the High Court's original test for inconsistency was the 'direct collision' test. Where there was both a valid federal and a valid State law, both of them dealing with the same matter and being in 'direct collision', the federal law would prevail under s 109 of the Constitution.

In *Clyde Engineering Co Ltd v Cowburn* (1926), the High Court added a wider test – the 'cover the field' test. The operation of this test was explained by Isaacs J thus:

> If a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.

In effect, this means that, if the State legislation is in conflict with comprehensive or exclusive federal legislation operating on the same field, the State legislation must give way.

7 Legal Personality and Status

You should be familiar with the following areas:

- the concept of a legal person
- the distinction between nationality and domicile
- legal status and the dissolution of mortgages
- legislation for the protection of the rights of children
- the differences between corporations and unincorporated associations

Concept of legal persons

All human beings are 'persons' under Australian law. One of the most important principles of Australian law is that all persons within the realm have certain rights and are subject to certain duties.

This state of affairs has not always been universal. A slave in early Roman and Anglo-Saxon times, for example, had no rights, as he was regarded as a chattel: a thing to be owned, used and even killed at the will of his master or owner. In law, a slave had no 'legal personality'. Similarly, in early Norman times, a criminal could be declared an outlaw: someone outside the law's protection whom anyone could kill with impunity. In early times, animals which had 'misbehaved' by attacking humans or cattle were sometimes hanged. Whether a human being or some other creation is a 'legal person' depends, therefore, on the law of the State where that person or creature is.

In Australian law, legal personality generally attaches to a human being at birth and ends at death. Although certain parts of the criminal law recognise and protect the existence of a child not yet 'in being', for example, it is an offence to commit abortion or child destruction (which means unlawfully causing the death of a child before it has an existence independent of the mother), this does not necessarily attribute legal personality to the unborn infant.

Death puts an end to both physical and legal personality. For example, the defamation of a deceased person is not actionable in Australian law by personal representatives or near relations.

Nationality and domicile

A person's nationality refers to their status as a citizen or member of a particular State to which allegiance is owed. Apart from Stateless persons, everyone is the subject of some State to which they owe political allegiance and loyalty, by which they may be called upon to fight, pay taxes and support, and from which they may expect protection. These are broad general statements only. For instance, although it could be said that all persons must be national subjects of some State or other, we know that, due to upheavals of war, there may be some unfortunate 'Stateless' persons who have been disowned by, or expelled from, their country of birth and origin.

Nationality is of great importance in the field of public law. Australian subjects enjoy universal franchise, that is, the right to vote at local, State and federal elections. Non-citizens in Australia have no such right. They are subject to certain restrictions concerning entry into Australia and employment after entry; furthermore, they must register certain particulars with the police.

Apart from these requirements, Australian law treats non-citizens in much the same way as ordinary Australian subjects: for example, they are subject to the same rules of criminal law and the same laws of tort and contract. There are special disabilities or restrictions, however, such as the general inability to vote in federal or State elections or to be employed in the Australian Public Service.

The acquisition of Australian nationality and the allied question of domicile is becoming increasingly important as modern modes of transport make it easier for people to move from one country to another.

Australian nationality

The Australian Citizenship Act 1948 (Cth) provides that Australian citizenship may be acquired in the following ways:

- by birth (as from 20 August 1986) in Australia to a parent who is an Australian citizen or who is a permanent resident in Australia at the time of the birth, or who becomes an Australian citizen or becomes settled in Australia;

- by adoption by an Australian citizen (provided that the person adopted is present in Australia as a permanent resident);
- by descent, that is, birth outside Australia to a parent who is Australian by birth, adoption, registration or naturalisation (not by descent);
- by grant of Australian citizenship. Any person may apply to the Department of Immigration, Local Government and Ethnic Affairs for a certificate of Australian citizenship. The conditions of grant (which is at the discretion of the Department) are that the applicant must be of full age and capacity, of good character, have at least a basic knowledge of the English language, have satisfied residence requirements and intend that Australia will be their home or their principal home. Children under the age of 16 years may be included in a parent's application, even though they themselves do not meet the usual requirements.

Loss of nationality

Australian citizenship may be lost by:

- acquisition of another nationality;
- renunciation. This is effected by a person of full age and capacity making a declaration of renunciation;
- service in the armed forces of an enemy country;
- deprivation. This applies only to citizens who acquired citizenship by registration, and may be ordered by the Minister for Immigration, Local Government and Ethnic Affairs for serious misconduct, for example, criminal acts.

Aliens

All persons other than Australian citizens are 'non-citizens'. Non-citizens may not become a member of either a State or the federal Parliament, and in some circumstances may be liable to deportation for commission of serious crimes.

Domicile

Domicile is a concept distinct from nationality. Thus, a person may be an Australian subject and yet be domiciled in, for example, France.

The concept of domicile under Australian law involves two elements: (a) actual residence; and (b) *animus manendi*, that is, the intention to remain in that place or country. Where these two elements co-exist, a person is said to have a domicile in that country.

Whereas nationality implies a political relationship between a person and the State to which allegiance is owed, domicile determines important civil rights and obligations.

First, under Australian law (Domicile Act 1982 (Cth); Domicile (Consequential Amendments) Act 1982 (Cth); Domicile Act 1979 (NSW); Domicile Act 1978 (Vic); Domicile Act 1981 (Qld); Domicile Act 1980 (SA); Domicile Act 1981 (WA); Domicile Act 1980 (Tas); Domicile Act 1979 (NT)), it is an inflexible rule that: (a) every person must possess a domicile; and (b) no person can have more than one domicile. There are two classes of domicile – domicile of origin and domicile of choice:

- Domicile of origin
  This domicile attaches at birth. A legitimate child takes the domicile of the father; an illegitimate child takes that of the mother. A foundling (a deserted infant without known parents) acquires the domicile of the place where found.
- Domicile of choice
  Where a person of full age and capacity establishes his or her home in a country with the intention of making his or her home indefinitely in that country (s 10) (that country being different from their last domicile), he or she is regarded as acquiring a domicile of choice.

Domicile of dependent persons

- A minor takes the domicile of a parent, as above. A child may take his or her mother's domicile instead of his or her father's where the spouses are separated and the child makes his or her home with his or her mother.
- A woman who marries normally acquires her husband's domicile immediately on marriage. However, a married woman is now capable of acquiring a domicile independent of her husband. The Domicile Act also states that a person is capable of acquiring an independent domicile when the age of 16 is attained.

The above represent the main rules regarding the concept of domicile in Australian law. The law of domicile is important in determining the law by which a person's rights and obligations are governed. For example, the law of domicile governs the essential validity of marriages, legitimation and jurisdiction in divorce.

Proof of domicile

The Australian court decides the question of domicile by applying Australian law, taking account of the intention of the party. Evidence of intention may include correspondence, oral or written declarations, the purchase of a house or even a gravesite. Inquiry by the Australian court may range over the whole of a person's life to enable the court to establish where a domicile has been acquired.

Marriage

The legal view of marriage is that it is a contract between two persons. Because it fundamentally affects the status of each of the contracting parties and imposes rights and obligations of a special kind, marriage is accorded a particular importance, legally as well as socially.

Lord Penzance defined marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others' (*Hyde v Hyde* (1866)). It follows from this definition that forcible marriage and marriage by deceit or by mistake must be void. 'Deceit' means misrepresentation of the essential nature of the transaction; 'mistake' means an essential mistake, for example, the identity of the other party or the ceremony itself. The free and voluntary consent of the parties is essential.

Capacity to marry

A person domiciled in Australia must comply with Australian law as to capacity to marry. The requirements, contained in the Marriage Act 1961 (Cth), are that, at the time of the marriage, neither party is:

- under 16 years of age;
- already married;
- certified of unsound mind; or
- within the 'prohibited degrees'.

'Prohibited degrees' means close members of the family, for example, brother and sister, as set out in s 23B(2) of the Marriage Act 1961 (Cth) (as amended).

A marriage under Australian law must take place in front of an authorised celebrant, who must be either a minister of religion or a civil celebrant. Notice of intention to marry should be given in writing to the celebrant one month before the wedding.

As well as valid marriages, those that are either void or voidable should also be considered. Void marriages are those destitute of legal effect. By the Marriage Act 1961 (Cth), a marriage is void if:

- either party is already legally married;
- the parties are within the prohibited degrees;
- certain formal requirements are not complied with (for example, the marriage was not conducted by an authorised celebrant and both parties were aware of this fact);
- either party did not validly consent, whether by duress, mistake, unsoundness of mind or otherwise;
- either party is not of marriageable age, that is, 18 for a male, 16 for a female (in exceptional circumstances, this may be reduced to 16 and 14 respectively).

If any of these grounds are satisfied, the Family Court may issue a decree of nullity, the effect of which is to declare the marriage void *ab initio*, that is, from the date of 'celebration'.

Divorce

In accordance with the Family Law Act 1975 (Cth), the sole ground on which an application for divorce may be presented to the court is that the marriage has broken down irretrievably. To establish this, the applicant must satisfy the court that:

- the parties to the marriage have lived apart for a continuous period of at least 12 months immediately preceding the filing of the application and there is no reasonable likelihood of a reconciliation and resumption of the marriage;
- a divorce application cannot normally be presented within two years of the marriage unless the parties have met with a counsellor at the Family Court or an approved counselling organisation.

The Act contains provisions designed to encourage reconciliation of the parties, but, where this is impossible and divorce is granted, the court has wide powers to order financial relief for either party.

Presumption of death

A person who can show good grounds for believing a spouse to be dead may apply to the court for an order to presume death and dissolve the marriage. Continuous absence for a period of seven years, provided that the petitioner has no reason to believe the absent spouse to have been alive within that time, is accepted as *prima facie* evidence that the absent spouse is dead.

Proceedings in the Family Court

In accordance with the Family Law Act 1975 (Cth), the Family Court exercises certain jurisdiction in regard to married persons and may make orders for: (a) the protection of the spouses; (b) the maintenance of spouses and children of the family; and (c) the custody of such children.

Nuptial and ex-nuptial children

A child is nuptial if his or her parents were married when the child was born or conceived, or if they marry after the child's birth (s 89 of the Marriage Act 1961 (Cth)). Children born outside these circumstances are referred to as ex-nuptial children. Most States and both Territories have enacted legislation which removes any legal distinction between nuptial and ex-nuptial children. In particular, ex-nuptial children now have equal rights with nuptial children in relation to inheriting from their parents under a will (or on intestacy if there is no will).

Adoption

Each of the States has its own adoption laws, which are, in general, based on similar principles.

Effect of adoption

An adoption order made by a court extinguishes the rights, duties and obligations of the natural parents or guardian and vests them in the adoptive parents. On adoption, the child is deemed to be the legitimate child of his or her adoptive parents to the exclusion, with minor exceptions, of all of his or her former ties. The adopted child has the same rights of inheritance under wills, deeds and intestacies (unless the adopted child is expressly excluded) as natural children born to the adopters in wedlock.

Who may adopt?

Section 19 of the Adoption of Children Act 1965 (NSW) permits the following to adopt:

- married couples, including Aboriginal couples recognised as traditionally married;
- *de facto* couples having a relationship of at least three years' duration and where the child has been in their care for two years, except in special circumstances;
- single applicants.

Procedure

The court has to be satisfied that:

- where the child is under 18 years, the adoptive parents are of good repute, are fit and proper persons to fulfil the responsibilities of a parent, and are otherwise suitable with regard to such matters as age, health, education, religious convictions and any other relevant factor; or
- where the child is 18 years or over, the applicant is of good repute; and
- the consent of 'parents and guardians' has been obtained.

The court can dispense with the parents' or guardians' consent if, for example, the person has abandoned, neglected or ill-treated the child and, in the opinion of the court, is unfit to be a parent or guardian.

The court is not able to make an adoption order:

- for applicants under 21 years of age;
- where the male applicant is less than 18 years older than the child; or
- the female applicant is less than 16 years older than the child.

The age limits can be waived by the court in exceptional circumstances.

The court's first consideration is to safeguard and promote the welfare of the child, whose wishes and feelings (having regard to their age and understanding) must also be taken into account. So far as practicable, consideration must also be given to the natural parents' religious preferences before placing a child for adoption.

Guardianship

Guardianship is the relationship existing between a child and a person who has the right of control over them and the duties of ensuring their maintenance, education and welfare.

Such powers are, of course, normally exercised by parents, who have a duty to provide care, protection and control. Where, however, either or both parents are deceased or are unable or unwilling to exercise these powers and duties, the question of appointing a successor in the form of a guardian will arise. Every child must have some adult who safeguards their interests.

Under the Family Law Act 1975 (Cth), each of the parents of a child who has not attained the age of 18 years is a guardian of the child. However, this may be varied by court order if, for example, divorce proceedings occur.

Appointment of guardians

Guardians may be appointed by:

- a deed or will of a parent;
- the Supreme Court, where no guardian has been appointed by deed or will and the infant has no parent, guardian or other person exercising control over him or her.

Where a child has been made a *ward of court* (which may occur when both parents are dead or divorced), all important decisions affecting the child, such as upbringing, property, investments, etc, may only be made by authority of the court. In some circumstances, a guardian may be appointed to an adult person who is incapacitated for some reason, for example, because of an intellectual disability (see, for example, the Guardianship and Administration Act 1986 (Vic)).

Infants or minors

State legislation (Minors (Property and Contracts) Act 1970 (NSW); Age of Majority Act 1977 (Vic); Age of Majority (Reduction) Act 1971 (SA); Age of Majority Act 1974 (Qld); Age of Majority Act 1972 (WA); Age of Majority Act 1973 (Tas); Age of Majority Act 1974 (ACT); Age of Majority Act 1974 (NT)) provides that a person shall be of full age on attaining the age of 18 'at the commencement of the relevant anniversary of the date of their birth'. For example, a child born on 31 December 1970 will reach his or her majority at the first moment of 31 December 1988.

The following is a summary of the rights and liabilities of minors under the law.

Under the criminal law

A child under the age of seven is not criminally liable for any offence and cannot, therefore, be convicted. Between the ages of seven and 14, a child is liable for any crime committed if the court finds that he or she knew his or her conduct to be wrongful.

Persons over the age of 14 are liable for criminal acts. Children (that is, persons under 14) and young persons (that is, persons over 14 and under 17) are, as a general rule, tried in a children's court. If the case is a serious indictable offence, for example, manslaughter, the child or young person will usually be committed for trial at the appropriate court (for example, the intermediate court).

Under the civil law

A minor is liable for all torts committed. (Torts are civil wrongs which are not breaches of contract or trust.) Usually, the minor is without means and, unless a parent or guardian is directly and personally involved in the commission of the tort, an injured party is left without remedy, since a parent or guardian as such is not liable. Where the tort complained of is also a breach of contract, a plaintiff will not be able to sue in contract in respect of damage so caused. The position and liability of minors in respect of torts will be considered below, p 121. The law relating to infants' contracts is discussed below, pp 102–03.

Voting rights

Under Commonwealth and State legislation, the minimum voting age for federal and State elections is 18 years.

Property rights

A minor may own all kinds of personal or movable property, but cannot legally own land.

Litigation rights

Where a minor wishes to enforce or protect rights in a civil court, a responsible person (for example, the mother or father) must be appointed to act as 'next friend'.

Where a minor is sued, a responsible person is similarly appointed to act as his or her 'guardian *ad litem*', that is, a guardian with respect to a legal action. In Victoria, the terms 'next friend' and 'guardian *ad litem*' have been replaced by a common term, 'litigation guardian'. In criminal proceedings, a minor may act in his or her own name by taking out a summons against another person: for example, A, aged 16, may prosecute B, aged 25, for common assault if the police do not prosecute B on behalf of the public.

Wills

A minor has no legal capacity to make a valid will. Where, however, he or she is a serving member of the Australian armed forces or is a mariner or seaman at sea, he or she may make an informal will.

Miscellaneous

The minimum age for holding a driving licence varies from State to State. In Victoria, for example, it is 18 years, whereas in New South Wales it is 17. Persons under 16 may normally not contract a valid marriage. Restrictions are placed on the possession and use of firearms. Generally, persons under 18 may not consume liquor on licensed premises.

Corporations

As well as natural persons recognised as such by law, there are artificial or juristic persons called corporations. A corporation is a legal entity, or artificial person, with a distinctive name, perpetual succession and, usually, a common seal.

The essential feature of a corporation is that it has a legal personality distinct from that of its members or those who control it. This was established in *Salomon v Salomon & Co Ltd* (1897). Of course, it is clear that, once created by law, a corporation will only be able to act if there are human servants or agents who, for example, order goods and make contracts for it, or perform other functions which the corporation itself is lawfully empowered to do.

It should be noted that a corporation continues in existence irrespective of the death or expulsion of any or all of its members. Its independent existence and survival is known as 'perpetual succession'. This technical expression means that once the corporation is created by law, it will continue until it is destroyed, annulled, deregistered or dissolved by law. For example, in the past, a monarch may have granted a charter to create a corporation. The corporation will continue until such time as Her Majesty or Parliament (by statute) revokes the charter. Unless the dissolution or revocation is effected by law, the corporation continues in existence for ever. A corporation cannot die: it must be 'killed'.

Limited liability companies constitute what may appear to be an exception to this observation. The Corporations Law (see below) provides that, where there is a reduction of membership below the statutory minimum of one member, the company may be wound up by the courts. Nevertheless, until the winding up is completed, the company continues in existence.

Classes of corporation

Sir Edward Coke LCJ (1552–1634) wrote: 'Persons are natural, created by God, and incorporate created by the policy of man, and these latter are either sole or aggregate of many.' In accordance with Coke's definition, corporations may be classified as:

- corporations sole; and
- corporations aggregate.

Alternatively, they may be classified according to their mode of creation:

- corporations created by charter (common law);
- corporations created by statute;
- corporations created by registration under s 118 of the Corporations Law.

Corporations sole

This class of corporation consists of only one person at any time. Examples include the Queen and bishops. In these examples, there is a natural person and a 'corporation' (that is, the office of monarch or bishop), each separate and distinct from the other. When the bishop dies, a new incumbent assumes office, and there is no break in the powers vested in the corporation sole, whether they be rights of ownership of land or any other rights attaching to their office in their corporate capacity.

Corporations aggregate

Whereas a corporation sole consists of one member only, corporations aggregate comprise many members or groups of people. Common examples include the Telstra Ltd, News Corporation Ltd, the Australian Post and all companies registered under the Corporations Law (see below).

As noted above, corporations may be classified according to their manner or mode of creation.

By charter

Under the common law, the Crown still has the power to create corporations at the royal pleasure. The monarch may grant a charter to groups of subjects who petition for the purpose of creating a professional organisation.

By statute

These corporations are created by Acts of Parliament. Examples are Telecom Australia (originally, but now a registered corporation – Telstra Ltd), the Australian Post and the Australian Broadcasting Authority (ABA). Parliament has generally adopted this form of incorporation in creating all the government boards.

Corporations registered under the Corporations Law

From the mid-19th century, Companies Acts were passed, which conferred the benefits of incorporation and limited members' liability on previously unincorporated associations of people, if they wished to achieve this, by registering under the Acts. The present law is to be found in the Corporations Act 1989 (Cth) and associated legislation, which replaced earlier legislation and is known as the 'Corporations Law'.

Organisation of companies

Registration of a company is effected by depositing certain documents with the Australian Securities and Investments Commission (ASIC) at the appropriate State or Territory office.

A private company limited by shares must have 'proprietary limited' (Pty Ltd) as a suffix to its name. Proprietary companies may not raise capital from the public. A public company may be limited by shares or a guarantee and its name is suffixed by 'limited' (Ltd).

The various categories of registered companies are: (a) those limited by shares; (b) those limited by guarantee; (c) unlimited companies; (d) those limited by shares and guarantee; (e) companies with unlimited liability; and (f) no liability companies.

Companies limited by shares

This is the usual form of company (99% of registered companies), whether public or proprietary (the latter is commonly referred to as a private company). Where a company is limited by shares, each member is liable to the amount (if any) unpaid on their shares. For example, Robinson buys 100 $1 shares in Xanadu Pty Ltd, for which he pays $75 on application to the company. Robinson's liability in the event of Xanadu Pty Ltd being wound up is to pay the outstanding $25 or at a later call of the capital.

Companies limited by guarantee

In this type of company, each member undertakes to contribute a certain sum in the event of its winding up. Thus, a member who has guaranteed $10,000 will be liable for that amount if the company becomes insolvent and is unable to pay its debts. The member cannot be compelled to contribute more. The guarantee is normally about $5 per member.

Unlimited companies

An unlimited company is one in which the liability of the members to pay the debts of the company is unlimited. The unlimited company is not common in the business world. Its main use is to hold property, or to provide services where outside indebtedness will not be large and secrecy of financial affairs is desired.

Companies limited by shares and guarantee

Pursuant to the Company Law Review Act 1998 (Cth), it is no longer possible to register a company limited by shares and guarantee, though previously registered companies are allowed to continue to exist.

No liability companies

These are a special class of mining companies.

Public and private companies

In addition to the above classes of companies distinguished by financial liability of members, the distinction between public and private companies should be noted.

Public limited companies

These have a minimum of one member; there is no maximum number of members. The shares of such members are freely transferable by sale or may be listed on the Australian stock exchange or elsewhere. The largest industrial and trading companies are public limited companies whose shares are quoted on the stock exchange lists.

Proprietary companies

These must have a minimum of one and a maximum of 50 members. They are guilty of an offence if they offer their shares or debentures to the public and may be ordered to convert into a public company.

Share structure of a company

The capital of a company may be divided into the following classes:

- Preference shares
  Holders of these shares are entitled to a dividend at a fixed rate out of profits, in priority to holders of any of the company's other shares.
- Ordinary shares
  The dividend paid under these shares is not fixed but fluctuates with the profits of the company.
- Deferred shares
  These are shares which may receive a higher dividend after the payment of preference and ordinary share dividends.

If the capital is insufficient to run the company, additional money may be raised by means of debentures. These are loans to the company, such loans usually being secured by means of a charge on the company's assets.

***Ultra vires* rule**

The doctrine of *ultra vires* ('beyond the powers') previously applied in particular to corporations. Where a corporation had been created by law, it had to act within the powers granted to it. These powers were contained within the memorandum of association (now called the corporate constitution) in respect of registered companies.

There is, however, a distinction between chartered corporations and the remainder: chartered corporations have the same rights and powers as ordinary individuals and are subject to the same liabilities. Where a chartered corporation acts beyond the powers defined in its charter, such acts are not void in law. Thus, a contract between such a corporation and a private person may be enforced in the same way as a contract between two adults. The only effect of acting beyond the powers defined in the charter is that the Crown (which granted the charter) may revoke it at its pleasure, or a statute may be passed with similar effect.

Previously, where a statutory or registered company exceeded the powers granted to it by the statute of incorporation or the memorandum of association, any contract made beyond the powers laid down was void.

In *Ashbury Rly Carriage & Iron Co v Riche* (1875), a company was formed with the following objects (defined in the memorandum of association): to make, sell or lend on hire railway carriages and wagons. The company, however, contracted to build a railway in Belgium. Held: the contract was *ultra vires* and void; it could not, therefore, be ratified by a meeting of shareholders.

The doctrine of *ultra vires* has been abolished by the Corporations Law (ss 124–26). The effect of this legislation upon the doctrine of *ultra vires* would be that it would now be of little effect.

Termination of a company

The existence of a company may be ended by either: (a) striking the name of the company off the register (after satisfying itself that it is defunct); or (b) winding up.

The winding up of a company is either voluntary or compulsory. A voluntary winding up is begun when the members of a company resolve so to do. A compulsory winding up is undertaken following an order of a court on a petition being presented by a member of the company, a creditor or the ASIC. The petition may allege one or a number of grounds, for example, inability to pay debts; failure to commence business within a year or maintain the minimum numbers; or that it is just and equitable to wind up.

Unincorporated associations

As the name implies, these associations of people differ from corporations, in that they (the associations) do not have a distinct legal personality (that is, a personality separate from the members themselves). Common examples include societies and clubs, such as a local tennis club, a college literary society or an arts group.

Legal liability of unincorporated associations

The law regards these groups as a collection of persons bearing individual responsibility for the association's actions. So, where an official of an association (for example, a secretary) makes a contract for the purchase of goods for the common use of the group, the official is personally liable on such a contract, either alone or jointly with the committee which authorised it. Where a tort is committed by an individual member, that person will be responsible in law. However, where a committee is appointed to act on behalf of a number of people, the committee may be held liable for any action which it authorised.

In *Brown v Lewis* (1896), the committee of a football club authorised the repair of a football stand for use by the public. The repair was faultily performed and a member of the public was injured when the stand collapsed. It was held that the committee authorising the repair was liable.

There are certain important points of law which affect unincorporated associations with regard to the following:

- Ownership of land
  Land law places certain restrictions on the number of people who may own land together. Consequently, the association may nominate four of their members to hold land as trustees. These trustees may sue and be sued in respect of the property vested in them.
- Representative action
  One representative or more may bring or defend actions on the part of the other members of the group. Recent legislative developments have expanded the scope for representative actions.
- Committee
  An unincorporated association may confer powers on a committee to control membership and, where necessary, expel members. It may, therefore, act as a disciplinary tribunal, but while so acting it is subject to the rules of natural justice, which may be enforced by the courts. An example of such a group is the Jockey Club, the stewards of which are empowered to control members.

Partnerships

A partnership is defined by the various State legislation (Partnership Act 1892 (NSW); Partnership Act 1958 (Vic); Partnership Act 1891

(Qld); Partnership Act 1891 (SA); Partnership Act 1895 (WA); Partnership Act 1891 (Tas); Partnership Ordinance 1963 (ACT)) as 'the relation which subsists between persons carrying on business in common with a view of profit'.

The relationship between the partners may be created orally, in writing or by conduct. Frequently, of course, a deed of partnership is drawn up legally to define the rights and duties of the partners.

The carrying on of business does not necessarily imply the buying and selling of goods; the partnership may well consist of the provision of services. Where persons engage in business and share profits, the law will presume that a partnership has been formed, even though the persons have never mentioned their intention orally or in writing.

The following is a summary of the main distinctions between a partnership and a registered corporation.

