

AUSTRALIAN LEGAL SYSTEM

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CHAPTER 1 - INTRODUCTION TO THE AUSTRALIAN LEGAL SYSTEM

1. History of the Australian Legal System from the English System – Creation of the Common Law and Equity

- 1.1 Both the English and Australian legal systems are founded and developed out of (both historically and conceptually) the common law. This is the name for the system of law which developed from the king's courts in England from the twelfth century onwards. The name "common law" was derived because it was said to be "common" to the king's courts all across England.
- 1.2 The common law is said to have originated in the practices which occurred in those courts in the centuries after the Norman Conquest in 1066. Prior to the Norman conquest there little or nothing in the nature of a common law in England. The Romans had departed around 600 years before and left nothing of their law (although their presence provided the roots of Christianity in the region).
- 1.3 It is interesting to note that the true state of law after the unification of England under Canute, is that, while there was an increased degree of administrative centralisation, most law was administered informally by local assembly. Therefore the idea that common law was derived out of customary law is doubtful given, in reality, there was little that could be considered general custom on which it could have been built.
- 1.4 As questionable as the precise origins of common law may be, it suffices to say that the creation of the common law is the birth of the idea of judge-made law and it has come to be accepted that this came from some of the customs of the time and also from the importation of ideas from foreign places. Also important is the idea that common law was founded on notions of justice and the application of what judges considered to be fair in the circumstances, informed by their shared culture, professional collegiality and a growing tradition. Thirdly, with common law came the idea that decision of law arose out of precedent: that is, a court of common law looks to decisions previously made by other, relevant courts, synthesizes the relevant principles out of those decisions and then applies those principles to the current facts at hand.
- 1.5 Such a system naturally depends on the appointment of judges, originally appointed as surrogates for the King in the twelfth century. In that time, judges were directed to tour the country deciding cases, while other followed the King and others stayed in London.
- 1.6 The common law was later supplemented by a distinct, though incomplete, body of law called equity, which developed in the Chancery from the fourteenth century onwards. At that time, it became apparent that the Chancery (one of the two main administrative offices – the other being the Exchequer) was operating as a court (which later developed into the Court of Chancery) that provided remedies where the strict procedures of the common law resulted in injustice or where common law provided no remedy to an aggrieved and deserving plaintiff. The chancellors were often well educated in theology and had clerical training and were also well-informed in Roman law and canon law. However as the early chancellors lacked formal legal training and

(unlike common law judges) they showed little regard for precedent, their decisions were often widely diverse.

- 1.7 This began to change in 1529 when Sir Thomas More, was appointed as Chancellor, after which all future Chancellors were lawyers. Records of proceedings of the Courts of Chancery were kept from 1557 and several equitable doctrines were developed.
- 1.8 A predominant feature of equity is the exercise of judicial discretion in whether or not to provide a litigant with a remedy. While this was a source of criticism as it developed in the fourteenth and fifteenth centuries, as it lacked fixed rules and because the Lord Chancellor was exercising an unbounded discretion, this also meant that equity mitigated the inflexibility and rigour of the common law as equity looked at substance rather than form.
- 1.9 The element of discretion is the point of difference between the common law and equity. Equitable remedies are distinguished from legal remedies (available to the winning litigant as of right) because they are discretionary in nature. Common equitable remedies include:
 - (a) injunctions;
 - (b) rectification;
 - (c) equitable estoppel;
 - (d) rescission;
 - (e) specific performance;
 - (f) determination of the existence of an equitable lien; and
 - (g) account of profits.
- 1.10 Further, it is said that equity operates on the conscience of the defendant so an equitable remedy is always directed on a particular person (for example, a person will be enjoined from engaging in particular conduct, or a defendant may be required to make an account of profits).
- 1.11 Situations which commonly arise where equity operates are those involving express, resulting or constructive trusts, fiduciary law, relief against forfeiture, and equitable estoppel.
- 1.12 The separate areas of law were later fused in the nineteenth century in England in the Judicature Reforms in the 1870s which ended the existence of common law and equity as two separate institutions. However, in Australia it remains that common law and equity are referred to as two distinct areas of law.