- Personality
  A partnership has no legal personality distinct from the personalities of its members. A registered company is a legal person distinct from its members.
- Management
  In the absence of a contrary agreement, all partners are entitled to share in managing the firm. The members of a company have no such right: they have vested the management of the company in its directors.
- Contractual authority
  A partner is presumed in law to have authority to enter into contracts on behalf of the firm in the ordinary course of its business. Members of a company, as such, have no such right.
- Liability
  A partner, other than a limited partner, is liable for the debts of the partnership to the full extent of their private estate. A shareholder member of an ordinary limited company bears liability limited to the amount, if any, unpaid on shares. If the company is limited by guarantee, liability is limited to the amount of the guarantee.
- Numbers
  Generally speaking, a partnership cannot have more than 20 members (exceptions include accountants, stock exchange brokers, solicitors, medical practitioners and building designers, such as architects and surveyors). Any type of company can be formed by at least two persons, and there is no maximum.

- Dissolution
  A partnership may be dissolved by:
  - the expiration of the agreed period of its duration;
  - the completion of the particular undertaking for which the firm was formed;
  - the death or bankruptcy of any partner;
  - mutual agreement; or
  - an order of a competent court.

Companies are wound up either compulsorily or voluntarily. The death of a member of a company does not affect the existence of the corporation itself.

Where a partner commits a tort while 'in actual or apparent furtherance of the business', the partnership will be liable for that tort.

The law requires that partners observe the utmost good faith in their mutual dealings. This means that a partner must disclose all profits made in relation to the business, so that such profits may be shared in common.

There are two types of partner – general and limited. A general partner is a partner in the fullest sense, while a limited partner, provision for which is made in Queensland (Partnership (Limited Liability) Act 1988 (Qld)), Western Australia (Limited Partnership Act 1909 (WA)) and Tasmania (Limited Partnership Act 1891 (Tas)), is one whose liability is limited to the amount of any capital investment.

Trade unions and employers' associations

Requirements of registration

Section 188 of the Workplace Relations Act 1996 (Cth) specifies two categories of associations that may apply for registration as an organisation: employer associations and employee associations. The Act states that 'an association of which some or all of the members are employers/employees who are capable of being engaged in an industrial dispute' may apply for registration. So, too, may 'an association of which some or all of the members are employees performing work in the same enterprise'.

Criteria for registration

Section 189 of the Act outlines the criteria for registration, including the provision that every association must be a 'genuine association' for 'furthering and protecting the interests of its members'. In this connection, it must be able to show that it existed prior to applying for registration as an organisation.

Section 189(1)(g) of the Act has established a further criterion of registration, namely, that the association (or its committee of management) must first pass a resolution in favour of registration.

Aggregate employees criterion for employer groups

Section 189(1)(b) provides that the members of an association of employers must have, in the aggregate, throughout the six months before the application, employed, on an average (taken per month), at least 50 employees.

Minimum membership criterion for employee groups

An association of employees must have at least 50 members who are employees (s 189(1)(c)).

Crown proceedings

The expression 'the Crown' may be used to describe (a) the Sovereign in his or her personal capacity, and (b) the Sovereign, as Head of State, in his or her corporate capacity. The Crown, in its corporate capacity, includes Her Majesty's Ministers, the Government departments and the public service, both Commonwealth and State.

Two ancient maxims of the common law determined the relationship of the Crown to a subject: *No action can be brought against the King (or Queen) personally, for he (or she) cannot be sued in his (or her) Courts*; and *The King (or Queen) can do no wrong*. The Sovereign could not, and still cannot, be sued personally for any alleged wrongs he or she may have committed in person. As a corporate body, the Crown was similarly immune from legal liability. The doctrine of vicarious liability (whereby, at common law, a master is liable for the wrongs which a servant has committed in the course of employment) did not apply to the Crown.

Judiciary Act 1903 (Cth)

This Act was passed as a result of the unsatisfactory state of the law regarding legal proceedings against the Crown. Its main object was to place the Commonwealth or a State in the same position, as far as possible, as a private person or employer, that is, able to sue and be sued for breaches of contracts or for torts committed by servants. The Act does not affect the Queen's personal immunity from legal proceedings.

8 General Law of Contract

You should be familiar with the following areas:

- what constitutes a contract
- the essentials of a valid contract
- the ways in which a contract may be discharged
- remedies for breach of contract

'Contract' may be defined

A contract is the result of an agreement between two parties. One person makes an offer, the other accepts it, and, provided they intend that their agreement shall be legally binding and certain formalities are observed or some consideration is given, the result is a contract. Note that is intended by the parties that the agreement should have legal consequences.

Compare the following cases:

- *Balfour v Balfour* (1919)
  Before leaving for Ceylon, the husband agreed with his wife to pay her an allowance while she was detained in England due to illness. Subsequently, they divorced and she sued on the promise. The court held that the agreement was not enforceable: it was only a domestic arrangement.
- *Todd v Nicol* (1957)
  This involved an arrangement for the defendant's sister and niece to move from Scotland to Australia, with the intention that they would live with the defendant. The arrangement was unsatisfactory and the parties were in dispute. The court held that the contract was legally binding.

Essentials of a valid contract

The following are essential to the formation of a valid contract:

- the parties must possess legal capacity;
- there must be an offer and acceptance;
- the resulting agreement of the parties must have been a genuine one;
- the contract must be supported by consideration;
- in certain exceptional cases, the contract must have been made in a particular form;
- the object of the contract must not be one disapproved of by the law.

Contractual capacity of the parties

Infants

Infants (also called minors) are persons under 18 years of age. At common law, contracts with infants may be considered under three headings, namely, valid, voidable and void, depending upon the effect given to them by law.

Valid contracts

Two types of contracts with infants are enforceable:

- contracts for the supply of what is termed 'necessaries'; and
- contracts, usually of service, made for the infant's benefit.

In *Roberts v Gray* (1913), an agreement between the plaintiff and the defendant, an infant professional billiards player, was held by the court to be an instructional contract and to the benefit of the defendant.

Note that the position with regard to trading contracts is that an infant is not necessarily bound because the contract is financially beneficial.

In *Mercantile Union Guarantee Corp Ltd v Ball* (1937), it was held that an infant haulage contractor was not bound by a hire purchase agreement for the purchase of a lorry for use in his trade.

Voidable contracts

There are contracts which the law regards as valid and binding upon an infant, unless and until repudiated by him or her during infancy or within a reasonable time after he or she has attained majority. These are contracts by which infants acquire an interest of a permanent nature in some property.

Void contracts

These may be divided into two types:

- void until ratified – for example, contracts for the purchase of goods or services which are not necessaries, contracts to marry and trading contracts; and
- contracts rendered void by statute – in most States, this would involve debts contracted during infancy.

Parties contract with an infant at their own risk and are not entitled to rely upon statements of the infant as to his or her age.

Position in New South Wales

The Minors (Property and Contracts) Act 1970 (NSW) made substantial changes to the common law. It introduced the concept of 'presumptively binding' civil acts by minors. The foundation of the Act is that a minor is presumptively bound to a civil act in which he or she participates. A civil act includes making a contract.

The Minors Contracts (Miscellaneous) Provisions Act 1979 (SA) is not as comprehensive as the New South Wales legislation. It does, however, provide that a minor may, with the prior approval of the court, enter into a specific contract. The courts may also appoint an agent to act on behalf of a minor.

Persons of unsound mind

An agreement made by a person who is of unsound mind is not voidable if the other party to the agreement believed that, at the time the contract was entered into, the former person was of sound mind. It is for the defendant to prove that not only were they incorporated, but also that the plaintiff was aware of the fact.

Intoxicated persons

It is for the defendant to prove that not only were they so intoxicated by alcohol or drugs that they were incapable of understanding the implications of the agreement, but also that the other party knew or ought to have known of their condition.

Offer and acceptance

Offer

An offer must be an expression of definite intention. It may be addressed to one particular person, a group of people (any of whose members may accept it) or to the world at large – as held by the court in *Carlill v Carbolic Smoke Ball Co* (1893).

An offer must be distinguished from an invitation to make an offer, as in *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd* (1953), where the court held that, in a self-service store, a sale was not effected when a customer took goods from the shelves; this only occurred when their offer to buy was accepted at the checkout counter.

Acceptance

An acceptance must be a complete and unqualified acceptance of the terms of the offer. Therefore, a conditional assent is not enough. The term 'subject to contract' was examined by the High Court of Australia in 1954. It stated that a contract is enforceable where the parties:

- have reached finality/intend to be immediately bound by the terms but propose to have them restated in a fuller form; or
- intend no departure from the agreed terms, express or implied, but have made performance of one or more terms conditional upon the execution of a formal document.

A contract is not enforceable where:

- the parties did not intend to make a concluded bargain at all, unless and until they have executed a formal contract.

Acceptance of an offer must be indicated by either words or conduct. It must be communicated to the offeror by either the offeree or a duly authorised agent, unless the offeror has dispensed with the necessity of notification of acceptance. In *Latec Finance Pty Ltd v Knight* (1969), the court stated that the language in a television hire purchase form was not sufficiently explicit.

Note that the rule with regard to the use of the postal system as a medium of exchange of offer and acceptance – acceptance is deemed to be effected, and the contract therefore formed, as soon as the letter of acceptance is posted.

Revocation of offer

Certain rules govern the revocation of an offer:

- the offeror has the right to recall or revoke an offer at any time before it is accepted by the offeree;
- the revocation must be actually communicated to the offeree before the offer is treated as legally revoked. In *Byrne & Co v Van Tienhoven* (1880), the defendant's letter from Cardiff revoking a sale of 1,000 boxes of tinplates reached the plaintiff in New York after the latter had telegraphed and confirmed this acceptance by letter. The court held that the postal rule was inapplicable to the posting of a letter of withdrawal of an offer.

Note that, where notice of revocation of an offer does not come directly from the offeror or an agent but from a reliable source, this is deemed indirect revocation. This occurred in *Dickinson v Dodds* (1876), where the plaintiff learnt of the sale of a house which had been offered to him from a third party. The court held that there was no contract between the plaintiff and defendant, since the defendant had revoked his offer and this revocation had been communicated to the plaintiff by the third party before the purported 'acceptance' by the plaintiff.

Rejection of offer

An offer may be lapsed:

- on the death of either party;
- if not accepted within the prescribed time: in *Ramsgate Victoria Hotel Co Ltd v Montefiore* (1866), there was a delay in the allotment of shares. The court held that the defendant was not bound to accept the shares allotted, as there was an implied term that allotment should be made within a reasonable time;
- by failure of a condition attaching to the offer.

Agreement must be genuine – consent of parties

In the 19th century, it was commonly thought that a contract resulted from a true meeting of minds – there had to be a genuine consensus *ad idem*. This modern tendency is to determine the existence of an agreement on a more objective basis. However, the assent of one or more of the contracting parties can still be regarded as being affected by the circumstances under which it was given.

Mistake

The law has never taken the view that a contract is void just because one or both of the parties concerned would never have entered into it, had the true facts been known. In *Riverplate Properties Ltd v Paul* (1975), the court stated that there must either mutual mistake or inequitable conduct by one party. There are, nevertheless, some cases in which an apparent contract will be held to be a nullity on the ground of a legally operative mistake by one or both of the contracting parties.

Common mistake

An example of this category is where there is a mistake as to the existence of the subject matter which causes both parties to believe the subject matter to be in existence when it has, in fact, ceased to exist (*res extincta*), as illustrated by the following cases:

- *Couturier v Hastie* (1852)
  The sale of a cargo of corn, supposed at the time of the contract to be in transit from Salonica to the UK, had, unknown to the parties, become fermented and had already been sold by the master of the ship to a purchaser in Tunis. The court held that the buyer was not liable for the price of the cargo.
- *Pritchard v Merchants and Tradesman's Mutual Life Assurance Society* (1858)
  The beneficiary of a life insurance policy, which had lapsed owing to the non-payment of the premium, paid the insurers a renewal premium which was sufficient to revive the policy. The parties were, however, ignorant of the fact that the assured had died before the payment was made. The court held that the contract was void due to the mistake.

However, a different approach was adopted by the High Court of Australia in *McRae v Commonwealth Disposals Commission* (1951), where it was held that the defendants were not able to rely on a claim that the 'contract' was void for common mistake where they invited tenders for the salvage of a wreck which had never been in the position stated in the tender specification.

Mutual mistake

This is a mistake as to the identity of the subject matter where the parties enter into a contract, each believing that the contract refers to a different thing. In *Raffles v Wichelhaus* (1864), two ships called *Peerless* were in Bombay Harbour. The parties referred to a cargo of cotton under the mistaken belief that it was in the same ship. The court held that there was no contract as there were no circumstances which would clearly indicate to a disinterested spectator which ship had been meant to carry the cargo.

Unilateral mistake

This occurs where only one person is mistaken. It will generally be of no effect unless it concerns some fundamental fact and the other party is aware of the mistake. It can arise as to the identity of the person contracted with: the decision in *Phillips v Brooks* (1919), that the plaintiff jeweller had entered into a contract with the rogue before the mistaken identity had become important, should be compared with *Ingram v Little* (1961), where it was held that the plaintiffs had intended to enter into a contract with the real Mr Hutchinson. Therefore, there was no contract between themselves and the rogue who claimed to be Mr Hutchinson.

Considerable doubt was cast on the correctness of the reasoning in *Ingram v Little* by the judgment in *Lewis v Avery* (1972). Here, a person posing as Richard Greene, a well known film actor, offered to buy the plaintiff's car, which was advertised for sale. The plaintiff accepted the offer and was given a cheque signed by RA Greene. Afraid that the cheque might be worthless, the plaintiff resisted a proposal that the car should be removed at once. In order to prove that he was who he claimed to be, the buyer produced a special admission pass to Pinewood Studios, which bore an official stamp. Satisfied with this, the plaintiff handed over the log book and allowed the car to be taken away. The cheque had been stolen and was worthless. 'Greene', now posing as Lewis, sold the car to the defendant and handed the log book to him. The court held that, despite his mistake, the plaintiff had concluded his contract with the imposter.

Nature of the document signed

Generally, as occurred in *L'Estrange v Graucob* (1934), which involved the sale of a vending machine, the court will hold that a person who signs a document is bound by it, even if they have not read it. In *Saunders v Anglia Building Society* (1970), sometimes cited as *Gallie v Lee* (1971), the court held that a widow who signed an assignment, thinking it was a gift to her nephew, was bound by the document.

But if a person signs a document which is entirely, essentially or fundamentally different from what the signer thought it to be, the mistake will render the contract void (*non est factum* – 'not my deed'), as consent is missing. In *Petelin v Cullen* (1975), the plaintiff, who was illiterate, signed an option in favour of the defendant, thinking that it was a receipt. The court held that he had discharged the heavy onus of showing a radical difference between the document he signed and what he thought he was signing.

Misrepresentation

There are two extremes: *uberrimae fidei* – 'utmost good faith' – where the parties are under a duty to disclose information to each other; and the maxim, *caveat emptor* – 'let the buyer beware'.

Misrepresentation may be fraudulent (or wilful), negligent or innocent.

Fraudulent misrepresentation

Fraud is a false representation of past or existing fact, made with knowledge of its falsehood or with reckless carelessness as to whether it be true or false, with the intention that it should be acted upon by another party who is, thereby, induced to act upon it to his or her loss. It will usually be one of fact – a mere statement of opinion or intention is not enough.

Innocent misrepresentation

This may be defined as an incorrect statement as to material fact, made without intention to mislead and without knowledge that the misstatement is false.

Duress and undue influence

Duress

'Duress' can mean actual or threatened violence to the person (not property) of the party concerned, or to their spouse, children or parents. The effect is to render the contract voidable at their option. So, in *Barton v Armstrong* (1973), where death threats against the plaintiff were held to be the reason for his entering into the contract, he was entitled to evade the contract.

Undue influence

This occurs where a party enters a contract under any kind of influence which prevents him or her from exercising a free independent judgment, known as a fiduciary relationship. The significance of the fiduciary relationship to the doctrine of undue influence is that, when such a relationship exists, the courts will be more ready to presume that undue influence has occurred. The onus of rebutting this presumption will then lie on the fiduciary.

Consideration

This is essential to the formation of any contract which is not made by deed. It was defined in *Currie v Misa* (1875) as:

> ... some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

In other words, the plaintiff must show that the defendant's promise was part of a bargain between them. The plaintiff must show that he or she gave, or promised to give, some advantage to the defendant in return for his or her promise. This advantage moving from the plaintiff to the defendant is known as *consideration*.

The plaintiff can establish either that he or she had conferred a benefit upon the defendant, in return for which the defendant's promise was given, or that he or she had incurred a detriment, for which the promise was to compensate. A different approach to the problem of consideration may be made through the language of purchase and sale. Sir Frederick Pollock summarised the position in a statement adopted by the House of Lords in *Dunlop v Selfridge* (1915):

> An act or forbearance of one party or the promise thereof, the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

Note that consideration may be 'executed' or 'executory' – it must not be 'past'. It need not be adequate to the promise, although it must be of some sufficient value in the eyes of the law – it must not be of too vague or indefinite a nature.

Estoppel

'Equitable', 'promissory' or 'quasi' estoppel were considered in *Central London Pty v High Trees House* (1947), where the plaintiffs let a block of flats to the defendants before the Second World War. In the first year of the war, many flats were unoccupied, so the plaintiffs agreed voluntarily to reduce the rent. The court held that:

(a) after the war, the plaintiffs could at any time demand the full rent again, as they had received no consideration for their promise to reduce the rent; and

(b) they could not claim any of the arrears of rent because, by their conduct in allowing a reduction, they had induced the defendants to do something (that is, retain the lease) which they would not otherwise have done.

In general terms, the principle in the *High Trees* case, as stated by Lord Denning, can be quoted as follows:

> If A, without consideration, makes a promise to B, which is accepted and acted upon by B, and the parties intended this promise to be a legally binding one, then B will be able to set up this promise by way of defence if he is sued by A.

Note the words 'by way of defence' – it was considered at that time that the principle could be employed only as a weapon of defence, not as the basis for an action. In *Combe v Combe* (1951), a husband had separated from his wife and agreed to make annual allowance to her. She failed to apply to the court for maintenance, he never paid, and, because of the delay, the wife was unable to claim through the court.

In the wife's action against her husband, the court held that she could not rely on his promise, as she had not given any consideration, and the *High Trees* rule did not apply, as it could be used by way of defence only.

The High Court of Australia expressed the view in *Legione v Hateley* (1983) (where there was a dispute with regard to a conveyancing situation) that the doctrine of promissory estoppel was applicable in Australia, at least as between parties in a pre-existing contractual relationship.

In *Waltons Stores (Interstate) Ltd v Maher* (1988), the plaintiffs (Mahers) had commenced the construction of a new store on the implied promise of the defendants (Waltons) that they would lease the property. When Waltons refused to execute the agreement, the court held that they were estopped from denying the existence of an agreement with the plaintiff. In effect, the court departed from the principle established in *Combe v Combe*.

Cases where the contract must have been made in a particular form

Specialty contracts are contracts made by deed, while simple contracts are those made in another form. A deed is a written instrument which has been signed, sealed and delivered – if not delivered, it is known as an 'escrow'.

Note that the law, for a variety of reasons, requires that some contracts be in a particular form:

- Made by deed
  Included in this category are agreements not supported by consideration; certain contracts made by corporations; power of attorney; or certain dealings with land or conveyance or lease for a period exceeding three years.
- In writing
  Certain simple contracts are required, usually by statute, to be entirely in writing and will be void or unenforceable unless so made, for example, bills of exchange, promissory notes and cheques; bills of sale; stock mortgages; hire purchase agreements, which are not enforceable by the owner of the goods if not reduced in writing; certain credit sale contracts, loan contracts, goods, mortgages and guarantees as defined in legislation such as the Credit Act 1984 (NSW).

- Evidenced in writing
  Certain other simple contracts are not enforceable unless there is written evidence of their terms. The historical source of this is the Statute of Frauds 1677 (UK). Whilst State enactments have, more or less, amended its operation, in a number of instances, its repealed provisions have been replaced with local legislation, especially with regard to the disposition of interests in land.

Void or illegal contracts

It is important to note the difference between contracts rendered illegal or void by statute as compared to those rendered illegal or void at common law.

Effects of contracts in restraint of trade

Such contracts are *prima facie* void but may be enforceable if they are:

- necessary to protect the interests of the party in whose favour the restraint operates;
- not unreasonable as regards the party restrained;
- not injurious to the public.

Three kinds of contract

Every agreement in restraint of trade is *prima facie* illegal or void. It might be valid if it is reasonable between the parties and not against the interests of the public, for example:

- an agreement between employer and employee to prevent the employee competing with the employer after leaving their employment;
- restraints on sale of a business;
- restraints regulating trade conditions.

Discharge of contract

A contract is discharged when it ceases to be operative, so that all rights and obligations which had existed under it are extinguished.

A contract may be discharged in the following ways:

- by actual performance;
- by attempted performance;

- by agreement between the parties;
- by virtue of a term in the contract – a 'condition precedent' or 'condition subsequent';
- by operation of law – upon merger, bankruptcy or material alteration of written document;
- by frustration – where performance becomes illegal, the subject matter is destroyed, a state of affairs ceases to exist, a future event does not occur, upon the death of party (personal services), upon government interference;
- by breach.

Remedies for breach of contract

When a contract is broken, the injured party may pursue several courses of action. These are:

- repudiation;
- to bring an action for damages;
- to sue for a *quantum meruit*;
- to apply for an order of specific performance or injunction.

9 Torts

You should be familiar with the following areas:

- the nature of a tort
- the distinction between trespass and trespass on the case
- how to prove negligence
- the differences between public nuisance and private nuisance

What are torts?

The word 'tort' derives from the Latin *tortus*, meaning crooked or twisted, and the Norman-French *tort,* meaning 'wrong'. In Australian law, the word 'tort' is used to denote certain civil wrongs as distinct from criminal wrongs.

Nature of a tort

A simple definition of a tort is 'a civil wrong other than a breach of trust or a breach of contract'.

A tort has been defined as:

> ... a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of trust or other merely equitable obligation [Salmond, JW (Sir), *Salmond and Heuston on the Law of Torts*, 19th edn, 1987, Sweet & Maxwell].

A tort must be distinguished from:

- a breach of contract, where the obligation of which a breach is alleged arose from the agreement of the parties;
- a breach of trust, where the duty broken is known only to equity and not to a common law right to damages;
- a crime, one of the objects of criminal proceedings being the punishment of the offender rather than the compensation of his or her victim.

Trespass and trespass on the case

In the UK, the early law did not distinguish between civil and criminal wrongs. Later, however, the idea sprang up that certain wrongs of an anti-social kind, for example, treason, murder, theft, arson, etc, were offences against the King or the State. The King's Peace, as it was called, extended to every corner of the land, and all crimes were at the same time breaches of the peace. Certain other wrongs which were done by one person to another were disregarded by the King and the State. These were left to be enforced by the person claiming to be injured or wronged. The injured plaintiff decided whether to take action or not. The claim, if any, was for damages, that is, money compensation or reparation for the injury inflicted by the defendant.

Whether or not a plaintiff had a right of action against another for an alleged wrong depended on the existence of a writ with which to begin the action. The available rights depended in practice on the available writs. The forms of action, as they were called, enshrined the rights. If there was no writ, there was no remedy available in the courts of law.

The most important all purpose writ which covered the common civil wrongs in medieval society was trespass. This was available for all direct injuries to the person, goods or lands. Thus, a personal injury to another, for example, assault and battery, damage to personal goods, gates, hedges or lands, or mere entry on lands or cattle trespass, fell within the ambit of trespass.

The writ of trespass was aptly called 'the fertile mother of actions'. After the Statue of Westminster II 1285, there grew up offshoots of trespass, named 'trespass on the case'. Whereas the writ of trespass was available for all direct and forcible injuries, the writ of trespass on the case was used for all injuries which were *indirect*.

For example, where A walked across B's land or lifted B's gate off its hinges, or punched B on the nose, there was a direct and forcible injury to the property or person of another; therefore, the writ of trespass lay.

But, where A lit a fire on his or her own property, which spread to a neighbour's house and burned it; or where A dug a hole, into which B fell; or where A left a log in the road and B tripped over it and was injured, A's action was not direct and forcible. Thus, the writ of trespass would not lie. The plaintiff would, therefore, have to proceed by trespass on the case.

Intentional torts

Intentional torts can be classified under three headings: (a) trespass against the person; (b) trespass against chattels; and (c) trespass against land.

Trespass against the person

This may be considered under several headings.

Assault

This takes place where a person intentionally creates in another person an immediate fear of unlawful force. Words without an accompanying threatening gesture or movement do not constitute assault. Also, the fear of force must be reasonable (see *Tuberville v Savage* (1669) (assize time)).

Battery

This is the actual application of unlawful force. It can be committed if there is a contact, however slight. There need be no actual bodily contact between the plaintiff and defendant, as long as force is actually applied.

False imprisonment

This is the total restraint, without lawful cause, by one person of another's freedom of movement. The restraint must be all encompassing and there is no tort if there is a reasonable means of escape. The imprisonment must be involuntary, in that there is no express or implied consent by the plaintiff. Neither assault nor battery are essential to this tort, although they are often present. The operation of this tort may be illustrated by *Merring v Graham-White Aviation Co Ltd* (1919), where the plaintiff was unaware that he was being kept in the offices of his employers on suspicion of theft.

Trespass against chattels

There are several types of trespass against chattels, including trespass to goods, conversion and detinue.

Trespass to goods

This will be committed where there is a direct or unlawful interference with goods in the actual possession of another person. There must be an actual possession and not merely the right to possession. Damage is generally assessed as follows:

(a) if the goods are removed, the damage is the full value of the goods;

(b) in all other cases, the damage is the loss actually suffered.

Conversion

This is, in a sense (but only in a sense), the civil counterpart of the crime of theft. However, it rests on a different basis, since it is committed when a person deals with the goods of another in such a way as to show that he or she calls the title of the other into question. Clearly, the most obvious form of conversion is, therefore, the wilful taking of another person's goods, but this is not the only form. For example, a person who innocently acquires goods from a thief (where he or she cannot give title to them), unless protected by law (for example, the Factors Act 1923 (NSW)), will usually be liable in conversion if he or she does anything which affects the title. There can also be acts amounting to conversion: where goods are wrongfully taken, delivered, detained, changed, used, disposed of or destroyed and there can be attributed to the defendant an intention to exercise dominion over them, the wrongdoer may be sued in conversion.

An action in conversion is an action for damages, so that:

- generally, the damages award are the value of the chattel and, upon payment, ownership passes to the defendant;
- value is assessed as at the date on which the plaintiff knew or should have known of the conversion;
- the plaintiff may sue for damages, even where the chattel is returned.

Detinue

This occurs where a person wrongfully retains or refuses to return a chattel to the person who is entitled to immediate possession, when asked to do so. The plaintiff must prove:

- a right to immediate possession;
- that a specific demand has been made for the chattel;
- that the defendant has not complied with the demand.

Note that the court has a discretion to order return of the goods and/or make an award for damages.

Trespass to land

This consists of unlawfully and without consent (express or implied) entering or remaining on the plaintiff's land or putting, throwing or leaving something on the plaintiff's land.

Note that the proper plaintiff in trespass is the person entitled to exclusive occupancy of the land. Although this will normally be the owner, it may be a tenant. A situation can arise where, if he or she enters onto premises leased to a tenant in breach of the lease, a landlord may be sued in trespass. Like all trespass torts, the plaintiff need not prove damage: the amount of damages awarded will be loss in value of the land caused by the defendant's conduct or a charge for the use of the land. (This could be expressed as *actionable* per se *without proof of special damage*.) The plaintiff could also seek an injunction restraining the defendant from further or continuing trespasses.

Negligence

Negligence may be an element determining liability for many torts, or it may be an independent tort, consisting of a breach of a legal duty to take care which results in damage.

Basis of negligence

The basis of negligence is the absence of reasonable conduct in the circumstances. Therefore, negligence is said to have three elements that must be satisfied by the plaintiff:

- the defendant owed the plaintiff a legal duty of care – the duty of care;
- the defendant must, in some way, have breached that duty – the standard of care;
- the plaintiff, as a result, must have suffered damage and that damage must not be too remote – damage caused to the plaintiff by that breach.

Duty of care

The duty of care was defined by Fleming in *The Law of Torts* (8th edn, 1993, Law Book Co) as 'an obligation recognised by law to avoid conduct fraught with unreasonable risk of danger to others'.

It is, therefore, for the plaintiff to establish that a duty of care was owed to him or her by the defendant. This may be illustrated by the case of *Donoghue v Stevenson* (1932), where a bottle of ginger beer was purchased for the plaintiff in a café. She became ill from drinking the contents, and it was discovered afterwards that the bottle contained the decomposed remains of a snail. The consumer sued the manufacturer in negligence. The court held that the manufacturer was liable to the consumer in negligence.

In this most important case, Lord Atkin laid down a broad definition of the duty of care:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour ... Who, then, is my neighbour? The answer seems to be persons who are so affected when I am directing my mind to the acts or omissions which are closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question.

Note that the general duty of care principle was first substantially established in Australia in *Grant v Australian Knitting Mills* (1936), where Dr Grant purchased from a retailer some underwear containing a chemical dye that reacted adversely with his skin, causing him to contract dermatitis. The High Court, applying *Donoghue v Stevenson*, held that a duty of care was owed by the manufacturer of the underwear to the customer.

It is for the judge to decide, as a question of law, the existence or otherwise of a duty of care in the particular situation. Sometimes, it is policy rather than law that governs the attitudes of the appeal courts. They will look at whether a situation involves a reasonable risk and then consider whether policy should extend, limit or modify the scope of the duty involved.

Standard of care

Granted that a person in a given situation must use care to another, the question is: what standard of care is he or she required in law to use? The answer here is that the standard of care is that of an ordinary prudent person, in other words, that care which a reasonable person would exercise or show in the circumstances of the particular case under consideration.

The degree or amount of care (to be distinguished from the standard) is variable. For example, one is expected to take more care in handling a loaded gun than in handling a walking stick. Where serious consequences may follow from carelessness in a particular situation, the greater degree of care must be exercised. One expects a manufacturer of, or dealer in, explosives to manifest a high degree of care; similarly, one would expect a high degree of care to be exercised by a manufacturer of poisons and drugs.

Where a person sets him or herself up as possessing a particular skill, for example, a surgeon, industrial chemist or accountant, he or she must exhibit, in following that calling, the skill which is usually found in such a person. A plumber, carpenter or labourer may not display the same amount of skill as a highly qualified heart specialist, but the same legal standard applies to both.

The test to be applied is: what is reasonable in the circumstances of the case, having regard to the person's particular profession or occupation?

Note that a minor is generally responsible for his or her tortious acts. However, a minor is only expected to conform to the standard expected of a normal person of similar age or experience.

Negligent misstatement

Formerly, the general rule was that a person was liable for negligent acts but not for negligent words. Where, therefore, a negligent statement was made, even though it was intended to be acted on by the plaintiff and was, in fact, acted on by him or her to his or her loss, no liability fell on the defendant. This was rectified by the House of Lords in *Hedley Byrne v Heller* (1964), where it was held that the defendant bankers would have been liable in negligence for giving a misleading report as to creditworthiness which was acted on by the plaintiffs, who would have suffered heavy loss as a result, had the defendants not expressly disclaimed liability.

The principle was extended by the High Court in *Shaddock v Parramatta CC* (1981), where the council informed the solicitor for the purchaser of real estate that the land being purchased was not affected by road widening proposals. This information was wrong and the purchaser suffered damage. The High Court held that the council was liable for the damage suffered.

The principles established from these cases are that a person suffering damage because of negligent advice or information is entitled to recover damages from the giver of the advice or information if it can be shown that:

- the giver had a special skill or knowledge, or he or she held him or herself out as having that skill or knowledge;
- the plaintiff relied upon the skill and knowledge and the advice given and, as a result, suffered the damage;

- the advice or information was given on a serious matter;
- there was no disclaimer of liability issued by the defendant.

Res ipsa loquitur

Where the facts of an accident in themselves are sufficient, in the absence of an explanation, to justify a finding of negligence, the plaintiff need not be put to the proof. This is expressed by the maxim *res ipsa loquitur* ('the thing speaks for itself'). This may be illustrated by *Byrne v Boodle* (1863), where a barrel of flour fell from an open door on an upper floor of the defendant's warehouse, injuring a passer by in the street. The court held that this was evidence to go to the jury without further explanation. Barrels which are properly handled do not generally so fall, and a jury might reasonably infer negligence on the part of the defendant.

The presumption is one of fact, not law, and it must be twofold:

(a) the accident was caused by a breach by somebody of a duty of care to the plaintiff;

(b) somebody was the defendant.

In *Schellenberg v Tunnel Holdings Pty Ltd* (2000), the High Court held that the principle of *res ipsa loquitur* is not a distinct, substantive rule of law, but an application of an inferential reasoning process; and the plaintiff bears the onus of proof of negligence even where the principle is applicable.

Contributory negligence

At common law, any contributory negligence by the plaintiff was a complete bar to his claim for damages. The Law Reform (Miscellaneous Provisions) Act 1965 (NSW) basically provides that, in cases where contributory negligence is found against the plaintiff, any damages are to be adjusted proportionally to the respective faults.

Nuisance

Nuisances are of two kinds: (a) public; and (b) private.

Public nuisance

A public nuisance is some unlawful act or omission which endangers or interferes with the lives, safety or comfort of the public generally or some section of the public, or by which the public, or some section of it, is obstructed in the exercise of a common right.

It is a public nuisance to keep to keep a brothel, to obstruct the public highway and to erect a factory which emits excessive smoke, fumes or dirt so as to cause discomfort to persons in the locality, although the latter could also give rise to a private nuisance.

A public nuisance is a *crime*, punishable at common law on indictment. It is also provided for in the Criminal Codes of Queensland, Tasmania, Western Australia and the Northern Territory. Usually, the criminal proceedings are undertaken by the police. Action may also be taken on behalf of the public by the Attorney General, who may also sue for an injunction to restrain further offences. In addition, a private person may sue (not prosecute) the person committing the public nuisance if it can be shown that they have suffered peculiar damage over and above that suffered by the public generally. Thus, to dig a trench in a public highway without lawful authority is a public nuisance and, thus, a crime. If A falls into the trench, or if the trench interferes with A's right of way onto their own premises, he or she may show peculiar damage to him or herself and sue the person who excavated the trench.

In *Benjamin v Storr* (1874), B kept a coffee house in Covent Garden. S continually kept horses and vans outside the coffee house, thereby obstructing the highway. B alleged that damage had been caused because the vans obstructed light to the shop windows so that B had to provide gas lights all day long and that the smell from the horses made the premises objectionable, deterring customers. The court held that B could lawfully sue because special damage had been suffered.

In *Lyons, Sons & Co v Gulliver* (1914), the defendants were occupiers of a theatre. Popular performances at 2.30 pm and 6.30 pm caused queues, which obstructed customers to an adjacent shop. The court held that the plaintiff suffered particular damage and the nuisance was actionable at the suit of the adjacent shop owner.

In *AG v PYA Quarries Ltd* (1957), the defendants owned and used a quarry at which rocks were blasted. Some stones and splinters were hurled out of the quarry, and dust and vibration caused discomfort to nearby dwellers. The court held that this was a public nuisance.

Private nuisance

A private nuisance is an unlawful interference with a person's use of their property or with their health, comfort or convenience. It is, in fact, a wrongful act or omission causing material injury to property or sensible personal discomfort.

There are two main classes of private nuisance: (a) interference with the enjoyment of land generally; and (b) injuries to servitudes. Of these two classes, the first is the more important; the second deals with servitudes or easements (for example, rights of way, rights of light and rights of support to land) and is more appropriate to a specialised study of Australian land law than the present book.

There are, of course, many varied acts which may constitute nuisance. Noise, vibrations, fumes, smell, smoke, dirt and damp are fairly obvious ones, and are part of the normal pattern of life.

Nuisance is not (in contrast to trespass) actionable *per se*. Some damage must have occurred to the plaintiff in order to enable an action to be brought.

The basic rule is that one should use one's property in such a way that no harm is caused to another (expressed by the Latin maxim, *sic utere tuo ut alienum non laedas*). More simply, one should 'live and let live' and act reasonably towards one's neighbours.

A balance has to be maintained between the right of the occupiers to do what they like with their own property, and the right of a neighbour not to be interfered with. It is impossible to give any precise formula, but it may broadly be said that a useful test is perhaps what is 'reasonable according to the ordinary uses of mankind living in society' (*Sedleigh-Denfield v O'Callaghan* (1940), *per* Lord Wright).

The following points are relevant to private nuisance and are helpful in understanding the field of law affecting this tort:

- Health and comfort
  There need be no direct injury to health. It is sufficient that a person has, to an appreciable extent, been prevented from enjoying the ordinary comforts of life.
- Standard of comfort
  The standard of the 'ordinary comfort of life' varies with the locality affected. Thus, for example, in Sydney, there is a difference between Pymble on the North Shore and King's Cross in the City. One area may be relatively quiet and peaceful, another bustling and noisy. The only exception, under this heading, seems to be that an interference with light to a building will be dealt with equally

regardless of location, for 'one requires as much light to sew in Double Bay as in Glebe'.

- Variety
  The modes of annoyance are infinitely diverse: stenches, filth, the use of radio, church bell-ringing and circus performing may all be nuisances.
- Several wrongdoers
  A nuisance may be caused by the combined operation of several wrongdoers. Their joint action or cumulative action (if operating separately) may result in nuisance. If for example A, B, C and D are involved in committing the nuisance, a plaintiff may sue all of them jointly, or one only may be sued for the total damage. If the latter option is taken, A will have a right of contribution from B, C and D, the joint tortfeasors, for their portion of the damage caused.
- Extra sensitivity
  As has been observed, reasonableness is the test. A person cannot take advantage of their personal sensitivity or be over-protective of their property. As stated above, one cannot expect the same standards to exist in a crowded industrial city as those which hold in a country town. There must be 'give and take'.
- Utility of the nuisance
  Pig sties, tanneries, lime kilns, quarries and fried fish shops are perhaps useful for the general well being, but if their operation causes serious or appreciable discomfort, they are a nuisance. The allegation that the trade or industry is 'for the public benefit' is no defence in law.
- Malice or evil motive
  This may, in some cases, be the essence of the tort, in as much as the wrongdoer's improper motive may show that he or she is not acting reasonably and lawfully. An act which is intended to annoy a neighbour may, therefore, be a nuisance, as held in *Hollywood Silver Fox Farm v Emmett* (1936) (see below, p 128).
- Prescription
  A person may acquire a right to commit a nuisance by long usage, for example, 20 years' continuous operation since the act complained of first became a nuisance.

Who may sue and be sued

The occupier of the property (for example, a tenant) affected by the nuisance is the person who brings the action (*Malone v Laskey* (1907)). A landlord may, however, sue in some cases, for example, where permanent damage is caused, or will be caused, to the property.

The person to be sued is the one who creates the nuisance. Where premises are leased, a landlord may, however, be liable if (a) the landlord creates the nuisance and then leases the property, or (b) the landlord authorised, expressly or impliedly, a tenant to commit or continue the nuisance (*Harris v James* (1876)).

Defences

The following defences may be raised in nuisance:

- Statutory authority
  It is a defence to show that a statute authorises the act or omission in question.
- Triviality
  A defendant may prove that the act or omission is small and trivial, for example, smoke from an ordinary garden fire on one morning only. The maxim is *de minimus non curat lex* ('the law does not concern itself with trifles'). Minimum discomfort must be expected on the basis of 'give and take'.
- Lawful use of land
  The defendant may prove that the use of the land does not give rise to a nuisance (*Bradford Corp v Pickles* (1895)).
- Prescription
  This is a defence in private nuisance, but not in public nuisance (which is a crime).
- Reasonableness
  The act or omission is reasonable, having regard to the locality concerned, so that there is a failure to prove an action.

The following defences are, therefore, ineffectual:

- that the plaintiff came to the nuisance. If a person goes to the place where a nuisance exists, he or she is not barred from his or her claim. The question is whether the act is reasonable in that locality (*Sturges v Bridgman* (1879); *Bliss v Hall* (1838));
- that the particular act is for the public benefit;
- that all care and skill have been used to prevent a nuisance.

Remedies

The following remedies exist:

- Abatement
  This means 'self help'. The injured party may stop the nuisance by removing the cause. But the abater must not, in the process, infringe another's rights. Abatement is not favoured as a remedy by the law, and, where entry on another's land is contemplated, notice to the alleged tortfeasor should first be given to remedy the alleged nuisance before entry is affected, unless there is an emergency (*Lemmon v Webb* (1894)). A common example of abatement is the cutting of roots and branches projecting from a neighbour's trees: such roots and branches may be sawn off, but they remain the property of the person who owns the trees (*Mills v Brooker* (1919)).
- Damages
  This is the ordinary common law remedy.
- Injunction
  Application may be made to the court for an order to restrain further acts constituting the nuisance if it can be proved that the nuisance will recur and do irreparable damage to the plaintiff.

Distinction between trespass and nuisance

The torts of nuisance and trespass to land are similar, in that both affect land. Nevertheless, there are important distinctions, as indicated below.

Trespass	Nuisance
Actionable *per se*	Must prove *damage*
Direct physical interference to land (eg, placing rubbish on a neighbour's land)	Need not be direct (eg, allowing bricks from a ruinous chimney to fall on a neighbour's land)
Wrongful *entry* of an object or person on another's land	No entry necessary. Can be created on defendant's own land
May consist of *one act* only	Usually, more than one act is necessary
Trespass to land is *not* a crime	*Public* nuisance is a crime

The following cases illustrate this distinction:

- *Clarey v Principal and Council of The Women's College* (1953)
  The plaintiffs let the rear of their weatherboard house to the defendants so that accommodation could be provided for students and staff. They alleged that noisy and rowdy behaviour constituted a nuisance and sued for repossession. *Held*: the defendants were not liable. The noises were of the kind incidental to the occupation of the premises as a dwelling. Discomfort arose because the plaintiffs and defendants were living under the same roof, in an old weatherboard building in which noises were very audible.

- *Kraemers v AG for Tasmania* (1966)
  The defendant (the Public Works Department) removed a bank from privately owned land in order to extract gravel for roadwork purposes. This resulted in water flowing into an old gravel pit and percolating through and causing damage to the plaintiff's land. *Held*: the defendant had created the nuisance, which was not a natural and reasonable use of the land. The defendant was therefore liable for all damage resulting from the seepage of the water as a result of the removal of the bank.

- *Munro v Southern Dairies Ltd* (1955)
  The plaintiff claimed that the defendants, who were milk distributors, interfered with the plaintiff's quiet enjoyment of his premises. It was alleged that a nuisance arose because of noise, smell and flies arising from the fact that horses were kept on the defendants' premises. *Held*: there was a nuisance.

- *Hollywood Silver Fox Farm v Emmett* (1936)
  The plaintiff bred silver foxes on land where a sign was erected. The defendant owned an adjacent field. A dispute arose over the sign, and the defendant sent his son to discharge a 12 bore shotgun near the plaintiff's land, which frightened the vixen, affected their breeding habits and caused them to miscarry their young. The plaintiff sued in nuisance. *Held*: this was an actionable nuisance. The defendant's malicious motive rendered his actions a nuisance, and an injunction was granted to restrain him from firing the gun near the vixen in future.

10 Equity

You should be familiar with the following areas:

- reasons for the development of equity
- concept of the trust and the role of the trustee
- classification of equitable remedies

Introduction

In a general sense, 'equity' means 'fairness'. In Australian law, equity is that body of rules originally enforced by the Court of Chancery. Equity has been described as 'a gloss on the common law' (meaning a supplement to the common law), filling in the gaps and making the legal system more complete.

Inadequacy of the common law

In medieval times, the common law experienced problems created by the rigidity of the writ system. In order to understand why equity developed as it did, these problems must be examined in greater detail.

Proceedings in the common law courts started with the issue of an 'original' writ (so named because it originated the proceedings), which was purchased from the main royal office, the Chancery. The writ was a formal document addressed to the sheriff of the county where the defendant resided, commanding him to secure the presence of the defendant at the trial and setting out the plaintiff's cause of action or ground of claim.

The plaintiff attended the Writ Office of the Chancery, where a register of the various writs was kept, and applied for the writ most suitable to his claim. It could be said, therefore, that the writ system dominated the civil law – for only where there was a remedy was there a right – expressed in the Latin phrase *ubi remedium ibi jus*.

Note the Provisions of Oxford 1258 and the Statute of Westminster II 1285 (see above, p 10).

Lord Chancellor's jurisdiction

The practice arose whereby persons unable to obtain justice in the common law courts petitioned the King, as the 'fountain of justice', for relief. These petitions were sometimes examined by the King and his Council (*Curia Regis*) and the relief was granted or refused. Later, due to the pressure of business in the Council, a proclamation of Edward III in 1349 provided for the petitions, as matters of grace, to be sent to the Lord Chancellor, who, as Chief Secretary of State and 'Keeper of the King's Conscience', dealt with them alone.

By the end of the 15th century, the Chancellor had set up his own court to deal with petitions for relief. The Chancellor was not bound by the writ system or the technical and formal rules of the common law and considered petitions on the basis of conscience and right.

At first, the Chancellor consulted the Council and sometimes the common law judges, but eventually, it became customary to summon the parties to the dispute to appear before him alone to answer 'interrogatories' (specific questions relevant to the issue) and to unburden their consciences so that the truth could be ascertained and justice done.

Procedure in Chancery by petition or bill was unique, as the process involved the writ of subpoena, under penalty, compelling attendance before the Chancellor for examination, disobedience of which was punishable by arrest and sequestration of property. This was a procedure of great superiority to common law process and explains the maxim 'equity acts *in personam*'.

Conflicts between law and equity

The Court of Chancery proved popular with litigants and this caused friction with the common law courts. Jurisdiction was lost to the Chancery Court. Sometimes, the courts of common law and the Chancery Court issued contradictory verdicts, and relations between the two became difficult. The dispute came to a head under James I (1603–25) in the *Earl of Oxford's Case* (1615). The common law courts, headed by Coke CJ, gave a judgment which was alleged to have been obtained by fraud. The Chancellor, Lord Ellesmere, issued an injunction preventing the successful party from proceeding to enforce the judgment, whereupon the dispute was referred to the King for decision. The King sought the views of Sir Francis Bacon (the Attorney General), who advised that, 'where common law and equity conflict, equity should prevail'.

Later history

The history of equity in the 19th century was notable for the delays which occurred in settling disputes and the confusion over jurisdiction. Lord Eldon's rule as Lord Chancellor has been described as 'ponderous' (one case is reported to have lasted 10 years). The delays may have been caused by the numerous duties which the Lord Chancellor was called upon to perform. In the 19th century, complaint was also made of the cost of proceedings, and it should be remembered that the clerks and assistants in the Chancery Court received emoluments from the litigants themselves, a system which evoked much criticism.

English courts

Judicature Acts 1873–75 (UK)

In the early part of the 19th century, there was a tendency for the systems of business in the courts of common law and equity to be brought closer together. This paved the way for the setting up of a single court, in which both law and equity should be administered concurrently.

In 1867, a commission was appointed to enquire, among other things, into the operation and effect of the separation and division of business between the various superior courts of law and equity.

In accordance with the Judicature Acts 1873–75, the superior English courts were entirely reorganised and were placed substantially upon their present day footing. One Supreme Court of Judicature was set up and this consisted, as it does now, of two branches: the Court of Appeal; and the High Court of Justice, which, when it came into operation on 1 November 1875, consisted of the following divisions:

- the Queen's Bench Division, of which the Assize Courts technically became a part;

- the Chancery Division;
- the Common Pleas Division (merged into the Queen's Bench Division in 1881);
- the Exchequer Division (merged into the Queen's Bench Division in 1881);
- the Probate, Divorce and Admiralty Division.

By s 25 of the Judicature Act 1873 (UK), points of conflict between law and equity were resolved. This section set out a series of rules to govern certain specific point, and, in its final sub-section, enacted that:

> ... for the future; in all matters not hereinbefore mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same subject matter, the rules of equity shall prevail.

Note that the Acts did not fuse law and equity into a single system of rules, as nothing short of codifying the whole law could achieve this; they only provided that, in the future, the two systems should be administered in the same courts.

Judicature Act system – effect on Australian law

Early English influence

When courts were established in the Australian colonies, there was no warrant for separating law and equity in different courts; the Supreme Courts established after 1824 were courts of general jurisdiction. However, local practitioners and judges were so attached to English models that each court was treated as being notionally divided into a court of law and a court of equity, with appropriate remedies available only when the judge was acting accordingly. This unnecessary refinement meant that, after England had adopted the Judicature Act system, the Australian colonies had to decide whether to accept a reform which only their previous copying of English practices required. Both Sir Samuel Griffith (Queensland) and WE Hearn (Victoria), in proposing Judicature Acts for their respective colonies, stressed that they merely restored the status quo of 40 years earlier.

Subsequent development

In fact, the general enactment of the Judicature Act system was a slow, disputatious progress. Adopted fairly rapidly by Queensland (1876), South Australia (1878), Western Australia (1880) and, with rather more dissent, Victoria (1883), the concurrent administration of law and equity was not achieved in Tasmania until 1932. More remarkably, New South Wales rejected the system outright. The Equity Act 1880 (NSW) was a movement in the opposite direction, towards the formal separation of equitable jurisdiction, and, although the New South Wales legislature thought the Act only a temporary expedient before the rapid introduction of general reform, the separation lasted 90 years (Supreme Court Act 1970 (NSW); Law Reform (Law and Equity) Act 1972 (NSW)), being defended to the last by equity practitioners.

Current position

Today, the fundamental principle in each State and Territory is that equitable rules and remedies should be accessible to judges exercising jurisdiction in any court. In case of conflict, equitable rules prevail. Each court is instructed as follows:

> ... to grant ... as shall seem just ... all such ... remedies whatsoever as any of the parties ... may appear to be entitled to in respect of any and every legal or equitable claim ... so that, as far as possible, all matters so in controversy ... may be completely and finally determined and all multiplicity of legal proceedings ... avoided.

This means that no longer does one court need to restrain proceedings in another court, and no longer do litigants have to sue several times in order to achieve a single result, at least not on the grounds of the separation of law and equity.

Trusts

Definition

Sir Arthur Underhill defined a trust as:

> ... an equitable obligation imposing upon a person (who is called a trustee) the duty of dealing with property over which he has control (which is called the trust property) for the benefit of persons (who are called beneficiaries or *cestuis que trust*) of whom he may himself be one, and any one of whom may enforce the obligation [Hayton, DJ, *Underhill and Hayton's Law Relating to Trusts and Trustees*, 15th edn, 1995, Butterworths].

Development

Trusts originally developed in the Middle Ages as devices for avoiding certain of the feudal obligations which attached to the ownership of land. When a freeholder died, his heir was entitled to succeed, upon payment of dues to the feudal overlord (who may have been either another landowner or the King). The freeholder transferred his title to the land to trustees, who undertook to hold the land to the use of the freeholder and, after the latter's death, to use of his heir. Therefore, no dues were payable when the original owner died, as his death did not affect the title to the land. If one of the trustees died, the surviving trustee(s) were still the legal owners, so no dues arose and another trustee was appointed to replace the one who had died. Furthermore, if a man died leaving an infant heir, the overlord had rights of wardship (whereby he could use the ward's land for his own benefit), but, as the heir was heir to nothing, the overlord gained no benefit here. As the King suffered most from the loss of these rights and revenues, legislation was introduced to prohibit trusts (or 'uses', as they were then called), namely, the Statute of Uses 1535, but lawyers used their ingenuity to find ways round the statute. With the abandonment of feudal rights, the Crown no longer had an interest in prohibiting trusts, which continued to develop, as they were convenient devices for administering property, quite apart from the taxation aspect.

As the legal title to the land was transferred to the trustees, they were looked upon as owners in the common law courts, and the rights of the beneficiaries were ignored. The Court of Chancery accordingly stepped in to enforce the trust, as it was clearly inequitable that a person should accept property on the understanding that he should take for the benefit of another and then appropriate it for himself. It is because trusts were not a common law obligation, but were only enforceable by the Court of Chancery, that they are known as equitable obligations.

Trust property

Generally speaking, all kinds of property, both real and personal, may be held on trust; but, in practice, most trust property includes land, stocks and shares.

Parties to the trust

There are three parties to a trust:

- settlor – the owner of the property;
- trustee – the holder and controller of the property while the trust is in force;
- beneficiary – the person for whom the property is being held.

Modern purposes of trusts

Trusts are employed widely today for protecting the interests of those who, due to legal or physical incapacity, are unable to look after themselves or their affairs.

Creation of trusts

In order to create a trust, a settlor must ensure that three certainties are present:

- certainty of words – showing an express intention to create a trust;
- certainty of subject matter – specifically defining all property included in the trust;
- certainty of objects – the beneficiaries must be clearly identified.

Appointment of trustees

Trustees are appointed by naming them in the instrument creating the trust. The Trustee Act 1925 (NSW) also makes provision for the appointment of new, substitute trustees in a variety of circumstances.

Duties and liabilities of trustees

Duties include:

- keeping accounts;
- not to delegate;
- prudent control;
- strict compliance with the terms of the trust;
- not to vary the trust;
- invest in accordance with 'authorised securities'.

If the trustee is acting in excess, contravening or committing a breach of trust, the following actions are available to the beneficiaries:

- damages;
- criminal prosecution;
- 'following' the trust property by obtaining a tracing order.

Maxims of equity

Introduction

Equity is pre-eminently a science, and it possesses and assumes certain maxims which embody and express the fundamental notions of that science. During the growth of equity jurisprudence, rules or maxims were laid down from time to time by the judges, as regards both the entertaining jurisdiction and the application of the principles of equity and conscience between the parties to the suit, and these rules or maxims were observed and acted upon by the Court of Chancery.

Explanation

The maxims do not cover the whole of the ground and, moreover, they overlap, one maxim containing by implication what belongs to another. Indeed, it would not be difficult to reduce them to just two: *equity will not suffer a wrong to be without a remedy*; and *equity acts* in personam *(on the person).* Nevertheless, each merits separate consideration, for each embodies some peculiar function of equity.

Equitable remedies

These remedies are at the discretion of the court, unlike the common law remedy of damages, which is 'of right'. The discretion is exercised on equitable principles, for example, *whoever comes to equity must come with clean hands*. The following are the most important remedies:

- Injunction
  An injunction is an order of the court, in the form of a decree, compelling the defendant to cease from doing certain acts.
- Specific performance of contracts
  This is available where the common law remedy of damages is inadequate to compensate the plaintiff.

- Rescission of contracts
  This may be granted by the court, which has a discretion to declare the contract as subsisting and may award damages in lieu of rescission.
- Rectification
  Where the parties make an agreement but the written instrument to which they have reduced their agreement does not accurately express the agreement, the court may rectify the instrument so as to make express the agreement of the parties and enforce it as rectified.
- Relief against penalties, fraud or undue influence
  Where equitable relief is requested in respect of these circumstances, the court has the power to rescind the transaction and to reinstate the wronged party to their former position.

11 Land Law

You should be familiar with the following areas:

- the distinction between ownership and possession
- classification of property
- the division of estates into freehold and leasehold
- comparison of the strict settlement and the trust for sale
- the role of easements and servitudes
- creation and termination of the various forms of mortgage

Ownership

Ownership has been described as 'the entirety of the powers of use and disposal allowed by law' (Pollock, F (Sir), *First Book of Jurisprudence,* 6th edn, 1929, Macmillan). With regard to land, the owner has an aggregate of rights; he or she may enjoy and use it, sell it or give it away; but an owner's use of his or her land is subject to the rights of others as allowed by law, for example, in nuisance and tort. Today, a landowner's rights are often restricted by legislation aimed at social control, such as planning legislation. Permission for any change in the use of the land has to be obtained from the local planning authorities. Moreover, government departments and local authorities may compulsorily acquire privately owned land and use it for public purposes, for example, as a site for a school or college. A person may own land notwithstanding the fact that another has an easement over it, such as a right of way.

The ownership of land grew out of possession. An early landowner's rights were possessory and, in medieval law, title to land was based on the concept of *seisin* (a possessory right). The word 'ownership' was not in use in England before 1583, and the word 'property' was uncommon before the 19th century. People spoke of 'possessions' and 'estates'.

In time, the idea of 'ownership' grew with an advancing industrial and capitalistic economy. The right of possession changed into the right of ownership that we know today.

Ownership of land may be acquired in the following ways:

- Originally
  Ownership may be obtained by occupation, where a person claims something not owned by anyone, for example, by occupation of property abandoned by another.
- Derivatively
  It may also be obtained through sale, gift or compulsory acquisition by law, for example, where land is compulsorily acquired by statute or taken by distress in execution of judgment.
- By succession
  On the death of a previous owner, another person may succeed to the property and thus acquire ownership, for example, a beneficiary under a will.

Possession

Possession in law is based on possession in fact. It involves two concepts:

- *corpus possessionis*, meaning the control over the thing itself which may be exercised by a person, their servant or agent; and
- *animus possidendi*, which is the intent to exercise exclusive possession of the thing itself and thus to prevent others from using it.

Possession may be obtained lawfully or unlawfully. Lawful possession needs no explanation. Under current law, even wrongful possession may, if continued for a certain length of time, ripen into a claim which is indistinguishable from ownership itself. Thus, where a squatter occupies derelict land or land in respect of which the true owner is unknown or untraceable, and continues in uninterrupted possession (for example, for 12 years in New South Wales), using it in a way inconsistent with the true owner's right, the owner's title to the land is destroyed. The squatter thereupon acquires a lawful title of ownership with rights against the whole world.

Although possession is largely a question of fact, it also has considerable legal significance. Actual possession is evidence (though not conclusive evidence) of ownership.

It is sometimes difficult to prove ownership of land. A may claim ownership by right of inheritance or purchase from some other person, B, who may be able to prove ownership or 'a good root of title', for example, by a document showing the devolution of the property. It may be possible to trace the title ultimately to someone who took possession, so originating the ownership of the particular portion of land in dispute. Whilst all ownership of land can be traced to an original grant by the Crown, A's claim may, of course, be defeated by a rival claimant, C, who can prove that their predecessors in title were in possession or that A wrongfully dispossessed C. The law has always protected the rights of possession.

As a general rule, the right to take action in respect of trespass to land inheres in the occupier (that is, the person in possession), for it is the right of possession or the enjoyment of possession which is disturbed or infringed by trespass.

It must be noted that the law's acknowledgment of wrongful possession of land may mature into lawful ownership, thereby destroying the previous owner's title and even the legal right to recover the land by action (see the Limitation Acts of the various States).

Classification of property

Australian law has classified property in various ways. Land, the main source of wealth, is by the very nature of things treated differently to most other kinds of property. Property may be divided into two classes:

(a) real property (freehold interests in land); and

(b) personal property, which may be subdivided into:
- chattels real; and
- chattels personal.

'Chattels real' means leaseholds in land. 'Chattels personal' comprises choses in action and *choses in possession* (which are not covered by this book).

Real property

In English medieval law, property was said to be 'real' if the courts of law would restore it (the *res*) to a dispossessed owner. For example, if

A, the owner of freehold land (see below), was turned out of his land by B, A could bring a 'real' action against B for the recovery of the land.

If B took away, for example, a car owned by A, the remedy available to A was a personal action at civil law against B for the recovery of the specific property (that is, the car) or its value. The car in the present example is referred to as *personalty*; land is referred to as *realty*.

A right *in rem* (sometimes called a real right) corresponds to a right against persons in general. In other words, the owner of the right has a right, enforceable against the whole world, not to be interfered with in relation to the thing, for example, owned land (the *res*). A right *in personam* is a personal right against one person or a group of persons; the most common example is an ordinary contract made between A and B, where each has a right against the other under the agreement.

As a result of these historical and procedural rules, a distinction was made between real property and personal property, and the distinction continues to this day.

The term 'real property' in general signifies all interests in land. An important exception exists with regard to leaseholds, or 'terms of years', as they are sometimes called. A leasehold arises where, for example, A, the owner of land, grants to B a lease for (say) two years. A is called the lessor, and B is the lessee.

A dispossessed leaseholder had no right at law to recover the land from anyone except the lessor who granted the lease. Until the 13th century, the lessee could recover damages, but not possession. Later, in 1499, a lessee was permitted to recover the land itself by action. The law had, by this time, come to look upon leases as personalty, and has done so ever since. A lease has, therefore, acquired a different status in property law. Even today, if, for example, A dies, leaving realty to B and personalty to C, any leaseholds held by A on his or her death will pass to C.

The relationship of landlord and tenant is mainly contractual: the tenant pays the rent to the landlord, who agrees to allow the tenant to occupy the land or house, as the case may be. The lease is in law classified as personalty, but it may also be described as a *chattel real*. The word 'chattel' derives from the Latin *cattala* (cattle), loosely meaning 'goods'. The word 'real' signifies connection with land. A lease incorporates both goods and land and, in order to distinguish it from 'real property' and 'personal chattels', is called a chattel real.

Freehold and leasehold land

The basic rule of English land law was that all land in England was owned by the Crown. When William I defeated the English in 1066, grants of land were made to his followers, to certain of the English barons and to those who submitted to his control. The grantees thereupon became holders of the land. Since there could only be one owner under feudal law (the King was lord paramount and owned the land by right of conquest), it followed that the interest in land possessed or held by a grantee was certainly less than that of the royal grantor.

Tenure

The grants of land were made in return for services to be rendered by the tenant. The terms on which the tenant held the land (called the tenure) were of various kinds, for example, free and unfree tenure.

The feudal system broke down in the Middle Ages and the various forms of tenure disappeared after 1660 (with the exception of socage tenure, which related to services of a non-military nature, usually agricultural, which was retained as the only form of free tenure).

In early land law, the possession that a freeholder of land had or enjoyed was of a special kind, known as *seisin*. Seisin was, therefore, the interest of a freeholder in land. The right of seisin was protected in the courts of common law and was enforced against all persons, except those with a prior right to seisin acquired by lawful means.

Meaning of 'estate'

A person who owned the seisin in land owned a collection of rights in relation to it. The tenant's interest in land was known as an *estate*. Estates in land were of various kinds and they differed as to the length of time they might exist. In law, the word 'estate' does not mean the vast areas of land often implied in the everyday use of the word.

Classification of estates

Estates are classified according to the duration of a tenant's rights to the land as either:

- freehold estates (of uncertain length of duration); or
- estates less than freehold (for example, leaseholds), where the duration is either certain or may be ascertained from the terms of the grant.

Freehold estates may be subdivided into four categories: estates in fee simple, estates in fee tail (note that these were abolished in New South Wales by s 19 of the Conveyancing Act 1919 (NSW), and it was impossible to create new estates in tail in other States), estates for life and estates *pur autre vie*.

Estate in fee simple

This is the greatest estate in land that can be held. In broad terms, it is equivalent to complete ownership: if A is referred to as owner of a certain portion of land, it means that he or she enjoys an estate in fee simple in the land (see below).

Estate in fee tail

This may be best illustrated by an example: where a parent owned land in fee simple and had dependant sons, they might wish to make a grant of a portion of land to son A, but might be limited to the requirement that the land be kept within the family. They could, therefore, make a grant of an estate in fee tail, which meant that, on A's death, the land would devolve on A's lineal descendants only. If there were no lineal descendants, the estate reverted to the grantor or, if already dead, to the (the grantor's) own successors, that is, the next son.

Estate for life

Although now abolished, an estate for life previously existed where an owner in fee simple (A) wished to grant an estate for the life of the grantee only; this could be done at common law. A formal grant was merely made to indicate intention: 'To B for life.' B became the owner of a limited estate, in that it could not be disposed of at will. On B's death, the land reverted to the grantor, A. A's interest was known as an *interest in reversion*. Sometimes, the grant could be 'To B for life, with remainder in fee simple to C'. In this case, the estate would not revert to the grantor but would vest in C. C's interest was known as an *interest in remainder*, so called because the estate remained away from the grantor, A.

Estate *pur autre vie*

This is endured for the life of a person other than a grantee. Assume that A is owner in fee simple of land granted to B in the following terms: 'To B for the life of C.' B becomes tenant of the land for the duration of C's life. On C's death, the estate terminates and will revert to the grantor or become vested in some other person to whom the 'remainder' has been granted.

Reform of land law

The Australia Courts Act 1828 (UK) provided that all the appropriate laws and statutes which were in force in England on 25 July 1828 should be applied in the administration of justice in the courts of New South Wales. This Act and the subsequent Colonial Laws Validity Act 1865 (UK), which applied British statutes by 'paramount force', meant that there was a wide divergence between land law in England and Australia from then onwards.

While Australia adopted a structured system of land registration as early as 1857 (in South Australia), there was no thorough reform of English land law until the reforms introduced by the English Lord Chancellor, Lord Birkenhead, in 1925.

Estate in fee simple absolute in possession

This is one of the two estates in land which may exist as a legal estate. The expression is admittedly a technical one, but the meaning may be ascertained by analysis of each of the terms used:

- *fee* denotes that the estate is an estate of inheritance, that is, one that may be inherited under the laws of intestacy or given by will;
- *simple* denotes that the estate is not a fee tail (an estate limited to certain lineal descendants of the grantee). 'Simple' means that the estate is capable of passing to the general heirs of the grantee;
- *absolute* signifies the grant is not subject to a condition but will continue for ever, and distinguishes it from a fee or an estate which may be determinable on the happening of an event;
- *in possession* signifies that the grantee must be entitled to immediate possession of the estate. This may be physical possession, though this is not necessarily so, for the phrase 'in possession' includes 'the receipt of rents and profits and the right to receive rents and profits'. A grantee need not, therefore, take physical possession to qualify as being 'in possession'.

Extent of rights

A tenant in fee simple absolute in possession is, for all practical purposes, the owner of the estate. Those ownership rights extend down to the centre of the earth and up to the sky (*usque ad inferos et usque ad caelum*), as explained in *Graham v KD Morris & Sons Pty Ltd*

(1974), where, at frequent intervals, the jib of the defendant's crane projected over the plaintiff's land. The court held that the invasion of the plaintiff's airspace by the projection of the crane jib was a trespass, not just a nuisance.

Owners are not, of course, absolutely free to do what they like with property, whether it be land or any other thing. This is because the general law of torts applies, including nuisance and negligence. It applies particularly to modern statute law which circumscribes the rights of the individual owner in the interest of the community, for example, town planning legislation. Moreover, certain mineral rights (for example, coal, iron ore and petroleum) in an owner's land have been taken away and vested in the State.

Creation

It is clear that an owner of land who wishes to transfer ownership may do so in various ways, for example, by gift, sale or will. Land is transferred by means of a conveyance, which is a legal document conveying the ownership of the property from one person to another. The words in the conveyance must be used with care in defining or delimiting the right to be transferred. The words marking out the interest in the land to be taken by another are known as 'words of limitation'.

The common law rules on words of limitation were exceedingly strict; however, s 47(1) of the Conveyancing Act 1919 (NSW) states that the 'grantee will take the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance'. At the present time, therefore, where X owns the fee simple in Blackacre and wishes to transfer the land to Y, Blackacre may be conveyed. In such a case, Y will take the fee simple in Blackacre.

The rules regarding words of limitation apply to wills as well as conveyances. Words of limitation must be distinguished from words of purchase. Words of limitation *define* or *delimit* an estate or interest; words of purchase *confer* one. For example:

- 'to A and his heirs' – the entire phrase is taken together to delimit A's estate. A receives the fee simple estate, which can be sold, given away or left by will. There is no interest conveyed to the heirs;
- 'to Y for life, remainder to Z' – the effect of this grant is that Y takes a life interest, and, on Y's death, the estate will pass to Z. The effect of the words of purchase here is to confer an interest on the two persons, Y and Z.

In the first example, the words are words of limitation. In the latter example, the words are words of purchase, since they define or mark out and confer the estate or interest to be taken by Y and Z. Words of purchase do not necessarily mean that the recipient bought the estate. They mean that the estate or interest was handed over by grant, which may take the form of a sale or a gift, as distinct from entitlement arising by operation of law (as when an owner dies intestate).

Future estates

There are three main varieties of future estate: reversions and remainders; shifting and springing uses; and executory devises.

Reversions and remainders

Where a grant of land is made by a tenant in fee simple to another for life, the grantor loses the right to current possession and enjoyment of the land. The estate becomes a future estate, and is called a *reversion*.

For example, A, the tenant owner in fee simple of Blackacre, makes the following grant: 'To B for life.' When B's life comes to an end, the 'particular estate' carved out of A's fee simple estate also ends, and the estate reverts to A in possession. The same rule applied to the fee tail when the lineal descendants of the grantee became extinct. Where a grant was made by A (the fee simple owner of Blackacre) 'to B for life, then to C in fee simple', the future interest to be taken by C was known as a remainder. Even if C died before B, the effect would be that C's heirs would take the fee simple in Blackacre. The tenant for life and the tenant of the fee tail estate were known as 'limited owners', as distinct from the tenant in fee simple in possession, who was a full 'owner'. However, estates tail were abolished in New South Wales by s 19 of the Conveyancing Act 1919 (NSW).

Shifting and springing uses

These kinds of future interests were created by means of a trust (which evolved from the medieval 'use') and were equitable, as they are today.

Executory devises

These future interests were created by means of wills. The details need not concern us here.

Settlements and trusts for sale

In former times, where a person owned considerable land in England, methods for the provision for his family out of the estate's income might have been considered. It was also a matter of pride to keep the land within the family. These were the main reasons for the creation of family settlements. A settlement is a legal instrument by which land or other property is limited in trust for a number of persons successively. Settlements fall into two classes: (a) strict settlements; and (b) settlements by way of trust for sale.

Strict settlements

The means adopted to keep the land within the family was the trust. The land was so limited that it descended as a whole from father to the eldest son. If the father had no son, it was so arranged that the land descended to the daughters. The claims of the other members of the family, that is, his wife (or widow) and other sons and daughters dependent upon the father, were satisfied by giving them an income or capital sum charged upon the land.

The life estate and the estate tail existed as legal estates. These forms were used to effect the intention of the creator of the trust or settlement.

Trusts for sale

The strict settlement described above, while popular among the English landed gentry, never became common in Australia, and must be distinguished from a settlement by way of trust for sale. In the latter case, the purpose of creating a trust was not to keep the land in the family, but to sell the land and to provide a regular income for the beneficiaries out of the money realised on the sale. Accordingly, the trust for sale imposed on the trustees an absolute duty to sell the land and to hold the proceeds of the sale and the rents and profits until the sale for the beneficiaries.

The trustees were usually given power to postpone the sale at their discretion and to manage the land until the sale. As long as it produced a satisfactory income, the land could be retained. Often, it was necessary to obtain the consent of the beneficiaries under the trust before a sale could take place.

The effect of creating a trust for sale was that, even before sale, the rights of the beneficiaries were deemed to be rights in personalty, not in the land. Since there was a binding obligation to sell the land, the beneficiaries were treated as having immediate interests in the purchase money into which the land would ultimately be converted, but they had no interest in the land itself. This doctrine, known as *conversion*, is based on the principle that 'equity looks upon that as done which ought to be done'. Thus, from the moment of the conveyance of the property to the trustees, whether there has been an actual sale or not, the land is regarded in equity as if it were already purchase money.

In a trust for sale, the trustees exercise the power of sale, since they are the legal owners. The trustees for sale are also given other powers, for example, the powers to exchange the land for other land, to grant leases, to obtain mortgages, to manage the property and to make improvements to the land. The trustees may delegate their powers of leasing, accepting surrenders of leases and management at any time before sale to 'any person of full age for the time being beneficially entitled in possession to the rents and profits' under the terms of the trust.

Since the rights which encumber the land are (in theory) rights only in respect of a share of the purchase money, notice of them will have no effect upon a purchaser. Once the latter pays the trustees on the sale, the distribution of the money among those beneficially entitled is the responsibility and business of the trustees; the purchaser takes the land free from those interests, which are said to be *overreached.* There is, therefore, no need for special machinery (for example, the making of two deeds) to conceal these rights. Although only one deed is strictly necessary in a trust for sale, in practice, and for the sake of simplicity, two are generally used.

Trusts for sale may arise in one of two ways:

(a) expressly, as where land is deliberately limited by a settlor on trust for sale; or

(b) by operation of law. The most common circumstances under which a trust for sale arises by operation of law are:

- where there is co-ownership of land by two or more persons; and
- where a person dies intestate.

Co-ownership

Although property rights in relation to land are often held by only one person at a time, it is, of course, possible for two or more persons to own land together. For example, a husband and wife may both own their matrimonial home. This form of ownership is known as co-ownership, and is one of two kinds: joint tenancy or tenancy in common.

Joint tenancy

The owners are known as joint tenants and each is the owner of the whole land, though, of course, the rights of ownership of each are subject to the rights of the other party or parties.

Tenancy in common

In this case, each tenant is regarded as owning an individual share in the property, though not a specific part. For example, if there are three tenants in common, each is entitled to one-third.

The difference between the two forms of ownership is best observed by looking at the position when one tenant (joint or in common) dies. Where a joint tenant dies, the share in the property passes to the survivor(s). For example if A, B, and C are joint tenants, when C dies, the share in the property passes automatically to A and B equally. When B then dies, the share in the property passes to A, who thereupon becomes the sole owner of the land. This is known as the *jus accrescendi* or right of survivorship. If, however, the land is held in common, the deceased owner's share will pass under the will to the heir and does not accrue to the surviving co-tenant. Thus, where A, B, and C are tenants in common, on the death of C, his share will form part of C's estate and will be disposed of accordingly.

The advantage of joint tenancy is that it avoids splitting the estate into many different parts, thus preventing the creation of too many interests in one portion of land. A joint tenant cannot leave any part of the jointly owned property by will. Whilst each co-owner may leave their interest by will, this creates further complications. A joint tenancy could be regarded as unfair, in that the right to the sole ownership depends on the length of one's life, and longevity is uncertain.

Leaseholds

As has already been mentioned, a freeholder can grant leases of land to others. Much of the property in Australia, both land and real property, is occupied by tenants under leases.

The essential nature of a lease is that it is a grant by a landlord to a tenant of exclusive possession of the property leased. In doubtful cases, it is for the courts to decide whether the agreement into which the parties have entered (orally, in writing or by conduct) is a tenancy agreement in law. The further essential feature of a leasehold interest is that it will start and end at some definite time in the future and will not continue indefinitely; that is, it is of a determinate nature.

The expression 'term of years', which is sometimes used to describe a tenancy, is misleading, in that it includes weekly, monthly, quarterly and yearly tenancies (called periodic tenancies), as well as long leases for 99 years or 999 years. Other types of tenancies are known as tenancies at will and tenancies at sufferance.

Tenancies

There are several different types of tenancy:

- Lease for a fixed period
  The characteristics of this tenancy are (a) that it is created by express agreement, and (b) that the commencement and the termination of the lease must be certain or ascertainable before the lease comes into effect.
- Yearly tenancy
  A yearly tenancy continues from year to year until determined by proper notice. The period of notice necessary to determine the tenancy is agreed upon between the parties. If no such agreed notice has been arrived at, a yearly tenancy must be determined by at least half a year's notice to expire at the end of the year of the tenancy.
- Tenancy at will
  This arises where a person takes possession of property on the understanding that the term can be brought to an end at any time by either party giving notice. The tenancy may be rent free, but, unless this has been expressly agreed between the parties, the tenant must pay rent. In addition to notice, the tenancy may come to an end if either landlord or tenant does some act inconsistent with the tenancy.

- Tenancy at sufferance
  This can only arise by implication of law. It comes into existence where, on the expiration of the tenancy, a tenant holds over without the landlord's permission. The distinction between this and the tenancy at will is that, in the former case, the landlord does not consent and, in the latter, he or she does consent. No rent is payable, but the tenant must compensate the owner by a payment, called mesne profits, for the use and occupation of the land. The tenancy may be brought to an end at any time, or it may be converted into a periodic tenancy if rent is paid and accepted periodically.

Statutory protection

Because of the shortage of houses and accommodation, the State governments have been increasingly interventionist in the landlord and tenant relationship, which was originally purely contractual. This involves detailed legislation which cannot be described here. The main purpose is to give some degree of security to tenants and to restrict rents.

Creation of leases

Lease for more than three years

This must be created by deed in order to become a legal estate. A mere written lease (not a deed) creates only an equitable interest, which is capable of being converted into a legal estate by an order for specific performance. If the lease is merely oral, it may be enforced by equity, as above, provided that the equitable doctrine of part performance applies.

Leases for not more than three years

These need not be by deed in order to be legal: a written or oral lease will suffice, so long as the lease takes effect in possession at once, at the best rent obtainable and without payment of a capital sum.

Duties of landlord and tenant

In any lease, the lessor may require the tenant to sign certain express covenants, for example, to insure against fire. As well as these express covenants, there are certain implied covenants.

Landlord's duties

The following are the main duties owed by the landlord to the tenant:

- the landlord has to ensure that the tenant gets 'quiet enjoyment' of the land. This does not mean there will be no noise, but that the lessor guarantees to the tenant that no third party will be lawfully able to question right of the tenant to occupy the land;
- the landlord must not derogate from the grant, that is, the tenant's enjoyment of the premises must not be interfered with. Therefore, nothing must be done which would render the land unfit for the purpose for which it was let, for example, by using the adjoining premises in a manner inconsistent with the lease;
- certain statutes and cases now impose limited obligations on the landlord to repair.

Tenant's duties

The main duties of the tenant are:

- to pay the rent;
- to pay rates and taxes, except those which are legally the landlord's personal obligation;
- not to commit waste. This means that the property must not be deliberately damaged or allowed to depreciate unreasonably by neglect.

Express covenants

The most important express covenants usually contained in a lease are:

- to pay rent;
- to pay rates and taxes;
- to repair;
- to permit the lessor to enter and inspect the state of repair;
- to obtain insurance;
- not to carry on any trade or business; and
- not to assign or underlet without consent.

Two of the above call for discussion.

Covenant not to assign or underlet

Where such a covenant exists, the tenant may neither assign or underlet; in the absence of such a covenant, he or she may do so. In an assignment, the lessee parts with the whole interest to the purchaser, who then becomes the tenant of the freeholder. Such an assignee is bound, as long as the leasehold interest is owned, to observe and perform all the covenants binding on the vendor (the assignor) which touch and concern the land. In an underletting, the original lessee grants an underlease to the purchaser for the residue of the lease, less the last few days.

For example, A is fee simple owner and leases Blackacre to B for twenty years. B, the lessee, may then sub-let Blackacre to C (who becomes sub-lessee) for the residue of the term held by B, less the last 10 days thereof. B will, therefore, retain the reversion of 10 days on the expiration of C's underlease. Generally, the sub-lessee is not bound by the covenants in the lease granted by the freeholder, but will be bound by those in the underlease of the sub-lessee.

Where a landlord imposes a covenant permitting the lessee to assign, but only with the landlords consent, there is a statutory duty on the landlord not to withhold consent unreasonably. In order to justify a refusal to consent, the landlord must have a good reason, for example, the unsuitability of the use to which the sub-tenant proposes to put the land.

The English Court of Appeal in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* (1986) set out seven propositions which can be deduced from the authorities on the reasonableness of withholding consent.

Covenant to repair

In long leases, the tenant usually covenants to repair. In short leases, the landlord frequently assumes liability for external repairs and structural repairs, and the tenant assumes responsibility for internal repairs only. The standard of repair is the standard which any reasonable landowner would adopt.

If the lease makes no mention of the liability to repair, neither party is liable. The tenant is liable for committing waste, and must generally keep the property in a reasonable state of repair (an implied duty).

Servitudes

In addition to the ordinary rights of property which a landowner may exercise over his or her own land, the law recognises certain rights which extend over the land of a neighbour. These are known as servitudes and may be either easements or profits *à prendre*.

Easements

Easements are defined as the right to use, or to restrict the use of, the land of another person in some way. The most important easements are rights of way, rights of light and rights to the support of buildings. The main features of an easement are as follows:

There must be a *dominant* and a *servient* tenement. The land in favour of which the easement exists is known as the dominant tenement, and the land in respect of which the right is exercised is called the servient tenement. Therefore, if X merely gives Y permission to cross his land, Y will have no easement. It is a personal grant only and, at most, may be a licence so that Y does not become a trespasser. If, however, X, the owner of Blackacre, grants a similar right to Z, the owner of neighbouring Whiteacre, this is an easement. In this example, Whiteacre is the dominant tenement and Blackacre is the servient tenement. The easement must contribute in some way to the better enjoyment of the dominant tenement, for example, by facilitating access to house or land, and not merely benefit the owner personally in a way unconnected with the enjoyment of the dominant tenement.

The easement must be capable of forming the subject-matter of a grant by deed. Thus, there must be a capable grantor and a capable grantee, and the grant must relate to something which is capable of reasonable definition and have the characteristics of an easement.

There must be separate ownership of the dominant and servient tenements.

Profits *à prendre*

A profit *à prendre* is the right to take something from the land of another, for example, grazing rights for cattle, or a right to collect firewood or to cut turf. The distinctions between a profit and an easement are:

- an easement must be appurtenant to land (that is, there must be a dominant and servient tenement), while a profit may exist *in gross*, which means that it may be enjoyed by its owner or owners independently of any dominant tenement and unconnected with the enjoyment of land;
- a profit may be a 'several profit', that is, enjoyed by one person only, to the exclusion of all others, or a 'profit in common', that is, enjoyed by many people. Thus, A may have a right to shoot game on B's land (a several profit), and all the inhabitants of a certain township may have a right to graze cattle on B's land (a profit in common).

Creation

Easements and profits may be created by: (a) statute; (b) grant; or (c) prescription. Grant is the most usual method of acquisition of a servitude.

Express grants exist where the owner of the servient tenement creates the servitude. An implied grant is one implied by law. Suppose that A owns a paddock and a house in the middle of the paddock. If A sells the paddock without reserving a right of way from the house to the road, there will be no means of access. A reservation of way is, therefore, implied in favour of the house retained by A. This is called an easement or 'way of necessity'.

In England, proof of use of a servitude from 'time immemorial', that is, since 1189, is regarded as giving a prescriptive right to the servitude. In practice, the courts there regard any long usage as sufficient to raise the presumption that the right has existed since 1189, but the presumption may be rebutted by proof that the right did not exist, or by its nature could not have existed, at some time since 1189.

Of course, it is difficult to prove continuous use since 1189 in England; in Australia, it is impossible. So, the courts evolved the doctrine of the lost modern grant. Under this doctrine, a court will sometimes presume, provided that long use (at least 20 years) can be proved, that a grant was made at some time since 1189 but that it has subsequently been lost (as in *Bridle v Ruby and Another* (1988)). In *Delohery v Permanent Trustee Co of NSW* (1904), the High Court held that the doctrine applied in Australia.

Restrictive covenants

Restrictive covenants are agreements restricting the use of freehold land, which are enforceable not only between the original contracting parties, but also between assignees of the respective lands. In spite of the doctrine of privity of contract, such a covenant may be enforced by applying the principles of equity. This will arise where a person who acquires property with knowledge that some other person has rights in relation thereto will, in conscience, be bound to observe those rights, provided that certain conditions are satisfied. This can be illustrated by *Tulk v Moxhay* (1848). There, Tulk sold the central part of Leicester Square to Elms, who covenanted on behalf of himself, his heirs and his assigns not to build on the land. The land was later sold to Moxhay, who knew of this covenant, but nevertheless proceeded to build on the land. The court held that Moxhay was bound by the covenant. It would be inequitable that Elms, who gave a small price for the land because of the restrictions, should be able to sell it for a higher price and free from those restrictions.

It was laid down in this case that the purchaser was bound, even if with only 'constructive' notice of the covenants, that is, those covenants that would have been discovered if a proper investigation of title had been made. It should be noted that, under the doctrine of constructive notice, any sub-lessees are deemed to have notice of the contents of the head lease and are, therefore, bound in equity by any negative covenants contained therein.

Today, restrictive covenants may be enforced subject to the following conditions:

- the covenant must be *negative* in nature, that is, one which does not require the expenditure of money. For example, a covenant not to use dwellings as shops is negative, but a covenant to build or maintain a house or a wall is positive;
- the covenant must 'touch and concern' the land benefited by the covenant, that is, it must be in some way beneficial in protecting the value of the land or its amenities or a house on the land;
- the land benefited by the covenant must be owned by the person who seeks to enforce it;
- where the claimant of the benefit of the covenant is not the original covenantee, it must be shown that the benefit of the covenant has been expressly assigned, that it was originally annexed to the land or that it was contained in a building estate development plan.

Mortgages

A loan of money may be obtained in various ways. The borrower can approach a friend, who may agree to the loan quite freely, making no charge; or the borrower may obtain a loan based on some form of security for repayment. This security might be personal, for example, where a third person (a guarantor) undertakes to repay the loan, should the borrower default. Alternatively, the lender may agree to advance the required loan, provided that the borrower offers some form of property against which the lender may lawfully make a claim, should the borrower default in repayment of the debt.

Personal property (for example, a gold bracelet) is a simple form of security; it is easily deliverable and is the type of property sometimes transferred to a pawnbroker as security for a loan which the latter is prepared to advance to the borrower (the pawner). When the loan is repaid with interest on the date agreed, the property is returned to the borrower.

Real property, such as valuable land or a house, provides a good form of security, but this form of property cannot, by its very nature, be 'delivered' in the straightforward way applicable to personal property; the land or house must be *conveyed*, which means that a formal document must be prepared.

Mortgage (Norman-French, meaning 'dead pledge') is the name given to the transaction by which a borrower (a mortgagor) obtains a loan from another person (a mortgagee) on the security of property.

The usual method of creating a mortgage of freehold land was for the borrower (the mortgagor) to convey the fee simple (the freehold estate) to the lender (the mortgagee), with the condition that, if the mortgagor repaid the loan plus interest on a specified date (usually six months later), the mortgagee would reconvey the land. In the early days, the common law courts held the parties to their agreement (into which they had freely entered), strictly construed the contract and enforced its terms. If the loan was not repaid on the date named in the mortgage deed, the borrower would be permanently deprived of the land, which then would become a 'dead pledge'.

This caused some hardship: the lender obtained the land itself (which was more valuable than the loan advanced); in addition, he could sue the mortgagor on the agreement to repay the sum advanced, plus interest thereon. Mortgagors could obtain no relief from this situation in the common law courts, and eventually approached the Court of Chancery. As a result, equity intervened in the mortgage transaction and gave borrowers certain rights, the most notable being the right to get back their land (taken as security) if the loans were able to be repaid at some time later than the date of redemption named in the contract. This right became known as the *equitable right to redeem*. As stated by Lord Nottingham in 1675, 'the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money'. From the earliest days, equity gave valuable rights to mortgagors on the ground of conscience, such rights being collectively termed the *equity of redemption*.

In addition to creating a mortgage in the way described, that is, by transferring the whole of the interest of the mortgagor in the land to the mortgagee, it is now also possible to create other forms of mortgage of land. In considering these, it is also important to remember that the principle of the equity of redemption is still in existence today.

Legal mortgages

These take two forms:

- Mortgage by demise
  This is effected by the creation of a lease. Suppose that A is owner of Blackacre in fee simple. A (the mortgagor) wishes to borrow money from B (the mortgagee). A may grant to B a legal term of years, usually 3,000 years, with a proviso in the deed that, if the principal loan plus interest is repaid on a date named (usually six months later), the term of years shall cease. A further agrees that he will repay the sum due plus interest on the date named.
- Charge by way of legal mortgage
  This is created by a short deed which confers on the mortgagee a legal interest, not a legal estate. The legal interest entitles the mortgagee to the same remedies as if the mortgage were by lease for a long term of years, as above.

Where the mortgagor owns leasehold property (this is sometimes as valuable as freehold, for example, where the lease is for 999 years), the mortgagor may adopt one of two methods:

- Grant of a sub-lease
  A sub-lease may be granted to the mortgagee for a term of years, subject to the proviso that the sub-lease will cease or determine on repayment of the principal sum secured plus interest. The sub-lease will be at least one day shorter than the lease vested in the mortgagor. In practice, the term of the first sub-lease is usually for 10 days less than that held by the mortgagor.
- Charge by way of legal mortgage
  The advantage of the charge by way of legal mortgage over the mortgage by demise is that, where the mortgagor owns both the freehold and leasehold, he or she may charge both types of property with the mortgage debt in one document. Moreover, where a holder of a lease wishes to create a mortgage on the lease, he or she may be obliged to obtain the lessor's consent to sub-let. No consent is required if the charge by way of legal mortgage is adopted.

Equitable mortgages

An equitable mortgage is one in which the mortgagee receives merely an equitable interest in the land. There are two distinct types:

- Mortgage of an equitable interest
  The mortgagor may mortgage his or her equitable interest, for example, a life interest or other interest under a trust. In these cases,

the mortgagor may assign the equitable interest to the mortgagee with a proviso for reassignment of the equitable interest on repayment of the debt, plus interest.

- Informal mortgage of a legal estate or legal interest
  Sometimes, a borrower will require a loan urgently and will wish to avoid the trouble and expense of drawing up a formal legal mortgage. In cases of this type, an agreement in writing to create a mortgage or the deposit of title deeds as an act of part performance of an oral agreement operates to create an equitable mortgage. This will be treated in equity as a mortgage, since 'equity looks upon that as done which ought to be done'.

The three usual methods of creating such equitable mortgages are by:

(a) written agreement (signed as required by the relevant legislation, for example, s 54A of the Conveyancing Act 1919 (NSW)), which is not accompanied by a deposit of title deeds;

(b) deposit of deeds alone, without written agreement, if the deposit of the deeds amounts to part performance of an agreement to give security;

(c) a combination of (a) and (b).

Remedies of the mortgagee

The mortgagee of a legal mortgage has the following rights:

- To sue for the debt
  The amount due on the mortgagor's covenant to repay is the principal sum plus interest. Where the date fixed for redemption has passed, the mortgagee may sue for that amount.
- To take possession
  This remedy is available to the mortgagee, being the holder of the land. Possession may be taken at once or 'before the ink is dry on the mortgage', as stated by Harman J in *Four Maids Ltd v Dudley Marshall (Properties) Ltd* (1957). The remedy of taking possession is not, in practice, desirable, since the mortgagee is strictly accountable to the mortgagor for any loss occasioned by default. The mortgagee is accountable not only for such rents and other income from the property received, but also for those rents and incomes, etc, which might have been received had due diligence and proper management been exercised.

- To foreclose
  If the mortgagor fails to pay the sum due for an unreasonable time, the mortgagee may obtain a court order extinguishing the mortgagor's equitable right to redeem the property and vesting the full legal estate in the mortgagee. The first order is a *foreclosure order nisi*, which directs that the money due must be repaid within a given time, for example, six months. If unpaid, the court order is made *absolute* and the property then vests in the mortgagee, free from the equity of redemption. Foreclosure is a rare remedy in practice, since the court may reopen the foreclosure, thus giving the mortgagor a further opportunity to redeem the mortgage. Alternatively, the mortgagor may apply to the court for an order for sale.
- To sell the land
  This is the most frequently used right and is implied in all mortgages. Subject to the exceptions below, the mortgagee has a power to sell the property as soon as the legal date for redemption has passed. The power of sale cannot normally be exercised until certain statutory requirements imposed by each State (for example, the period of time for notice or the number of months interests is in arrears) have been satisfied.

  Mortgagees cannot purchase the land for themselves. The sale of the property is usually by public auction. Out of the proceeds of sale, the mortgagee may recover: (a) any expenses incurred in the sale of the property; and (b) the principal sum due, plus interest. Any surplus money belongs to the mortgagor, provided that any other mortgages have been paid;
- To appoint a receiver
  The power to appoint a receiver is implied in all mortgages, unless a contrary intention is expressed. The receiver's duties are to receive the rents and profits on the mortgagee's behalf in order to discharge the sum due. The receiver is deemed in law to be the agent of the mortgagor, and the latter is liable for the receiver's acts or defaults unless the mortgage otherwise provides. For this reason, it is usually more advantageous to appoint a receiver than for the mortgagee to take possession.

Where the mortgage is equitable, the mortgagee has practically the same remedies as those stated above. However, unless the power to do so is expressly reserved to him, the equitable mortgagee has no right to take possession. If the mortgage is created by a deposit of title deeds, the mortgagee must apply to the court for orders to sell the property and appointing a receiver.

Remedies of the mortgagor

The chief advantage of the mortgagor is the right to redeem the mortgaged property on payment of the principal sum borrowed plus interest. This amount falls due on the date specified in the contract. The equity of redemption evolved in the Court of Chancery, which applied two equitable principles in its jurisdiction: *once a mortgage, always a mortgage*; and *equity looks to the intent rather than the form* (see above). Accordingly, even after the date for redemption had passed, the mortgagor could get back the land when in a position to repay the debt plus interest.

As long as an order of foreclosure has not been issued by a court, that right of late redemption exists. However, there are conditions. The mortgagor must behave in a conscionable manner and must give the mortgagee six months' notice of the desire to redeem (or give six months' interest in lieu), unless the mortgage states some shorter period. This period gives the mortgagee, who regards the mortgage transaction as an investment, time to reinvest the money in a suitable security elsewhere.

Equity treated the right of redemption with special care. Any provision in the mortgage which tended to make the mortgage irredeemable, or which encumbered the mortgagor's enjoyment of it in the future after paying off the sum due, was regarded as inequitable. The mortgagor had the right, in essence, to get the property back in exactly the same condition as it was before the mortgage. Any term in a mortgage which greatly benefits the mortgagee at the expense of the mortgagor has always been viewed with suspicion.

In *Carritt v Bradley* (1903), B held most of the shares in a tea company. They were mortgaged to C. The mortgage contained a term that B, as a shareholder, would induce the company to employ C to sell tea as the company's agent. The company paid off the mortgage and ceased to employ C, whereupon C claimed damages for breach of the employment agreement. The court held that the proviso in the mortgage as to the employment of C ceased to exist after the mortgage was paid off.

In *Noakes v Rice* (1902), the tenant of a 'free' public house under a 26 year lease mortgaged the premises to a brewery company as security for a loan and covenanted that, during the remainder of the 26 years, only beer provided by the brewery company (the mortgagees) would be sold. The tenant paid off the mortgage three years later and sued for the covenant to be removed. The court held that the covenant was inconsistent with the express proviso for redemption (which entitled the tenant to demand a reconveyance of the premises upon repayment of the loan with interest) and was a clog upon the equity. The tenant became entitled to trade as a 'free' public house.

Nevertheless, not every collateral advantage to the mortgagee is void, as will be seen from the following case.

In *Krelinger v New Patagonia Meat and Cold Storage Co* (1914), a firm of woolbrokers (the mortgagees) lent £10,000 to a meat company on mortgage. The woolbrokers agreed not to demand repayment for five years, but the mortgagors (the meat company) could repay the debt earlier on giving notice. The parties also covenanted that the meat company would not sell sheepskins to anyone except the woolbrokers for five years from the date of the agreement, as long as the woolbrokers were willing to purchase the skins at the agreed price. The loan was paid off before the five years had elapsed. The court held that the option of purchasing the sheepskins did not end on repayment, but continued for five years. It was a collateral contract and did not affect the right to redeem.

Where the parties to a mortgage agree to postpone redemption for a long period, the question of whether it is enforceable is a matter for the court in each case. In *Knightsbridge Estates Ltd v Byrne* (1939), where the mortgagee required a long term investment, the court held that the postponement of the period of repayment for 40 years was not oppressive or unconscionable in the circumstances (although such a period would be unreasonable between private persons who mortgage property of small value in return for a small loan).

Sale of land

The sale of land involves two elements: (a) the contract of sale; and (b) the delivery of the land and transfer of title to it. As to the contract of sale, the general rules of the law of contract already considered apply. The parties to the sale must have contractual capacity, the contract must not be illegal, there must be an 'agreement' and the acceptance of the offer must be unconditional. Where the offer of the sale is made 'subject to contract', no agreement comes into effect until a formal contract is approved by both parties.

Under most State legislation, contracts for the sale of land must be evidenced in writing. In the absence of a 'note or memorandum', the contract, though valid, is unenforceable by legal action. The general rules discussed above apply, and are subject to the proviso that, where the doctrine of 'part performance' applies, the contract may be enforced, notwithstanding that the agreement does not comply with the particular statute.

Old system title and registration of deeds legislation

When it is necessary for the parties to consider the title which the vendor is going to pass to the purchaser, it is appropriate to consider the two principal systems of title in operation in most States.

In New South Wales, the original deeds system, or old system title, was introduced into the State from the commencement of settlement in 1788, registration of deeds being permitted from 1817. The system is now governed by the Conveyancing Act 1919 (NSW), with similar systems operating in other States, viz: Property Law Act 1958 (Vic); Property Law Act (Qld); Registration of Deeds Act 1935 (Tas); Registration of Deeds Act 1856 (WA).

The deeds system depends upon the fact that the Crown granted the original title to the property and that a specific document has been required on each occasion that a transfer of title has taken place. Because of this, there was, and still is, a most important condition implied by law: the vendor must show title for the required period of time (30 years in New South Wales), starting with a good root of title.

A 'good root of title' may be shown by an instrument of disposition dealing with the whole of the legal and equitable estate in the property to be sold, containing an adequate description of the property and revealing no defect in title thereto. The vendor must, at his or her own expense, abstract and produce the document which forms the root of the title and all subsequent documents which affect the legal estate. All facts which have affected the legal estate for the required period of time must also be proved. This is called 'deducing title'. The purchaser 'investigates the title'.

Upon the satisfactory investigation of title, the transaction proceeds to the conveyance of the property to the purchaser.

The stages in this process are as follows:

- preparation of the contract;
- depending on the State in which the transaction is taking place, an exchange of contracts procedure might be followed. This consists of

the exchange of contracts between the vendor's solicitor and the purchaser's solicitor, when the purchaser pays a deposit (usually 10% of the purchase money). The transaction is now binding on both parties;

- delivery by the vendor's solicitors of an 'abstract of title';
- examination of this title by the purchaser's solicitor and comparison of the abstract with the title deeds to check accuracy;
- search by the purchaser's solicitor in the State Deeds Register;
- enquiry of the local council and other authorities to ascertain what encumbrances exist in relation to the property.

Once the conveyance has been drawn up, the sale has to be completed. Completion is usually carried out at the office of the vendor's solicitor. The purchaser hands over the money and the vendor hands over the signed conveyance, together with the title deeds of the property. The deed must be stamped as required by the various State Stamp Acts. The solicitor will then register the conveyance with the office of the State Register.

Torrens Title

The investigation of title to land is sometimes very difficult and complicated. The parties to the conveyance are responsible for ensuring accuracy. The deeds system, which was basically the English method of recording land ownership, was commonly used until the middle of the 19th century. In 1857, South Australia introduced the 'Torrens Title' system of land registration, which was devised by Sir Robert Torrens, who based it on a system which had previously been used for the registration of merchant shipping.

This system of land registration is in operation throughout Australia, the relevant legislation being: Real Property Act 1900 (NSW); Transfer of Land Act 1958 (Vic); Real Property Act 1886 (SA); Real Property Act 1861 (Qld); Land Titles Act 1980 (Tas); Transfer of Land Act 1893(WA); Real Property Act 1925 (ACT). The purpose of this system is to provide an official guarantee, certifying who is the owner of a particular piece of land ('indefeasibility of title') and to disclose certain encumbrances to which the land is or may be subject. A purchaser need only consult a single publicly operated register in order to find out whether the vendor has a good title to the property and the nature of the rights and encumbrances affecting the prospective purchase.

The effect of this is that, on the completion of the transfer of the title to the property, it may be registered with the appropriate Registrar General. Once a person is recorded on the Register as proprietor of an interest, they will hold it free from any other interests or encumbrances, except those which are recorded upon the Register and certain others provided for in the Act or added by the courts. When the property is resold, the prospective purchaser only needs to search the Register in order to ascertain what title can be obtained to it.

Strata title

The Torrens system of land title has now been extended to the registration of title into horizontal sub-division of multi-storey buildings. The first legislation of this form of title was the Transfer of Land (Stratum Estates) Act 1960 (Vic). The current New South Wales Act is the Strata Schemes Act 1996 (NSW). The system depends on the creation of a 'strata plan', which consists of both a 'location plan', showing the location of the building on the land in question, and a 'floor plan', which indicates the position of each lot (that is, 'unit') on each floor of the building. There will also be parts of the building which are the 'common property' of all the residents, such as the staircases and corridors. The residents, as joint proprietors of the lots in the strata plan, constitute what is known as the 'body corporate', in whom are vested certain powers, duties and authorities under the appropriate legislation.

Crown lands

These are the various forms of title which can be traced back to the mid-19th century, when the Crown granted conditional rights of purchase to settlers of large tracts of land outside town boundaries.

In New South Wales, this system of land tenure was regularised by the Crown Lands Alienation Act 1861 (NSW). This and subsequent legislation was incorporated into the Crown Lands Consolidation Act 1913 (NSW), which, in turn, was superseded by the Crown Lands Act 1989 (NSW) The forms of tenure are:

- purchase;
- perpetual lease;
- term lease; and
- permissive occupancy.

It should be noted that there is no guaranteed indefeasibility of title for the holders of Crown lands. The position of the owners is similar to those holding title under the old deeds system of title. However, most Crown land is now registered under Torrens Title, and so will have the benefit of indefeasibility.

12 The Law of Succession

You should be familiar with the following areas:

- formalities and revocation of a will
- variation of a will in favour of family members
- appointment and duties of personal representatives

Introduction

In law, the word 'succession' has a special meaning. When A transfers property to B, it can be said that B 'succeeds' to that property, that is, takes over the rights owned by the transferor. 'Universal succession' may refer to two classes: (a) succession on death; and (b) succession on bankruptcy. This chapter deals with succession on death.

Obviously, a dead person cannot own property or exercise rights over property. The law bows to inevitable facts: other persons will succeed to property owned or possessed by the deceased. All systems of law have certain rules of succession which lay down how, and to whom, the property of a deceased person is to be distributed.

Where a person makes a valid will, stating how their property is to be distributed, they are said to die 'testate' (from the Latin *testari*, 'to make a will'). Where a person leaves no will, or an invalid will, they are said to die 'intestate'.

Wills

For centuries, the law has recognised the right of a person to make a will showing to whom personal property should descend.

Birth, marriage and death have always been of immediate concern to the church, and, in Norman and medieval times, the English church courts (which were separate from the lay courts) adjudicated on wills of personal property, including leaseholds. The Court of Probate Act 1857 (UK) transferred the jurisdiction relating to wills to the ordinary civil courts, where it has been exercised ever since. However, many of the rules applied today in the UK and in Australia are derived from the early church courts, which applied canon law (that is, church law), not the common law.

Nature of a will

A will is a declaration of a person's intentions concerning the descent of property after death. A will is said to be *ambulatory* (that is, not permanent: it is subject to revocation or alteration) until the death of the testator. The will speaks from death. If A makes a disposition of 'All my property to Z', the successor (Z) will receive all the property which A owns at the moment of death. The gift will include property which A acquires between the time of making the will and death. It will not, however, include property which A has disposed of between these times.

Testamentary capacity

The general rule is that any person of full age and sound mind may make a valid will. The testator is presumed sane at the time the will was made; but if the will is contested on the ground that the testator was of unsound mind, the person propounding the will has the burden of proving the sanity of the testator .

An infant (that is, a person under the age of 18) cannot make a valid will, but there is an exception in regard to infant soldiers, sailors and airmen in most jurisdictions (see below).

Formalities

These have to conform with State legislation (viz, Wills Probate and Administration Act 1898 (NSW); Wills Act 1958 (Vic); Succession Act 1981 (Qld); Wills Act 1936 (SA); Wills Act 1970 (WA); Wills Act 1840 (Tas); Wills Act 1968 (ACT); Wills Act 1983 (NT)) governing this important matter. The main requirements are that the will be in writing, signed and witnessed.

Writing

A will must be in the form of a written document. Any document, for example, a letter, can suffice and may include other documents which existed at the time that the will was made and which are referred to in the will. Oral evidence may be given to identify these documents if they are so referred to. 'In writing' includes handwriting, print and typescript.

Signature

The will must be signed at its 'foot' or 'end' by the testator or by someone in their presence and by their directions. Initials, a partial signature, a mark (for example, a cross) or a thumb print in ink may be used, as long as the mark is clearly ascribable to the testator. A seal stamped with the testator's initials has been held to be a signature.

Attestation

The signature of the testator must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and then each witness must either attest and signs the will or acknowledge the testator's signature in his or her presence.

The purpose of attestation is to authenticate the testator's signature. The witnesses need not be present at the time of the actual signing of the will by the testator. They must, however, both be present together either at this time *or* at some later time when the testator acknowledges the signature. Although, in practice, a witness signs or acknowledges the signature in the presence of the other witness (except in the Australian Capital Territory), this is not a legal requirement.

Addresses and occupations are added to assist in identification and subsequent tracing. If a dispute should arise over the validity of the will, the evidence of the witnesses will be vital. Witnesses need not read the will or know its contents.

As was held in *Re Gibson (Deceased)* (1949), a blind person may not 'witness' a will or a codicil because they cannot 'see' the signature. A person under the age of majority is a competent witness for the purpose of attestation, provided that they satisfy the other criteria.

There is no legal necessity for any particular form of attestation. It is enough if the witnesses merely subscribe their names, their initials (*Re Christian's Goods* (1849)) or their marks (*Re Ashmore's Goods* (1843)).

Wills of soldiers, sailors and airmen

Roman law allowed a soldier 'in the field' to make an informal will. During hostilities, death in battle is likely; a soldier may have no legal advice nearby, and pen and paper are not readily available. The law, by its very nature, cannot apply stringent rules in such abnormal situations. It has, therefore, allowed oral declarations and other informal dispositions to take effect, notwithstanding their non-compliance with the technical rules of regular law applicable to civilians.

These practical rules found their way into English common law and are now incorporated in all State legislation, except that of New South Wales (viz, s 10 of the Wills Act 1958 (Vic); s 16 of the Succession Act 1981 (Qld); s 11 of the Wills Act 1936 (SA); s 17 of the Wills Act 1970 (WA); s 11 of the Wills Acts 1840 and 1918 (Tas); s 16 of the Wills Act 1968 (ACT); s 11 of the Wills Act 1983 (NT)). The effect of these provisions is to grant special privileges to soldiers, sailors and airmen who are on actual military service and to seamen who are at sea (under any conditions). Such persons may make wills, even if they are infants, and such wills may be made informally.

Where a soldier about to embark overseas orally declares, 'If anything happens to me, this is for R', the disposition will be held to be a valid will. When a privileged testator writes a will, there is no need for witnesses. Whether the declaration is oral or written, the court will give effect to its terms, provided that the person wanted it to be a binding will.

The phrase 'actual military service' means that the serviceman is called up for service, is engaged in hostilities, is about to proceed to a hostile engagement or is on embarkation leave for a foreign station in connection with operations of war, either imminent or taking place, as held in *Re Anderson* (1958) and *Re Gillespie* (1968). In *Re Wingham* (1949), it was held that a trainee pilot on an RAF instructional course in Canada was on actual military service. A soldier in Australia in peace time is not. Seamen, including those serving in the merchant navy, may make informal wills when at sea or about to embark on a voyage, but not if they are on leave and do not have orders to join a ship, as held in *Re Rapley's Estate*, *Rapley v Rapley* (1983).

Persons serving as army nurses, typists, etc, under military or naval orders, may enjoy the same privilege as soldiers on actual military service.

An informal will made by any of the above persons remains valid even after the testator ceases to be a sailor or completes service in the armed forces.

Revocation

It is of the very nature of a will, according to Australian law, that it shall be revocable until the testator dies. Revocation may be express, or it may be implied from the conduct of the testator. Revocation may be effected by any of the following.

Revocation by a subsequent will or codicil

A will usually begins with a clause revoking all former wills. If such a clause is not inserted, the later will (or codicil) will not revoke any former will unless there is an inconsistency between the two. Therefore, if a testator, T, in a first will leaves a specified named house to A, and in a later will leaves the same house to B, the house will go to B. If, however, T leaves $500 to X in the first will, and in a later will (which does not contain a revocation clause) leaves $500 to Y, both X and Y will receive legacies of $500.

Revocation by writing executed as a will

A will may be revoked by writing which, though not itself a will, is signed and attested. It is sufficient that it should declare the testator's intention to revoke the will without containing any dispositions in lieu of those contained in the instrument revoked. Thus, a letter, signed by a testator and attested by two witnesses, directing a will to be destroyed, was held in *Re Durance's Goods* (1872) to be sufficient to revoke the will.

Revocation *per subsequens matrimonium* (by marriage)

A will is revoked by the subsequent marriage of the testator, whether the testator be male or female. Where it appears from a will that, at the time it was made, the testator was expecting to be married to a particular person and it was intended that the will should not be revoked by the marriage, the will is not revoked by marriage to that person.

Revocation by destruction of the will with *animus revocandi* (intention to revoke)

This is effected by the testator (or someone present and under direction) destroying the will, provided that the act of destruction, for example, by burning or tearing, is done with the intention to revoke the will. The following elements must be proved:

- physical destruction;
- intention (*animus revocandi*) to revoke by such destruction; and
- the destruction must be effected by the testator or someone present and by his or her direction.

As to destruction, a partial destruction is sufficient if there is clear evidence that cancellation of the will was intended, for example, tearing off the signature and attestation clause. As stated by Lord Justice James in *Cheese v Lovejoy* (1877):

> All the destroying in the world without the intention will not revoke a will, nor intention without destroying. There must be the two.

The destruction cannot be delegated to a solicitor or other agent unless the will is destroyed in the presence of, or by the authority of, the testator.

> If it was not done with the testator's authority at that time ... no amount of authority afterwards can be brought into play so as to ratify an act done without authority at the time [*Gill v Gill* (1909)].

Where a will is lost or is destroyed without being revoked, its contents may be proved by other evidence, for example, a copy, a draft or oral evidence, as occurred in *Sugden v Lord St Leonards* (1876).

Revival of revoked wills

Where a will has been revoked in any of the above ways, it may nevertheless be revived either by re-execution as a will or by a properly executed codicil which expresses a clear intention that the earlier will shall stand. It should be noted that it is not possible to revive a will which has been revoked by a later will merely by destroying the later will. For example, a testator makes will No 1; later, will No 2 is made, revoking will No 1. The testator now wishes to revive will No 1. It is not possible to do this merely by destroying will No 2. The only effect of this would be that the testator would have left no will at all, and would die intestate.

Doctrine of dependent relative revocation

Where a testator revokes a will with the intention of making a new one, and for some reason fails to make a new one (for example, he or she dies before executing it), the original (that is, the revoked will) may remain valid and be treated as the will of the testator. This occurs where the court is satisfied that the testator did not intend to revoke the will *absolutely*, but merely revoked it as a first step towards making a new will. For example, in *Re Greenstreet's Estate* (1930), a person destroyed a will, made out in favour of the spouse, under the mistaken belief that all the property would pass automatically to the spouse if the death occurred while intestate. It was held that, in these circumstances, a copy of the will could be admitted to probate.

Legacies and devises

A *devise* is a disposition of freehold land contained in a will. A *legacy* or a *bequest* is a disposition of any other form of property, including leaseholds. The terms used for recipients of the gift by will are 'devisees' and 'legatees' respectively.

Classes of disposition

A legacy (or bequest) may be any one of the following:

- General legacy
  Where a gift is made which does not refer to a specific or particular object, it is described as a general legacy, for example, a gift of 'a horse', 'a car' or '$1,000'.
- Specific legacy
  This is a gift which is specifically described, for example, 'my Holden car' or 'my Federation chairs'.
- Demonstrative legacy
  A gift of a sum of money to be paid out of a particular fund is referred to as demonstrative, for example, 'a sum of $500 from my bank deposit account'.

A 'residuary gift' refers to the residue of an estate which remains after all the debts have been paid and the devises and legacies have been distributed. Unless the residue is disposed of, for example, by gift to some person, the testator will be intestate as to that part.

The effect of abatement and ademption are important in distinguishing these different classes of legacies.

Lapse of gifts

Where a legatee or devisee dies before the testator and is not issue of the testator, the intended gift lapses. The property allocated to the deceased beneficiary falls into the residue of the estate.

Abatement

The first duty of the personal representative responsible for winding up the testator's estate is to pay the testator's debts before the estate is distributed among the beneficiaries. Where there is insufficient property remaining after the debts have been paid to satisfy all the beneficiaries, it follows that some of the legacies will have to be reduced or even repudiated altogether. The legacies are said to 'abate' and they will do so in a certain order. Residuary gifts abate first, followed by general legacies and then specific legacies. Demonstrative gifts will not abate unless the fund out of which they are to be paid is itself exhausted. If that happens, the demonstrative legacies will be treated as general legacies and will abate with them.

Ademption

If a specific thing to be given by will to a legatee is not in existence or no longer belongs to the testator at the time of his or her death, the gift is 'adeemed' and the legatee gets nothing. Thus, if X bequeaths a specific painting to Y, and the painting is destroyed by a fire before X dies, Y will get nothing. The rule as to ademption does not apply to general legacies or demonstrative gifts.

Family provision

Until the early 20th century, a testator had complete freedom to dispose of property in any manner thought fit. There was no obligation to make any will. Moreover, if a husband made a will, he was not obliged by law to include any provision for his wife and children, and he could leave to any other person the whole of his property if he so decided. This was regarded as testamentary freedom.

Various State family provision legislation has given the court power to vary a will or the rules of intestacy on the application of certain eligible persons. If a court considers that either the dispositions of the will or the intestacy rules do not make adequate provision for certain relatives or dependants of a deceased person, payment of provision out of the net estate might be ordered for their maintenance.

The list of claimants varies from jurisdiction to jurisdiction, but may include:

- the wife or husband;
- a former spouse who has not remarried;
- a *de facto* of the deceased at his or her death;

- a child of the deceased;
- a person who was treated by the deceased as a child of the family;
- any other person who was at some time maintained by the deceased and a member of the deceased's household.

Any person in these categories may apply to the court for an order on the grounds that the disposition of the deceased's estate effected by the will or the law relating to intestacy does not make *adequate provision* for the proper maintenance of that person.

In making any order, the court must make such provision as, in its opinion, ought to be made for the maintenance of the eligible person.

Application under the legislation must be made within the required period of time from the date on which representation in respect of the estate is taken out, or, in New South Wales, from the date of death.

The court may make an order for periodical or lump sum payments from the estate. In making the order, the court must have regard to a number of matters, for example, the applicant's resources, the size of the estate and the applicant's conduct towards the deceased. In New South Wales, there are wide powers under the Family Provision Act 1982 (NSW) to upset dispositions intended to defeat or frustrate family provision applications.

The relevant legislation for other States is: Administration and Probate Act 1958 (Vic); Succession Act 1981 (Qld); Inheritance (Family Provision) Act 1972 (SA); Inheritance (Family and Dependants Provision) Act 1972 (WA); Testator's Family Maintenance Act 1912 (Tas); Family Provision Act 1969 (ACT); Family Provision Act 1970 (NT).

Personal representatives

Under Australian law, a deceased's estate does not vest in the persons to whom it has been left by will or among whom it has by law to be distributed on an intestacy. The estate vests, on the grant of probate or letters of administration, in the deceased's personal representatives. These are interposed between the estate and the beneficiaries. The personal representatives are recognised by law as representing the deceased person for all purposes under the law of property and, for most purposes, under the law of contract and tort. In general terms, the deceased's rights and liabilities are transferred or transmitted to the lawfully appointed personal representatives, and can be enforced by or against them as soon as they are officially able to act.

There are two classes of personal representative:

- Executors
  These are usually appointed by a testator in a will. Sometimes, an appointment may be implied, as where a testator nominates a certain person to pay off debts. In this event, the executor is technically called 'an executor according to the tenor'.
- Administrators
  Administrators are personal representatives of a person who has died intestate.There is a danger of oversimplifying the division between these two classes, because, although a testator may appoint an executor in a will, there is no certainty that the appointee will act when the time comes. Where no executor is appointed or where a sole or surviving executor dies, becomes incapacitated through illness or refuses to act, the court itself will appoint a person to administer the estate 'with the will annexed'. This means that the appointee will administer the estate in accordance with the terms of the will as though he or she were an executor. This special type of administrator is called an administrator *cum testamento annexo*.

If an infant is appointed an administrator, an adult will be required to act during his or her minority. Such an appointee is called an administrator *durante minore aetate* ('during infancy').

An executor appointed under a will of which the validity is in dispute cannot take office, for the authority would be void if the will was declared invalid. In this type of case, an administrator *pendente lite* ('during the litigation') has to be appointed; they may proceed with the administration but must not distribute the property among the beneficiaries.

Probate and letters of administration

An executor can begin duties immediately following the death of the testator. The right to dispose of the estate is not complete, however, until a grant of probate of the will has been obtained.

Probate (from the Latin *probatum*, 'proved') is nothing more than an official acceptance that the will is a genuine one and that the executor's right to administer the estate is officially sanctioned. Probate may be obtained in two ways: (a) probate in common form (the usual one); or (b) probate in solemn form.

Probate in common form

Application for probate in common form is made to the Registrar of Probates. Documents which must be presented by applicants include:

- the will;
- oath of office;
- affidavit of death; and
- affidavit of assets and liabilities.

Where the deceased has many complicated business interests, the collection of information may take some time. If the documents are in order, probate can then be granted and a copy of the will handed to the executor. The original will is retained at the Probate Registry. Probate in common form is usually a matter of course.

Probate in solemn form

This will have to be obtained where a dispute arises as to the validity of the will. This usually involves an action taken before a judge of the appropriate division of the Supreme Court.

Letters of administration

Letters of administration are granted in broadly the same way as probate of a will. Whereas an executor is selected because he or she may be an honest and prudent person (at least, in the opinion of the deceased), an administrator enjoys no such confidence. Therefore (except in Queensland), the court will not usually appoint an administrator unless he or she produces what is called an 'administration bond'. There is power to dispense with the administration bond, however, and this commonly occurs where the beneficiaries are all adults and their consent is obtained.

Who may be appointed as executor or administrator

Executor

The naming of an executor is within the discretion of the testator. Usually, more than one executor is nominated, partly because it is always open to a sole executor to refuse to act. In some jurisdictions, probate will not be granted to more than four executors, neither will it be granted to a person of unsound mind or an infant during his or her minority.

Administrator

The appointment of administrator is within the discretion of the court. The order of priority of appointment follows that of the persons entitled to take on intestacy: a surviving spouse, any children, the father and mother of deceased, etc. Sometimes, a creditor may be appointed, for example, where the estate is insolvent. Usually, there is only one administrator, but occasionally, joint administrators are appointed.

The Public Trustee and trustee companies may also act as personal representatives. Trustee companies are only entitled to do so by way of legislation in the jurisdiction concerned.

Powers and liabilities of personal representatives

The personal representatives have absolute power to dispose of the property for the purpose of administration of the estate. On a total intestacy, a trust for sale automatically arises and the powers of trustees for sale are conferred upon the executors.

Personal representatives have one year in which to wind up the estate, such time being extended if need be. Where a beneficiary or creditor is prejudiced by delay, a complaint may be made to the court, but it will have to be proved that neglect on the part of the personal representatives was the cause of the delay.

Personal representatives hold a fiduciary position in respect of the administration, and are therefore in the position of trustees. If they distribute the estate imprudently, for example, by paying the beneficiaries before the creditors, they render themselves personally liable. However, the court has power to relieve a personal representative who has acted honestly and reasonably and ought fairly to be excused.

Revocation

A grant of probate or letters of administration may be revoked if good reason can be shown. For example, if the grant was obtained by fraud, if a later will has been discovered, if it can be shown that the testator is alive, or if probate was granted to the wrong persons or was irregular, there would be good reason for revocation.

Duties of personal representatives

The four main duties of personal representatives are as stated in *Union Bank of Australia v Harrison Jones & Devlin Ltd* (1910):

- to collect all debts due to the estate;
- to pay all the debts and satisfy all the liabilities of the estate;
- to convert unauthorised investments into authorised ones (if need be). There is usually power to postpone this duty for as long as the personal representatives think fit;
- to distribute the remainder of the estate according to (a) the will, or (b) the rules of intestacy.

Where the estate is sufficient to pay off all debts and the beneficiaries in full, there is no difficulty. Where, on the other hand, the estate is insolvent, there will necessarily be conflicting claims. Accordingly, rules must be laid down as to the order or priority of payment.

Intestacy

Descent upon an intestacy is governed by the appropriate State legislation. Generally, after paying funeral expenses, testamentary expenses and debts, the administrators hold the estate on trust for sale (with power to postpone the sale) and distribute the proceeds of sale according to rules laid down in the legislation.

Five main groups of surviving relatives must be considered: (a) a husband or wife; (b) children or other issue; (c) parents; (d) brothers and sisters; and (e) relations of remoter degree. The share of the intestate's widow or widower depends on whether there are any children of the marriage. Parents, siblings and remoter relations are only eligible in turn where there is no spouse or issue. A *de facto* spouse may also be eligible in some circumstances.

On an intestacy, the surviving spouse has, in some jurisdictions, the right to require the personal representatives to appropriate to him or her the matrimonial home. The market value of the home on such an appropriation has to be deducted from the other benefits accruing to the surviving spouse under the intestacy.

Where a testator fails to dispose of all property, this is described as dying 'partially intestate'. The property not disposed of specifically is taken by the residuary legatee, if there is one. In the absence of such a person, the property not specifically disposed of by will is distributed by the testator's executors in accordance with the rules of intestacy, as set out above.

Hotchpot

On a total intestacy, the law in some jurisdictions requires money or property transferred to a child by the intestate during their lifetime to be brought into account on the division of the estate, and must be treated as having been paid on account of the child's share under the intestacy, unless a contrary intention is shown. This is called the 'hotchpot' rule.

Gifts *inter vivos*

In contrast to the disposition of a person's estate in the event of their death has been considered, a person may make dispositions of property with the intention that they be effective or become operative during their lifetime.

Such a gift may be defined as *a transfer of property whereby the transferor (the donor) receives no valuable consideration from the transferee (the donee)*. Gifts may be made by deed or, more usually, by a transfer of the property by the donor to the donee with the intention that the ownership in the goods (as distinct from mere possession) shall be transferred. A gift is not complete, therefore, until *possession* of the thing has actually been transferred to the donee; mere intention alone is insufficient – there must be an actual transfer of possession. Where the gift is by deed, the physical transfer of possession or delivery is not necessary. A donee can, of course, refuse a gift. The law presumes that a donee has accepted the gift unless it has been clearly shown that they do not wish to do so.

Once a gift is made, it is irrevocable. By contrast, some European legal systems permit a donor to revoke a gift on the grounds of ingratitude by the donee. A gift may be conditional. Thus, a gift of an engagement ring may be conditional on the fiancee being prepared to marry the donor of the ring.

Donatio mortis causa

A *donatio mortis causa* (gift in anticipation of death) is the delivery of property to another in contemplation of the donor's imminent death, on condition that the gift is not to be absolute until the donor dies. A *donatio mortis causa* resembles a gift by will, in that the donor has the right to revoke the gift, the gift lapses if the donee happens to die before the donor and the donee is liable for the donor's debts.

A *donatio* resembles a gift *inter vivos* ('between the living'), in that it takes effect when the delivery occurs, subject to the condition (as stated above) that the gift will only become absolute if the donor dies. The donor must be in imminent peril of death, that is, *in extremis*, either by illness or otherwise.

Revocation of the gift is automatic on the donor's recovery from the illness. Revocation may be express, as where the donor informs the donee that the gift is revoked, or implied, as where the donor resumes possession of the property.

Delivery of the gift may be actual or constructive. Actual delivery occurs where, for example, A, who is about to die, hands a ring to B. Constructive delivery occurs where, for example, A hands the keys of his safe in which the property is kept to B, the donee, coupled with the intention to transfer ownership.

Anything capable of passing by mere delivery can be the subject of a *donatio*. An example would be a bank deposit book. Freehold land and leasehold land cannot pass by means of a *donatio*.

13 Criminal Law

You should be familiar with the following areas:

- structure and classification of criminal law in Australia
- the elements of criminal liability
- offences against the person
- offences against property

Introduction

In a legal system, there are certain wrongful actions committed by individuals that society regards as being not simply a matter between a perpetrator and the victim, but a matter of such seriousness that it affects society as a whole. Such actions are called crimes.

Not all wrongful actions are crimes, and one or more of statute law, delegated legislation or common law will specify what actions are crimes and what actions are civil wrongs. This distinction is important, as there are different remedies and different procedures for righting crimes and civil wrongs.

Description of criminal law

Criminal law is concerned with rules about crimes. Crimes are wrongs which the State is greatly concerned to prevent or, failing prevention, to punish the perpetrators of them. Special vocabulary is used in this area of the law – 'crime' itself, and the outcomes associated with it – 'punishment'; 'prosecution'; 'accused'; and 'conviction'. It is difficult to give a short and sensible statement of what are the common characteristics of crimes.

Many crimes are grave moral wrongs, and this results in the use of the moralist's language of 'guilt' and 'innocence' in this context. But not all crimes are grave moral wrongs, and not all grave moral wrongs are crimes; so, keeping a shop open after specified hours is a crime, but adultery is not. Nevertheless, there is an important general connection between moral heinousness and the content of the criminal law which must never be overlooked.

Nearly all of the crimes which were developed by the common law and which still form the core of the criminal law – murder, rape, theft, arson and assault – are acts of gross immorality. Similarly, the basic notion which lies behind treason – open disloyalty towards the State itself or, in different terms, the community of which a person is a member – enunciates a moral wrong. This connection between moral heinousness and crime has produced the fundamental legal principle that only persons who may be described as morally blameworthy may be convicted of crimes. This means that, first, they are shown to be capable of making a free choice about acting or refraining from action, and, secondly, that they made such a choice. Therefore, special rules have been devised for the young, the mentally ill, those in a special position of dependence and those shown to be affected by acts of violence or other forms of duress. All of these are people who cannot be said to be able to exercise a completely free and informed choice in their own activities. This is summed up in a well known maxim, *actus non facit reum nisi mens sit rea* – 'the act does not make him guilty unless the mind be guilty'.

Sources

English common law

Many criminal offences were originally created by the English common law courts, and the definitions of some of these offences are to be found even today only in case law, for example, murder, involuntary manslaughter and common assault.

Australian common law and legislation

As with other areas of Australian law, the criminal law of Australia is derived from the English legal system, which was received into Australia upon English settlement. As compared to other areas of Australian law, there is a contrast in criminal law between some States (New South Wales, Victoria and South Australia and the Australian Capital Territory), which have retained a common law approach, and those (Criminal Code Act 1899 (Qld); Criminal Code Act (WA);

Criminal Code Act 1924 (Tas); Criminal Code Act 1983 (NT)) which have codified their criminal law. The latter statutes are often referred to as the Australian Criminal Codes.

There is also a federal jurisdiction which is concerned with the exercise of Commonwealth power affecting federal personnel and property, the principal statute being the Crimes Act 1914 (Cth).

Subordinate legislation

Statue may empower a minister or some other body, for example, a local authority, to make rules, orders or bylaws which may contain offences. If the minister exceeds the authority given to him or her by the statue, it is said that the action is *ultra vires* and the rule will be invalid.

Classifications

Crimes may be classified as follows:

(a) according to source (see above);

(b) according to method of trial. This provides as follows:

- indictable offences – triable by judge and jury, for example, murder and robbery;
- summary offences – triable by magistrate, for example, most traffic offences.

Criminal liability

Almost all common law offences and serious statutory offences require two elements, *actus reus* and *mens rea*; in the words of the Latin maxim: *actus non facit reum nisi mens sit rea* ('the act does not make him guilty unless the mind be guilty'). Some offences are satisfied with negligence instead of *mens rea*. Many minor offences require proof only of the *actus reus*: these are called strict liability offences. In addition, a person may sometimes be criminally liable for the act and even *mens rea* of another; this is known as vicarious liability. Lastly, a corporation, a non-human, may be held personally liable for acts of its directors or servants.

Actus reus

This is the prohibited act which is necessary for all crimes and is to be found in the definition of the crime. Glanville Williams defined *actus reus* as:

> ... the conduct that is forbidden by the rule of the criminal law on the assumption that any necessary *mens rea* is found to exist ... the external elements of the offence, including the negative of defences [*Textbook of Criminal Law*, 3rd edn, 1996, Sweet & Maxwell].

The *actus reus* may consist of three elements:

- a willed conduct or omission;
- the surrounding circumstances; and
- the prohibited consequences.

The following may amount to conduct:

- a physical act, for example, a blow;
- words, in such offences as incitement, conspiracy, blackmail and where the words induce an act by an innocent agent;
- an omission, where there is a legal duty to act at common law, by statute or by undertaking, for example, parents are under a duty to provide food and medical attention for their children. In *R v Instan* (1893), a niece had undertaken to look after an elderly aunt at the aunt's expense. Having failed to provide food and to call medical assistance when the aunt was seriously ill, she was convicted of manslaughter;
- possession, for example, duty offences;
- a state of affairs, for example, 'being found in a dwelling house for an unlawful purpose';
- conduct of others in vicarious liability.

If the conduct is not willed by the person, it will not count as their act, for example, where A is pushed by B into C, it is not A's act. Similarly, the conduct of a sleepwalker whilst asleep is not willed conduct (it is automatism). The word 'unlawfully' in the definition of a crime indicates merely that there are defences.

Mens rea

This consists of intention or recklessness. It is necessary to distinguish them, since some crimes require nothing less than intention, for example, attempt and wounding with intent.

Intention

The hallmark of intention is desire or purpose. This has been defined as:

> ... a volitional movement (or omission). Knowledge of the relevant circumstance and a desire that any relevant consequences shall follow [Williams, G, *Textbook of Criminal Law*].

Foresight of certainty without desire must also be counted as intention. In *R v Crabbe* (1985), the High Court stated: 'A person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur.'

Recklessness

Here, there is foresight of the consequences but not desire. The approach adopted towards this concept may be illustrated by the decision of the High Court in *Crabbe*, where D, having consumed a large amount of alcohol, was ejected from a hotel, subsequently returned and crashed a road train into the bar, resulting in the death of five people. The court held that D was not guilty of murder, as actual knowledge or foresight of the consequences of the action had not been proved. Imputed knowledge was insufficient.

Negligence

Mens rea involves foresight or awareness. Negligence does not. It is conduct which fails to measure up to the conduct of a reasonable person; that is, the test is objective. Negligence has been long established in the law of tort: for example, the negligent motorist will have to compensate anyone injured as a result of his or her negligent driving. In criminal law, there is less scope for this, since the sanction is punishment. Some writers doubt, therefore, whether negligence ought to feature at all in criminal law (for example, Hart). There is also one serious offence, manslaughter, which can be committed by grossly negligent conduct (s 18.50 of the Crimes Act 1900 (NSW)).

Strict liability

Common law offences require *mens rea*; and, until the middle of the 19th century, the courts always presumed that a statutory offence also required *mens rea*, even when the statute did not expressly say so. However, when the courts came to construe the social legislation which the English Parliament had begun to pass, they felt that the statutes would be rendered more or less ineffective if the prosecution had to prove *mens rea* before the lay magistrates who heard these minor cases. Therefore, the courts began to hold that, in this class of offence, called 'public welfare offences' in America, where the statute neither expressly nor by necessary implication required *mens rea*, then Parliament had intended that it was not necessary, and thus, the prosecution could succeed merely by proving the *actus reus*.

Offences which the courts have construed in this way are to be found in such statutes as the Public Health Act 1991 (NSW), the Traffic Act 1909 (NSW) and the Trade Measurement Act 1989 (NSW). In *Westminster CC v Croyalgrange Ltd* (1986), it was stated that caution should be exercised in reaching a guilty verdict where the word 'knowing' is incorporated in the offence. Occasionally, the courts have extended the notion of strict liability to offences outside the field of social legislation. For example, in *R v Kennedy* (1981), a conviction under s 59 of the Crimes Act 1958 (Vic) (now repealed) for unlawfully taking a girl under 18 out of the possession and against the will of the superintendent of a state hostel was upheld. This was so despite the fact that D believed on reasonable grounds that the girl had permission to leave the hostel, the court holding that it was an offence of strict liability so far as the consent of a guardian or parent was concerned.

However, this decision appears to be inconsistent with that of the High Court in *He Kaw Teh* (1985), where D had been convicted on charges relating to the importing of heroin into Australia and of being in possession of heroin without lawful excuse. The court stated that there is a presumption that *mens rea* is an essential ingredient in every offence, including offences created by statute. In deciding whether Parliament intended to displace such a presumption, regard should be had to the words of the statute, the subject matter with which the statute deals and whether such a construction will assist in the reference of these provisions. On a charge of possessing heroin, the onus was on the prosecution to prove that the prohibited goods were in D's possession, and this would involve proving that D knew that the goods were in his custody or control. It was held that the decision of the Supreme Court of Victoria (Court of Criminal Appeal), upholding D's conviction, be reversed.

Vicarious liability

In tort, an employer may be liable for the tort of an employee committed in the course of employment. At common law, there was no vicarious liability in criminal law (*R v Huggins* (1730)). But, from the late 19th century, the courts began to hold that it could arise in statutory offences in the following circumstances:

- where the statute expressly says so;
- in licensing cases:
  - where the licensee knows and fails to stop an employee contravening the statute; or
  - where the licensee has delegated control of the business.

  In *Allen v Whitehead* (1930), the licensee of a refreshment house employed a manager who was instructed that prostitutes were not to be allowed to frequent the premises. The manager knew that they were doing so. The licensee did not, but was convicted because control had been delegated to the manager;
- where the offence is one of strict liability and the employer can legitimately be regarded as coming within the *actus reus*. An employer can be held guilty of a 'selling' or 'using' offence even though the act is that of an employee. But an employer will not be held liable for a 'driving' offence by an employee.

In *Coppen v Moore* (1898), the owner of a shop was convicted under the English Merchandise Marks Act 1887 (UK) of selling goods to which a false trade description was applied when, without the owner's knowledge, an assistant sold American ham as 'Scotch ham'.

In *Green v Burnett* (1955), a company was convicted under the English Motor Vehicles (Construction and Use) Regulations of using a vehicle on the road with defective brakes, even though the defect leading to the failure could only have been discovered by dismantling the cylinder.

There are one or two other cases which cannot be brought under the above headings, for example, *Newton v Smith* (1962), where there was a breach of the Road Traffic Act 1960 (UK) by the driver of a public service vehicle, for which the owner/employer was found liable for the act of his servant.

Corporate liability

A corporation may be liable either: (a) vicariously, where an ordinary employer can be liable (see above); or (b) under the 'alter ego' doctrine.

Under (b), a corporation can be held personally liable for most offences, provided that:

- it is a fineable offence;
- it is committed by a 'controlling mind', that is, a director;
- it is committed in the course of corporate duties.

In *ICR Haulage* (1944), a company, its managing director and persons outside the company were indicted for conspiracy to defraud. The English Court of Criminal Appeal held that the company could be liable through its director.

In *Henshall v Harvey* (1965), a weighbridge operator, by oversight, allowed an overloaded lorry to be driven away. The company he worked for was held not guilty of aiding and abetting the driving offence, since the knowledge of an inferior employee is not knowledge of the company.

Specific offences – primary offences

Primary offences may be divided into offences against the person and offences against property.

Offences against the person

These may be divided into offences without a sexual component and offences with a sexual component. The main offences without a sexual component are murder and manslaughter (that is, 'unlawful homicide'), dangerous driving and assault.

Murder

There are three heads of murder at common law which have been replaced by statutory provisions in some States. For example, in South Australia and Victoria, there are the following:

- intentional murder;
- reckless murder;
- constructive murder.

In New South Wales, the common law offence of murder has been replaced by s 18 of the Crimes Act 1900 (NSW). Section 18(1)(a) states:

Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by death or penal servitude for life or for 25 years [see *R v Ryan* (1967) – victim shot during armed robbery].

Manslaughter

Under the common law, manslaughter is considered under two categories:

- Voluntary manslaughter
  Here, D has the necessary *mens rea* for murder but his or her liability is reduced due to the presence of recognised integrating factors.
- Involuntary manslaughter
  Here, D commits an unlawful homicide but lacks the necessary *mens rea* for murder. Constructive manslaughter and negligent manslaughter are included in this category.

In New South Wales, the statutory provision for manslaughter is defined as follows: 'every other punishable homicide shall be taken to be manslaughter' (s 18(1)(b) of the Crimes Act 1900 (NSW)). It includes both voluntary and involuntary manslaughter.

Voluntary manslaughter

The State proves beyond reasonable doubt *mens rea* against the accused, who successfully pleads provocation, excessive self-defence, voluntary intoxication or diminished responsibility, as in *R v Camplin* (1978), where the test of loss of self-control was held to be what was expected of the ordinary person. See, also, *R v Croft* (1981), where the accused killed his wife, whom he had found in compromising circumstances. The court held that it was relevant that the husband was under the influence of alcohol at the time.

Involuntary manslaughter

This exists when an unlawful homicide is perpetrated with any one of a number of guilty states of minds less culpable than those appropriate to *mens rea* murder, such as foresight of the probability of bodily harm or inadvertence to a risk of grievous bodily harm. It can be either 'manslaughter by negligence' or 'manslaughter by an unlawful and dangerous act':

- manslaughter by negligence: *R v Stone and Dobinson* (1977) – reckless disregard of danger to the health and welfare of an infirm person;
- manslaughter by an unlawful and dangerous act: *R v Newbury and Jones* (1977) – D dropped a paving stone on a train, leading to the death of the railing guard.

Dangerous (previously culpable) driving

This is defined as 'Death of, or grievous bodily harm to, any person by impact of a motor vehicle being driven by another person under the influence of drink or drugs or at a speed or in a manner dangerous to the public' (s 52A of the Crimes Act 1900 (NSW)) – as in *R v Hain* (1966), where death was caused by the bus driver 'not keeping his eyes on the road ahead'.

Assault

Assault may be either simple assault or battery (s 61 of the Crimes Act 1900 (NSW)) – as in *R v Everingham* (1949), where a toy pistol was pointed at a taxi driver, who became frightened.

Sexual offences

These offences include rape, sexual assault, intercourse with girls under 16, incest and indecent assault.

Rape

At common law, a man commits rape if he has unlawful sexual intercourse with a woman who at the time does not consent if, at that time, he knows that she does not consent or is reckless as to whether she consents or not.

The least degree of penetration *per vaginam* is sufficient, and it is not necessary to prove that the hymen is ruptured (*R v Lines* (1844)).

If the woman's consent is obtained without the use of threats, force or fraud, D will not be guilty of rape.

Sexual assaults

The common law relating to rape has been drastically amended in all Australian jurisdictions. The level of reform varies from State to State and may be summarised as follows:

- Queensland
  This is very similar to the common law definition, but clarified with regard to the limits of the offence (s 347 of the Criminal Code (1899) (Qld)):

  > ... any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

- South Australia
  The scope of the offence is expanded by a wider definition of sexual intercourse (s 48 of the Criminal Law Consolidation Act 1935 (SA)).
- Victoria and Western Australia
  These States not only follow the wider definition of sexual intercourse, but incorporate a range of aggravating circumstances relating to the offence (s 38 of the Crimes Act 1958 (Vic); s 325 of the Criminal Code (1913) (WA)).
- New South Wales, Australian Capital Territory, Tasmania, Northern Territory
  Generally, all of these jurisdictions expand the scope of the basic offence, combining it with new offences of aggravated assault with intent to have sexual intercourse (s 61 of the Crimes Act 1900 (NSW); s 92(1) of the Crimes Act 1900 (ACT); s 185 of the Criminal Code (1924) (Tas); s 192(3) of the Criminal Code (1983) (NT)).

Intercourse with girls under 16

Intercourse with a girl of immature years is an offence, consent being no defence.

In most States, there is a more serious category where, if the child is under 10 (in South Australia, New South Wales and the Australian Capital Territory, the equivalent is 12), consent is no defence. In some States, where the girl is above this age, the court might accept evidence that, despite being under age, the she was capable of understanding the nature of sexual intercourse and, therefore, was capable of consenting to it.

Incest

In all States, it is an offence for a man to have sexual intercourse with a woman whom he knows to be his granddaughter, daughter, sister or mother. There is a corresponding offence for a woman in respect of her grandfather, father, brother or son. Consent is no defence to either of these offences.

Indecent assault
In New South Wales, Victoria and South Australia, indecent assault by any person on a woman is a statutory offence. The offence consists of a physical assault accompanied by circumstances of indecency (*R v Rolfe* (1952)).

Offences against property

Larceny

The law relating to larceny (also known as theft or stealing) varies from State to State.

Before considering the State variations in this offence, consideration should be given to the definition of stealing in s 1 of the Larceny Act 1916 (UK) (now repealed):

> A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

It is this definition which incorporates the common law approach of New South Wales, South Australia and Tasmania (note that the latter is now modified by legislation). Within these States, the offence must involve a *taking and carrying away*.

Taking

To take is to seize or take something into one's possession. Hence, larceny is an offence against possession, not ownership; therefore:

- one cannot steal (because one cannot 'take') what is already in one's possession. There are exceptions to this rule in respect of stealing by employers or bailees and part owners (see below);
- there can be no larceny if, by a wrongful act, the accused has obtained ownership, and not merely possession, because such an obtaining is not a 'taking';
- if a possessor of goods voluntarily parts with them to the accused, the accused obtains ownership (and so does not commit larceny) if two conditions are fulfilled:
    - the person who parts with the goods has the power to pass the ownership to the accused; and

- the person who parts with the goods intends to transfer the ownership to the accused.

If these two conditions are fulfilled, the ownership passes and larceny is not committed.

Carrying away

There must be some element of carrying away ('asportation'). In addition, if the thing taken is attached to something else which is not taken, the attachment must have been severed.

Consent

Merely to facilitate a taking is not to consent to it. But to deliver the goods to the accused for the purposes of entrapment is to consent to their being taken, and larceny would not be committed.

Claim of right

A *bona fide* claim of right is a good defence to a charge of larceny, even if founded on a mistake of law.

Intent

At the time of the taking, there must be an intent permanently to deprive. For that reason, merely to borrow an article without permission is not to steal it.

If (without any delivery of possession to him or her) the accused has taken another's property, the latter not realising that it has been taken, and so has committed a trespass, larceny will be committed if, when the person discovers the mistake, the property is appropriated.

Larceny by a bailee

Where a bailee of any property fraudulently takes the property to their own use, they will be guilty of larceny (s 125 of the Crimes Act 1900 (NSW); s 132 of the Criminal Law Consolidation Act 1935 (SA); s 226 of the Criminal Code Act 1924 (Tas)).

Note that, in *R v Slattery* (1905), D, a rent collector, converted money collected as rent for his own use. It was held that he was not guilty of larceny by a bailee.

Fraudulent misappropriation and related offences

This is committed when D collects or receives money for delivery to someone else and then misappropriates it for his own use (s 178 of the Crimes Act 1900 (NSW); ss 132, 184(1)(a) of the Criminal Law Consolidation Act 1935 (SA); ss 226(1)(b), 229(1)(a), 231(1) of the Criminal Code Act 1924 (Tas)).

Embezzlement – larceny by an employee

This is a separate indictable offence in New South Wales (s 157 of the Crimes Act 1900 (NSW)) and South Australia (ss 176(1)(b), 177(b), 182 of the Criminal Law Consolidation Act 1935 (SA)). It may be defined as follows:

When a clerk or servant fraudulently embezzles the whole or any part of any property delivered to or received or taken into possession by him or her, for or in the name or on account of, his or her master or employer [s 157 of the Crimes Act 1900 (NSW)].

Fraudulently embezzles

This involves a fraudulent conversion of the property before it reaches the employer's possession, actually or constructively (for example, by being placed in a receptacle such as a till on the master's premises). The object of the offence is the interception of the property on its way to the employer's possession.

Compare *R v Sullivan* (1820), where no offence was committed when D, a servant, changed a promissory note into silver coins but never returned the coins to his master, with *R v Davenport* (1954), where D was found guilty of embezzlement despite the fact that there had been no authorisation to receive the property which had been embezzled.

Larceny by a trick

This offence is committed where the owner's consent to the taking has been obtained by some fraud perpetrated by D. The ownership of the property must not have passed – this is the essential distinction between larceny by a trick (where the accused obtains possession) and obtaining by false pretences (where the accused obtains ownership).

The offence of larceny by a trick is said to have originated in *R v Pear* (1779), where D borrowed a horse which, it was agreed, would be ridden to a venue three miles away. Instead, the horse was ridden to London, where it was sold on arrival. D was found guilty of larceny.

Obtaining by false pretences

D commits this offence if, with intent to defraud, property is obtained from another by misrepresentation. It is sufficient that D has, by false pretences, induced the owner to pass the property to any other person. In *R v Petronius-Kuff* (1983), D was found guilty where he had obtained two motor cars by a false statement that he was a doctor and would pay for them within a week.

Larceny by finding

This is committed where, at the time of the finding of lost goods, the finder keeps what is found safe for the loser (in theory a trespasser) and then becomes a thief (that is, develops *animus furandi* – continuing trespass).

In *Minigall v McCammon* (1970), D found a wallet in a shop and, on examining it two days later, decided to keep the contents. *Held*: D was guilty of larceny by finding when he later decided to form an intent to steal.

Larceny by mistake

This is committed where the owner hands over the property as a result of some spontaneous mistake and the property is taken by D with knowledge of the mistake at the time of taking.

Where the mistake of the owner is shared by D at the time of the receipt of the property, there is some authority for the proposition that there can be no taking by D until the mistake is discovered. When the intention to deprive is formed, larceny is then committed.

In *R v Hudson* (1943), a cheque was sent to D's address by mistake. On receiving it, D opened a bank account and paid the cheque in. *Held*: D was guilty of larceny.

In *Russell v Smith* (1958), D was the driver of a truck which had eight additional sacks of pigmeal loaded onto it by mistake. On discovering the mistake, D took the extra sacks. *Held*: D was guilty of larceny.

Robbery

Robbery may be defined as stealing and, immediately before or at the time of doing so, and in order to do so, using force on any person, or putting or seeking to put any person in fear of being then and there subjected to force. If there is no theft, there is no robbery.

In *R v Skivington* (1968), D went to his sister's firm to collect wages due to her. When the cashier refused to pay, the money was obtained by threatening the cashier with a knife. *Held*: this was not robbery because there was no theft, since D had a claim of right.

In *Smith v Desmond* (1965), the House of Lords held that it was robbery where money was stolen from a safe 27 metres away from a bakery where two people had been overpowered.

The force must be to the person and must be used in order to obtain the property. Force against a third person is sufficient, for example, a passer by who intervenes.

Burglary and housebreaking

The offence of burglary consists, at common law, of the breaking and entering of the dwelling house of another, at night, with the intention of committing a felony.

Housebreaking differs from burglary, in that it may be committed by day.

According to the common law rules, 'entering' means that the insertion of any part of the body is sufficient.

In *Davis* (1823), D pushed in a window pane and a finger was seen to be inside. In *Machent v Quinn* (1970), D broke a shop window, stole from the window display and was convicted of burglary. In *R v Collins* (1973), the English Court of Appeal spoke of 'substantial entry' but did not elaborate.

If an instrument is inserted, it will amount to an entry if inserted for the purpose of committing an ulterior offence, even though no part of the body enters, for example, the barrel of a gun inserted to shoot somebody inside. However, it will not amount to 'entry' if it is inserted only to gain entry.

Blackmail

Blackmail, otherwise known as extortion, is committed when, with a view to gain for one's self or another, or with intent to cause loss to another, a person makes any unwarranted demand with menaces. A demand is unwarranted unless it is made in the belief that:

- there were unreasonable grounds for making the demand; and
- the use of the menaces is a proper means of enforcing the demand (s 99 of the Crimes Act 1900 (NSW); s 160 of the Criminal Law Consolidation Act 1935 (SA); s 242 of the Criminal Code Act 1928 (Tas); s 414 of the Criminal Code Act 1899 (Qld); s 396 of the Criminal Code Act 1913 (WA)).

'Menaces' was described by Lord Wright in *Thorne v Motor Trade Association* (1937) as follows:

> I think the word 'menace' is to be liberally construed and not as limited to threats of any action detrimental to or unpleasant to the person addressed. It may also include a warning that in certain events such action is intended.

Receiving stolen goods

This offence carries a penalty which is normally higher than the penalty for theft. This is because the courts have always taken the view that, if there were no receivers, then there would be no object in stealing.

The common law offence of receiving is committed by D who receives property, knowing it to be stolen. The *mens rea* of receiving is that D received the goods with the knowledge that they were stolen. The *actus reus* of receiving is the actual receiving of property, personally or through an agent, which has been stolen by another.

In Victoria, the traditional common law approach to the offence has been replaced with the offence of dishonestly handling stolen goods:

> A person handles stolen goods if (otherwise than in the course of stealing), knowing or believing them to be stolen goods, he or she dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he or she arranges to do [s 88 of the Crimes Act 1958 (Vic)].

Goods are 'stolen' for the purposes of this section if they are obtained by an offence under s 72 of the Crimes Act 1958 (Vic) or, if obtained in another jurisdiction, if the act would have been a crime in that jurisdiction.

D must know or believe the goods to be stolen; and they must actually be stolen at the time of the offence. If they have ceased to be stolen by being taken into the possession of the owner or the police, D cannot be convicted of the offence or an attempt (*Haughten v Smith* (1975)). The forms of offence are:

- receiving;
- arranging to receive;
- undertaking or assisting in their retention, etc;
- arranging to undertake or assist.

Where D is charged with receiving, there must be *mens rea* at the time of receiving in order to find D guilty. If D was a *bona fide* purchaser for value and only later knew that the goods were stolen, he or she cannot be guilty of theft.

To be guilty of undertaking, etc, D must be acting for the benefit of another person. In *R v Pitchley* (1973), D's son stole $450 and gave it to D to look after. D paid it into a bank account and only later learned that it had been stolen; he did nothing about it. *Held*: D was guilty of assisting in retaining. This decision is open to the objection that D alone retained the money, and therefore could hardly be said to have assisted.

The *mens rea* of the offence is knowledge or belief. The test is subjective: therefore, negligence is not sufficient; nor is mere suspicion or wilful blindness, since knowledge and belief are positive notions (*R v Ismail* (1977); *R v Stagg* (1978)). Dishonesty is an essential ingredient. Therefore, if D knows that the goods are stolen but intends to return them to the owner, there will be no guilt (*R v Matthews* (1950)).

Proof of *mens rea* in receiving cases enables evidence of previous handling or of previous convictions for theft or handling to be given. Additionally, common law rules enable a jury to infer guilty knowledge where D is in possession of recently stolen property and no satisfactory explanation is given.

Wilful damage

There is a wide range of miscellaneous offences which could be grouped under this heading: damaging a fountain in a public place; damaging shrines or monuments; defacing (ss 7–9 of the Summary Offences Act 1988 (NSW)); setting fire to crops and growing plants (s 44 of the Criminal Code Act 1913 (WA)).

Forgery

This occurs when a person makes a false instrument in order that it may be used as a genuine one. Section 250 of the Crimes Act 1900 (NSW) defines forgery as the counterfeiting or altering with intent to defraud of an instrument, document, signature (or something similar) or attestation or signature of a witness to a legal document; whilst s 63 of the Crimes Act 1914 (Cth) provides that a person is guilty of forgery if he or she counterfeits a seal or a signature or makes a false document, register or record.

At common law, 'document' usually means something that is in writing. A painting with a false signature has been held not to be a document (*R v Closs* (1858)); the same is true of a printed wrapper on a baking powder packet (*R v Smith* (1858)). The rule is that 'a document must not only tell a lie, it must tell a lie about itself' (*per* Blackburn J). In *Re Windsor* (1865), a teller in a bank fraudulently entered in the bank's ledger a greater sum than the actual asset. *Held*: not a forgery, since the journal did not tell a lie about itself. However, in the later case of *Hopkins v Collins* (1957), the Court of Criminal Appeal (UK) did not follow this rule and held, on similar facts but where a figure had been altered, that the document was a forgery.

The House of Lords has held that the log-on procedure for assessing computer databases such as Prestel does not constitute forgery. In *R v Gold and Schifreen* (1987), illicit access to a database was obtained by using someone else's identity number. *Held*: this was not forgery.

Buckley J in *Re London and Globe Finance Corp Ltd* (1903) defined 'defraud' and 'deceive' as follows: 'to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.' The House of Lords in *Welham v DPP* (1961) held that defrauding is not confined to an economic loss; and D was held to have intended to defraud where his intention was to cover up a breach of credit regulations so as to avoid a prosecution.

In *R v Bassey* (1931), D was held to have an intent to defraud where documents were forged in order to gain admission as a student to the Inner Temple.

Codification of offences against property

In 1972, the Chief Justice's Law Reform Committee of Victoria recommended that the law relating to property offences in Victoria be reformed on the basis of the Theft Act 1968 (UK). As a result of these recommendations, the Victorian Parliament enacted the Crimes (Theft) Act 1973 (Vic), which came into force on 1 October 1974.

The Australian Capital Territory introduced similar reforms by the Crimes (Amendment) Ordinance (No 4) 1985 (ACT), which was modelled on the Victorian legislation, although some variations were made in order to avoid some of the problems which had arisen in relation to the Victorian legislation. The Criminal Code Act 1983 (NT) also adopted some of the provisions of the Victorian legislation.

14 Procedure

You should be familiar with the following areas:

- the distinction between civil and criminal procedure
- the division of county or district court proceedings into matters and actions
- outline of civil proceedings in both county and district courts and State and Territory Supreme Courts
- outline of criminal proceedings in both courts of summary jurisdiction and international and Supreme Courts

Civil procedure

General

Persons considering themselves to have a civil claim against another will normally consult their solicitor. If unable to afford this, they may first visit a legal or law centre and take advantage of any facilities available for free legal advice. There are also various provisions available under State Legal Services Commissions for free legal aid. There is no obligation to consult a solicitor, but legal procedure is technical and detailed and it is a matter of common sense to take advice from those who are experienced and qualified to give it. The first step for the solicitor is to ascertain whether a cause of action is disclosed or whether the matter can be resolved by a straightforward letter to, for example, a debtor asking for payment. This may be all that is required, but, if legal action is needed, the next step is to see whether the action will be taken in the local county or district courts or the Supreme Court (the jurisdiction of each is dealt with in Chapter 4). No court can entertain an action unless it is legally empowered to do so.

County or district court procedure

Proceedings in the county or district courts are divided into two classes: (a) matters; and (b) actions.

Matters

Where a person brings a proceeding, such as an adoption order or a declaration of legitimacy, the initial proceeding is by *originating application*. Where a person seeks to bring an action for divorce or judicial separation, bankruptcy or winding up a company, the application is begun by a *petition*. Originating applications and petitions are collectively called 'matters', as opposed to 'actions'.

Actions

An action is a legal proceeding which is begun by a plaint. Broadly, all proceedings are begun by means of a plaint where one person, a plaintiff, brings an action against another, a defendant; as in claims for damages for breach of contract, a tort or where a plaintiff claims an equitable remedy. Actions are of two kinds: *ordinary actions* and *default actions*, each with its own technical rules and steps.

Steps in an ordinary action

The general rules are that the plaintiff obtains from the court office a request for the summons and completes it. The document sets out full particulars of:

- the parties;
- the nature of the claim; and
- the amount of damages the plaintiff claims.

The plaintiff files the completed request in the court office, together with the particulars of claim.

The particulars of claim lay down the basis of the plaintiff's case. Thus, in a road accident case in which the plaintiff sustained a fractured leg, was severely cut on the face and suffered shock, the claim will detail any allegations of negligence, such as driving a motor car carelessly or at excessive speed, and give details of the injury and damage to property, together with the cost and details of any other losses incurred during the plaintiff's incapacity, such as wages.

The registrar of the court then prepares a summons for service on the defendant. Affixed to the summons are:

- the particulars of claim;
- the form of admission (should the defendant admit the allegations and/or particulars); and
- the form of defence and counterclaim.

The documents so prepared must be served upon the defendant (or each of the defendants if there are more than one). There must be a prescribed time between the date of service and the date of the hearing of the action.

Once the summons has been served, the defendant will have to decide what to do. Normally, this will involve consulting a solicitor, if this has not already been done.

The defendant may, within a prescribed time, admit liability for all or part of the claim. He or she can make payment of the sum claimed, with costs, into court, or may offer to pay a lesser sum, which the plaintiff may decide to accept in full settlement. The defendant may, if unable to pay the whole sum due at once, offer to pay at a later date or by instalments, for example, $5 a month. If the plaintiff accepts the offer, the court will enter judgement accordingly, but if the offer is not accepted, the action proceeds.

A defendant who disputes the claim and wishes to contest the action must 'file a defence'. A counterclaim, if there is one, may also be made, and this should be served on the plaintiff, normally within a prescribed time.

At this stage, there is, therefore, (a) the plaintiff's claim with its allegations, and (b) the defence of the defendant with the other side of the case. The defence may be a denial of the allegations made by the plaintiff that, for example, the defendant drove too fast, together with any counterclaim that the defendant may make against the plaintiff.

Pre-trial review

This is a preliminary consideration of the action by the registrar, who will give directions to ensure a speedy and just disposal of the action. In effect, the registrar will try to narrow down the issue in dispute and see whether admissions may be made by one or both sides, whether witnesses need be called, what documents may be admitted in evidence without proof, etc.

The registrar also fixes the day for the trial of the action, after considering the two sides of the case. Notice is given to every party, so that all can be present.

The trial date having been fixed, the action proceeds on the date and in the court named. Normally, civil actions are brought to a court in the district where the defendant usually resides or carries on business. However, there are exceptions to this rule, such as where the ownership of land is in dispute; in a case such as this, the proceedings are brought in the district where the land is situated.

Many things may cause delays, for example, the illness of the plaintiff, defendant or an important witness, so that adjournments may have to be made.

If, after all the documents have been served, the defendant does not appear at the court for the action on the date named, the trial may proceed in his or her absence and judgment may be entered for the plaintiff, usually with costs. If, however, the plaintiff does not appear at the court and gives no explanation for his or her absence, the action will generally be struck out for want of prosecution. The action may be re-instated for sufficient cause on the plaintiff's application.

Let us assume that both parties are present with their witnesses and their respective solicitors or counsel.

At the trial before the judge, the usual procedure is as follows:

- plaintiff's lawyer makes an opening speech, describing the issues to be resolved and explaining how it is proposed to prove the points at issue;
- plaintiff's lawyer calls the plaintiff's witnesses and examines them. They are then cross-examined by the defendant's lawyer, in order to test the truth of what each witness says on oath;
- defendant's lawyer calls the defendant's witnesses, who testify what they know of the matter. Defendant's lawyer examines the witnesses, and they are cross-examined by plaintiff's lawyer;
- defendant's lawyer makes a speech to the judge, commenting on the points relevant to the issue and, if a point of law is concerned, brings the relevant statute or cases to the notice of the judge. Judgment in favour of the defence is requested;
- plaintiff's lawyer makes a speech in reply, giving the plaintiff's side of the story, commenting on the relevant factors, arguing points of law and asking for judgement in favour of the plaintiff;
- judge thereupon makes a decision. If sitting alone, the judge will give the judgment, which is then entered on the court records. If a jury is present, the judge will address the jury on the facts and the law, and ask them to retire and consider their verdict. Juries are rarely used in county courts.

Steps in a default action

A plaintiff claiming a debt or a liquidated (that is, ascertained) demand must proceed by default action, not by an ordinary action. Judgment may then be entered by the plaintiff in default without the case going to trial if the defendant fails to take the appropriate steps, that is, filing a defence, counterclaim or admission or paying into court the sum claimed with costs. Even where the claim is for a debt or liquidated demand, there are some exceptions to the above rule, and an ordinary action must be brought, for example, against a person under a disability or to recover a sum secured by mortgage.

The same initial steps must be taken by the plaintiff's solicitor as those taken in ordinary actions described above. However, after being served with the summons and the particulars of claim, the defendant may take one of several courses:

- if the defendant, after receiving the summons, *does nothing* within a prescribed time (that is, he or she defaults), the plaintiff may enter judgment;
- if, after receiving the summons, the defendant pays into court either the whole amount claimed *or* an amount which the plaintiff is prepared to accept in settlement, the action will in most cases be stayed;
- if the defendant admits the whole *or* part of the debt claimed, and at the same time offers to pay the sum claimed at a specific rate (say, $10 per month) and the plaintiff (a) accepts the amount admitted, and (b) agrees to accept the mode of payment, judgment will be entered for the plaintiff;
- if the defendant admits the *whole* of the claim but the plaintiff does not agree to accept the mode of payment (say, $10 per month), a date will be set by the registrar for the decision of the question of the mode of payment. Much depends on the means of the defendant, about which inquiries will be made;
- if the defendant admits only a *part* of the claim and the plaintiff does not wish to accept the amount admitted by the defendant and the form of payment which the defendant proposes, the registrar will fix a pre-trial review and then a date for hearing;
- if the defendant does not admit the claim *at all*, the registrar will fix a pre-trial review at which the action may be disposed of or a date for the hearing.

Enforcing county or district court judgments

There are, of course, rights of appeal against judgments given in a county or district court. Generally, however, once judgment is given in the court, that is the end of the matter. The sum adjudged to be paid to the plaintiff is sent to the court or to the plaintiff by the defendant; or, if the dispute is over the possession of land, the possessor either stays in occupation or removes in favour of the plaintiff.

Where the judgment is ignored, however, consideration must be given to how the judgment is to be enforced by the court. There are two kinds of enforcement: (a) those where a judgment is given for a sum of money; and (b) other judgments (for example, for possession of land or a chattel).

Enforcing judgments for a sum of money

The following methods of enforcement are available:

- Warrant of execution
  The warrant is issued under the authority of the court, directing the bailiffs to seize sufficient of the property of the debtor, including money, negotiable instruments and goods, and to sell the same, if need be, to satisfy the amount of the judgement plus costs. The clothing and bedding of the debtor and his or her family and the tools of trade to a prescribed value may not be seized.
- Attachment of earnings order
  A court may be empowered to issue this order, which directs the employer of the judgment debtor to make periodical payments from the debtor's earnings and to pay the amounts so deducted to the collecting officer of the court at certain specified intervals. The sums so paid over by the employer are allocated to the judgment creditor in satisfaction of his or her judgment.
- Bankruptcy proceedings
  Where the judgment is above a prescribed sum, the judgment creditor may serve a bankruptcy notice on the debtor. If the latter does not pay the sum claimed, this omission will constitute an 'act of bankruptcy' and proceedings will ensue in the normal way.
- Garnishee proceedings
  This form of enforcement is available where a third party owes a sum of money to the judgment debtor. Thus, where A, a judgment creditor, is owed $100 by B, the judgment debtor, and X, a third party, owes $100 to B, garnishee proceedings may be issued against X, the garnishee, to pay A the $100 instead of B. The debt is thereby extinguished and the judgment is satisfied.
- Appointment of a receiver
  Where a judgment debtor refuses to pay the judgment debt and the debtor has lands or houses which yield rents and profits, the court may, on the application of the judgment creditor, appoint a receiver, who is thereupon an officer of the court, to collect the rents and profits. These are applied in reducing the debt due. When the whole of the judgment debt (plus costs) is paid, the appointment of the receiver ends.
- Charging order
  Where the judgment debtor owns land and certain other forms of property, the judgment creditor may apply to the court for a charging order, the effect of which is that the property owned by

the debtor is charged with the payment of the sum due on the judgment (plus costs). The property subject to the charge may be sold in settlement of the judgment debt, any surplus being handed over to the judgment debtor.

- Judgment summons
  This is appropriate in only a few cases.
- Administration order
  Such an order will provide for the administration of an insolvent judgment debtor's estate by the court.

Enforcing other judgments

Sometimes, the court is called upon to decide ownership of land or goods which the defendant refuses to give up in favour of the rightful owner or possessor. The following authorise enforcement in such cases:

- Warrants of delivery or possession
  A warrant may be issued by the court to authorise the bailiff to take, by force if need be, the goods to be delivered to the person adjudged to have rightful ownership. Similarly, where a judgment for the recovery of land has been obtained and the defendant will not give up the land, a warrant may be issued by the court to the bailiff to enter onto the land and place the rightful owner in possession. Any interference with the bailiff is a punishable offence.
- Warrant of attachment
  A warrant may be issued by the court to attach the defendant for contempt. The warrant authorises the bailiff to arrest the defendant and convey him or her to the prison named. This form of enforcement is available where a defendant wilfully fails to comply with an order of the court.

Costs

The general rule regarding the costs involved in taking and defending actions, which includes barristers' fees and solicitors' charges, together with court fees and other disbursements, is in the discretion of the court. Usually, the court orders the costs to be paid by the party losing the action.

Civil proceedings in State and Territory Supreme Courts

The first step in an action, for example, in tort or a breach of contract, is begun by a writ of summons issued in the office of the appropriate court. The writ is a document requiring the defendant to enter an appearance (see below) within a prescribed time, or risk the plaintiff proceeding to judgment in the absence of the defendant.

The writ is dated with the day of issue and specifies, where necessary, the division to which it is intended that the action should be assigned.

Every writ is indorsed with short particulars of the plaintiff's claim and, in certain cases, with a 'special indorsement' (see below). The address of the plaintiff and the name and address of the solicitor issuing the writ are also indorsed, with the address for service. Normally, leave is not required to issue a writ.

The writ so obtained must be served. This may be done by handing it to the defendant (personal service), serving it by post or, in certain cases, serving it by advertisement.

Leave of the court is required for both the issue and service of a writ outside the jurisdiction.

The writ is indorsed with short particulars of the plaintiff's claim. The object of this is to show the defendant immediately the nature of the demand made against him or her. There are three kinds of indorsement:

(a) General
This need not set out details of the claim, but is simply a general description of the nature of the claim. Where libel is alleged, the indorsement must identify the publication(s) containing the alleged libel.

(b) For an account
This is used where the defendant has received money on behalf of the plaintiff, who does not know the exact amount. The plaintiff can call for an account to be taken.

(c) Special
This is a statement of claim and is used where the plaintiff seeks to recover a liquidated sum or to recover land or articles, etc. The special indorsement is a full statement of the cause of action and the plaintiff cannot serve another statement of claim, except to amend the indorsement.

The advantage of a special indorsement is that, as soon as the defendant gives notice of an intention to defend, the plaintiff may apply for summary judgment.

'Entering an appearance' formerly meant exactly what it said: the defendant had to appear at the court and, if need be, ask for an adjournment to arrange the defence. Today, a defendant 'enters an appearance' by his or her solicitor completing a form in duplicate and filing the document (or 'entering' it) at the office of the court within a prescribed time from service of the writ. A memorandum of the appearance, sealed with the official seal, is sent to the plaintiff. This notifies the plaintiff and his or her solicitor of the defendant's intention to defend.

If the defendant does not enter an appearance, the plaintiff is entitled to judgment in default of appearance (unless the defendant is a minor or of unsound mind). If the writ is specially indorsed for a liquidated sum, the plaintiff can enter final judgment for the sum, plus interest and costs. If the claim is for damages (not a liquidated demand), the damages must be assessed and the plaintiff may have interlocutory judgment, followed by final judgment, when the damages are assessed.

If the defendant appears and the writ is specially indorsed, the plaintiff may, on affidavit (verifying the cause of action and the amount claimed and stating that, in his or her belief, there is no defence), take out a summons before a master for leave to sign final judgment for the amount indorsed on the writ (or for the recovery of the land, if that is the issue) and costs. (Note that each Supreme Court has a number of legally qualified officers, known under such titles as masters, registrars and prothonotaries, who are empowered to carry out auxiliary legal duties.) The master may, however, on reviewing the claim and the facts, give leave to defend (subject to any conditions the master may lay down) or give the plaintiff leave to sign judgment. Where leave to defend is given by the master, the latter has considerable powers (similar to those of the registrar in the county or district court, described above) to give directions as to how the matter is to proceed, to admit affidavit evidence, for example, with a view to narrowing the issue, and to ensure a speedy and efficient disposal of the action, thereby avoiding extra costs to which the parties might otherwise be subject.

Pleadings in a legal action consist of statements in writing by both the plaintiff and the defendant. They exist to show the court (and the jury, if there is one) the questions at issue between the parties and the facts on which each party relies. Pleadings must be as brief as the nature of the claim or defence allows; they must state concisely the material facts upon which a party relies, but not the evidence by which those facts are to be proved. The pleadings must be divided into numbered paragraphs. When the pleadings are closed, two completed copies are lodged with the court.

The first pleading is the statement of claim. This must be clear and detailed; it must not be ambiguous. In tort, the right which has been violated need not be set out, unless the right is peculiar to the plaintiff. In breach of contract, the contract and then the breach must be proved. The statement of claim must be delivered either with the writ or within a prescribed time.

The next pleading is the defence, which must be delivered within a prescribed time after the delivery of the statement of claim. The defence must contain every material fact which is to be relied on at the trial and the denials made by the defendant must be specific.

The defendant may set up a claim against the plaintiff by way of set-off or counterclaim.

The next pleading following the delivery of the defence is the reply of the plaintiff. Where there is no counterclaim by the defendant, the reply will normally contain simply a joinder of issue, for example, a *traverse*, which means that the plaintiff denies the facts alleged by the defendant.

As a general rule, no pleading after reply is allowed. At this stage, the claim of the plaintiff and the defence of the defendant are known, as well as the reply of the plaintiff. The parties join issue. Now, a summons for directions must be taken out by the plaintiff. The directions are determined by the master and indicate the future course of the action. They are aimed to secure the just, expeditious and economical disposal of the case.

The duties of the master are mainly: (a) to limit the issues; and (b) to make orders which will reduce the costs of the evidence (by limiting the number of witnesses, particularly expert ones who may be expensive, and by ensuring that evidence may, where possible, be allowed by affidavit). The master may make orders as to discovery, when each party must swear on affidavit as to the documents which are or have been in their possession, or power, relating to the matters in question in the action. The master may make an order allowing the discovery of facts by means of *interrogatories*, which are questions addressed to the other party in the action, to which reply must be made. The answers must be given on oath.

Following the summons for directions, the next step is to give notice of trial, which may be on the application of the plaintiff or, if the plaintiff does not apply, the defendant. The form of the trial, whether before a judge or before a judge and jury, is decided by the master.

The procedure at the trial is that described above, except that, where the issue is exceptional in terms of the amount claimed or there are considerable legal complexities, there will be two counsel – a Queen's Counsel or Senior Counsel and a junior – on each side.

After the witnesses produced by both sides have been examined, cross-examined and re-examined, and after the speeches by the counsel on both sides, the judge sums up and explains to the jury (if there is one) the point upon which their verdict is required. The judge also directs the jury as to the proper measure of damages if the verdict should be given to the plaintiff. The jury then retire to consider their verdict, which is later announced in court by the foreman, who is chosen by the members of the jury from among their number. If there is no jury, the judge delivers the judgment and finding, which are entered on the records of the court. At the same time, the judge makes an order as to costs.

Enforcement of judgments in State and Territory Supreme Courts

Once a judgment is made by the judge, it follows that the judgment will have to be obeyed. If the party against whom the judgment is given pays the damages and costs awarded against them, that is the end of the matter. Sometimes, the judgment is not obeyed and the party to whom the money is due (or, if land is in dispute, the party entitled to possession) will have to take steps to enforce the judgment. There are two classes: (a) judgments for payment of money; and (b) judgments for other matters, such as possessions of land or goods. Writs of execution are issued by the court as follows:

- *Fieri facias*
  This is a writ which is directed to the sheriff, commanding that, out of the goods and chattels of the debtor, the sheriff 'do cause to be made the sum indorsed on the writ' with interest and costs. The sheriff, who acts through bailiffs, thereby becomes entitled to take possession of the goods of the debtor, except the wearing apparel and bedding and tools of trade to a prescribed value, and to sell the goods in satisfaction of the writ. The sheriff can enter the lands of the debtor to do this.
- Garnishee order
  This form of enforcement is available where the judgment debtor is owed money by a third party. The judgment creditor may institute proceedings against the third party (the garnishee) to pay the sum direct to him or her (the creditor) instead of to the judgment debtor. This extinguishes the debt and satisfies judgment.

- Charging order
  If a judgment debtor refuses to pay the debt but owns land and other forms of property, the judgment creditor may be awarded a charging order by another court, so that the property is sold to settle the judgment debt. Any surplus (minus costs) will be passed to the judgment debtor.
- Appointment of a receiver
  Where the judgment debtor owns property which has an income from rents and profits, the judgment creditor may apply for the appointment of a receiver to collect these rents and profits. When the debt, together with costs, has been paid in satisfaction of the debt, the receiver's appointment will be discharged.
- Sequestration
  The writ of sequestration authorises commissioners to enter the debtor's lands, to take possession of and collect the rent and profits from the debtor's real and personal estate, and to hold the land and personal estate until the debtor has paid the amount due. This writ is available where the debtor is in contempt of court by refusing or neglecting to obey the order of the court to pay the specified amount.
- Attachment of earnings
  This is available to the plaintiff only where the defendant neglects or refuses to obey a maintenance order made by the court.
- Committal to prison
  This is a rare method, but it is available where the defendant neglects or refuses to obey an order of the court.
- For possession of land or delivery of goods.

Criminal procedure

This section deals briefly with the procedure followed in the prosecution of a case in (a) a court of summary jurisdiction, and (b) an intermediate or Supreme Court.

All criminal prosecutions are, in theory, taken in the name of the Crown and are cited *Regina* (or *R*) *v Smith*. This form is followed in summary trials where the police institute proceedings, as prosecutor, against a defendant. A private citizen may also institute criminal proceedings.

Criminal proceedings in courts of summary jurisdiction

Process by summons

Refer to p 46 and note the distinction between summary offences and indictable offences. This section deals with the procedure followed in the prosecution of summary offences. These are by far the most numerous and include road traffic offences of all sorts.

Let us assume a simple case: X exceeds the speed limit whilst driving a car on the highway. He or she is stopped by a police officer, who notes down the explanation that X gives for exceeding the speed limit. The police officer then informs X that he or she will be reported for summons.

What happens now? The officer submits the report and, from this, an *information* is prepared – the first legal process. An information is merely a statement, which may be oral but is usually written, setting out the details of the alleged offence.

From the information, the clerk prepares a *summons,* which is then served on the defendant. Service may be effected simply by handing X a copy personally or, more usually, by sending a copy by post. The summons informs X of the date, time and place of the alleged offence and the statute (or common law rule) infringed. The summons commands the attendance of X at a court on a date named in the summons.

In most cases, the defendant, X, must appear at court. Indeed, if X does not attend the court, the magistrate may issue a warrant for his or her or her arrest. In minor offences, however, there is a procedure by which a defendant may avoid attendance at court by sending a form by post to the clerk of the court, pleading guilty. He or she may make any written explanation, which will be considered by the court. This saves much time and the case is quickly disposed of, usually by a fine.

Returning to the earlier illustration, if pleading not guilty, X (the defendant) should attend the court on the day named. He or she may consult a solicitor to assist in the defence. On the facts, however, there is not likely to be a defence. If X was speeding because he or she was in a hurry to visit a seriously ill parent, X may consider this a defence. However, it is not a defence, though it may be a mitigating circumstance which the court may take into consideration when fixing the sentence if it finds X guilty.

A defendant who wishes to contest the case will attend the court on the day named. When the magistrate is ready to hear the case, X's name will be called out. X will be directed into the court. The alleged offence is read out to the defendant, who is asked to plead. X pleads 'not guilty'. First, the police prosecutor will give a short outline of the facts and then ask the police officer to enter the witness box. The defendant will be sworn and will give evidence. X (or the solicitor) will be invited to ask any questions on the evidence of the officer. The police prosecutor may re-examine the officer to clear up any doubts raised by X (or X's solicitor). Any other prosecution witnesses will then be called to give their evidence and may be cross-examined by X or the defence solicitor. The prosecution is then at an end.

X will now be invited to do one of two things: (a) to go into the witness box and be sworn on oath to give evidence of what happened; or (b) to make a statement from outside the witness box, giving his or her side of the story. If the defendant adopts course (a), he or she will be liable to be cross-examined by the prosecuting solicitor, if there is one. Otherwise, after both sides – that is, the police (the prosecution) and X (the defendant) – have given their versions, the magistrate will announce the verdict of guilty or not guilty.

As to course (b), it will be apparent that the statement of a defendant who decides not to go into the witness box will not be as convincing as the statement of one who is prepared to testify. But note – this decision is the defendant's alone, and he or she is not forced to take either course. The defendant may say nothing at all.

In the example given, the magistrate will decide on a penalty. It may be a fine, but this is a matter for the court, and there may be circumstances in which the court may give an absolute discharge.

The above is the simplest example of a case brought before a magistrates' court. In many cases, there are more serious matters, such as dangerous driving, when there may be several witnesses for the defence and several for the prosecution. The burden of proving the guilt of the accused beyond reasonable doubt rests on the prosecution throughout the trial. The accused person is presumed innocent until the contrary is proved.

Process by warrant

A warrant is another means of starting a prosecution. Let us assume that X has stolen $100 from Y and that X has absconded. Y reports the matter to the police and gives a description of the offence and the offender. Theft of this nature can be a 'minor indictable' offence. After the police investigation, the police apply to the magistrates for a warrant. First, an *information* in writing and on oath must be laid by the police before a magistrate, who may then issue a *warrant* for the arrest of X.

The warrant authorises the police, to whom it is directed, to arrest X. The warrant may direct that, on arrest, X be granted bail. This is entirely at the discretion of the magistrate. If X is arrested in some other part of the State, he or she will be handed over by the police of that area to the police of the area where the offence occurred. X will then be brought before the court whence the warrant was issued to answer the charge of theft. A police officer may exercise powers regarding stop and search, entry, search and seizure, arrest, detention and questioning.

On being brought before the court, the magistrate will give X a choice of being tried either by (a) the magistrates' court, or (b) the intermediate court (that is, a district, district criminal or county court, depending on the State or Territory), since theft is an offence triable either way. Even if the magistrate considers that the offence is more suitable for summary trial, he or she must commit to the intermediate court unless the accused consents to summary trial.

Assume that the defendant opts for (a). The charge will be read out to him or her and he or she will be asked to plead guilty or not guilty. If the defendant does not plead one way or the other or says nothing which casts doubt on a plea of guilty, a plea of not guilty will be entered on the defendant's behalf.

Note that X will be given facilities to consult a solicitor, who will advise as to the course of action to be taken and how the defence should be conducted, that is, obtaining evidence and witnesses for the defence. If unable to afford a solicitor, the defendant may be granted the services of a solicitor by the court. X may apply for bail or for an adjournment to enable a defence to be arranged with the assistance of the solicitor. These matters are decided by the court.

When the case is ready for trial, the case proceeds in the normal way: the police prosecutor outlines the main facts of the case; the prosecution witnesses are then called, examined, and may then be cross-examined; the police prosecutor addresses the court; the defence solicitor addresses the court and calls defence witnesses, who give evidence. They are examined, cross-examined, and may be re-examined in order to clarify any points raised by the prosecution. The police prosecutor addresses the court, followed by the defence solicitor. At the conclusion of the case, the magistrate may retire to consider his or her verdict.

The magistrate will, if the defendant is found guilty, then hear the antecedents (that is, the history) of the accused. The magistrate then decides the appropriate penalty. If the magistrate finds the case not proved, a verdict of not guilty will be returned and the defendant will go free from the court.

Criminal proceedings in intermediate and Supreme Courts

Cases committed to the intermediate and Supreme Courts by the magistrates are triable by judge and jury.

Indictment

This is a written or printed accusation of the crime for which a person is to be tried by the intermediate and Supreme Courts. More than one person may be charged in an indictment, as where two or more persons are charged jointly or where the crime necessarily involves more than one person, for example, conspiracy. Moreover, several crimes may be charged in an indictment. Each offence will be described in a separate paragraph, called a 'count'.

A *bill of indictment* must be given to the clerk of the court. When the judge (or recorder) is satisfied that the requirements of the law are complied with, the clerk may be directed to sign the bill; when this has been done, the document becomes an 'indictment'.

Any person may prefer a bill of indictment before the court and, if it is properly drawn up and signed, a trial may take place. Where the court orders a new trial, it will direct a fresh indictment to be preferred; a bill may be preferred by a judge of the court; and where a person commits perjury, a bill of indictment may be there and then be drawn up and the person may be charged, tried and convicted. The usual channel, however, is by means of preliminary investigation at the local or magistrates' court, followed by a committal for trial to the appropriate superior court.

What follows is a general description of a trial when, for example, a defendant, X, is charged with larceny. Only the broad general procedure can be noted here.

Arraignment

The defendant, X, is 'arraigned' when the clerk of the court calls the defendant by name to the bar (that is, the bar of the dock) and asks: 'How say you, are you guilty or not guilty?'

The actual pleading to this question, that is, guilty or not guilty, must be made by the defendant him or herself, not by counsel.

Guilty pleas

Where the defendant pleads guilty, the prosecuting counsel outlines the broad facts of the case to the court, and the antecedents of the defendant are read out to the court by the police officer in charge of the case. Defendant's counsel may then make a speech in mitigation, pointing out any circumstances, for example, upbringing, mental depression, personal accidents, etc, which should be borne in mind by the court in fixing the sentence to be passed on the defendant. The judge, who may retire to consider the sentence, delivers his or her decision of the penalty in open court.

Not guilty pleas

In these cases, the procedure is as follows: a jury is empanelled from those potential members of the jury called to attend the court. They take the oath and are sworn to 'well and truly try the case according to the evidence'.

After this, prosecuting counsel outlines the facts of the case, shows how it is proposed to prove the case, states the number of witnesses intended to be called and shows the exhibits at the prosecution's disposal.

Prosecuting counsel then calls its witnesses. Each is examined and then cross-examined by defence counsel. Each may be re-examined by prosecuting counsel to clear up any doubtful points.

Defence counsel then outlines the defence. Counsel may, however, state that no case has been disclosed and that the defendant should go free. If that submission is accepted, the court makes its finding and may then free the prisoner. Usually, there is a *prima facie* case, and defence counsel, if calling witnesses to fact other than the defendant, may make an opening speech to the jury, after which defence witnesses are called. Each witness is examined, cross-examined by prosecuting counsel and re-examined by defence counsel.

The defendant, X, may elect to go into the witness box and give evidence on oath. If this occurs, and the defendant wishes to protest his or her innocence, not only will defence counsel examine (question) him or her, but prosecuting counsel will also cross-examine the defendant. This is usually a vital moment in any trial, since both what the defendant says and how it is said will be under close scrutiny by the jury and all those present in court. If this stage is successfully negotiated, the defendant will be re-examined by defence counsel.

If the defendant elects not to go into the witness box, he or she may make any statement at all from the bar or other appointed place.

Naturally, any statement not on oath will not be as convincing as statements subject to cross-examination under oath.

Prosecuting counsel now makes a closing speech, asking that the accused be found guilty. The last speech, however, will be that of the defence counsel, which will make a final plea to the jury.

The judge then directs the jury on the law, sums up and explains that the burden lying on the prosecution is to prove beyond reasonable doubt that the accused committed the offence. The judge will also direct them as regards majority verdicts in those States and Territories where this is applicable, viz, South Australia, Tasmania, Western Australia and the Northern Territory. The jury then retires and deliberates in secret and without any interference from anyone. The verdict is theirs and theirs alone.

If the jury disagree, and where a majority verdict is not acceptable, the judge will order a re-trial, when a different jury will be empanelled.

If the jury comes to a unanimous verdict of not guilty of the charge, the defendant is released immediately. This is known as an acquittal.

If the defendant is found guilty by the jury, defence counsel will make a plea in mitigation, bringing out those facts which ought to be borne in mind by the court before sentence of the court is awarded by the judge.

If the defendant is sentenced to prison, a committal warrant is prepared and the defendant is taken to the prison where the sentence is to be served.

With regard to some offences (for example, offences involving the supply of prohibited drugs or firearms and dangerous weapons), forfeiture may be ordered of any property which has been used for the purpose of committing or facilitating the commission of an offence (or which was intended to be used for that purpose) by the person convicted of the offence.

Proceedings against children and young persons

All offences committed by children and young persons must be dealt with summarily by children's courts. These are special courts set up in each State or Territory.

The following offences committed by either a child or a young person may not be dealt with summarily (other than in the Northern Territory):

- homicide;
- where the child or young person elects for trial by jury for any indictable offence.

In these classes of cases, the court of trial will be the appropriate higher court.

Standard works

A selection of standard books and materials used by lawyers practising in the various State and Commonwealth systems are:

- Ritchie, AV, *Supreme Court Procedure*, 1972, Butterworths;
- Butterworths Looseleaf/CD/Online Services, for example, *Criminal Practice and Procedure NSW*; *Criminal Law Western Australia*; *Criminal Law Victoria 2000*;
- Nevill, AG and Ashe, AW, *Equity Proceedings with Precedents*, 1981, Butterworths;
- Camilleri, BJ, *Practice and Procedure of the High Court and Federal Court of Australia*, 1978, Butterworths.

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