2. Reception of English Law in Australia

- 2.1 In 1788, a mix of predominantly soldiers and convicts settled in eastern Australia.
- 2.2 Sir William Blackstone, a prominent English jurist and judge who lived in the 1700s, described the process by which English common law followed colonisation by England

in his famous and oft-quoted text, *Commentaries on the Laws of England*, in the following passage:

“Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force... But in conquered or ceded countries, that have already laws of their own, the king may alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.”

- 2.3 This means that, where an uninhabited country is colonised by England, the laws of England apply from the moment that colonisation occurs. This is different to where the country was previously occupied or inhabited. Where that is the case, then the native law of that country would apply until it is formally superceded by English law.
- 2.4 In the case of Australia, it was, upon colonisation, declared *terra nullius*, a term which, in Latin, means “nobody’s land”. Of course, in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 the High Court found that *terra nullius* did not apply in circumstances where there were already inhabitants present. However when Australia was first colonised in 1788, the declaration of *terra nullius* provided the mechanism by which English law was first received in Australia.
- 2.5 Later, the passage of the *Australian Courts Act 1828* in the United Kingdom, clarified the reception of English law in Australia as it provided that all laws and statutes in force in England at the date of enactment should be applied in and by the courts of New South Wales and Van Dieman’s Land (i.e. Tasmania) insofar as those laws were applicable. Note that, at that time, Victoria and Queensland were part of New South Wales (and had originally been a part off New South Wales) and therefore the same date for the reception of English law applies in those places also. However, in South Australia, reception occurred from the passage of the *Acts Interpretation Act 1915* (SA) and in Western Australia it occurred with the passage of the *Interpretation Act 1918* (WA).
- 2.6 In the 1890s, a number of constitutional conventions were held between the separate colonies to discuss the creation of a federal nation comprising of the colonies. This culminated in the passage of the *Commonwealth of Australia Constitution Act* (UK) on 1 January 1900, which came into force on the same day. This British statute became the Constitution of Australia, thus forming the federated nation of Australia.
- 2.7 In the Constitution, the legislative power of the Commonwealth is vested in the federal Parliament which consists of the House of Representatives, the Senate and the Queen.

- 2.8 Insofar as the legislative process is concerned, the Queen's responsibility is to grant Royal Assent, which is the method by which a monarch formally approves an act of parliament. Because Australia is a constitutional monarchy, this role of the Queen is considered to be a mere formality and is exercised in Australia by the Governor-General, who is the Queen's official representative in Australia appointed to carry out the Queen's constitutional duties within the Commonwealth of Australia. Other duties of the Governor-General include appointing judges, ministers and ambassadors and issuing writs for elections. The Governor-General also holds reserve powers which are not set out in the Constitution but which are the province of convention and common law. This includes the power to dissolve or refuse to dissolve the House of Representatives. This is the power which was famously exercised by Sir John Kerr to dismiss the Labor government of Gough Whitlam on 11 November 1975, the most significant constitutional crisis in Australian history
- 2.9 The federal Parliament has the power to make legislation within the subject matter areas listed under section 51 of the Constitution, including matters referred to it by the parliament of one or more States, as well as a number of exclusive powers of the Parliament listed under section 52 of the Constitution.
- 2.10 In contrast to the legislative powers of Commonwealth Parliament being confined to matters expressly set out in the Constitution, the States generally have plenary power (i.e. power granted in absolute terms, without limitation upon the exercise of that power) to enact laws on any subject.
- 2.11 Section 109 of the Constitution provides that, where there is inconsistency between the laws of a State and the Commonwealth, the federal law will prevail over the State law.
- 2.12 The government of New South Wales was formed in 1856 as prescribed by its Constitution (currently the *Constitution Act 1902* (NSW)). The New South Wales Parliament is comprised of the Governor, in whom executive authority is vested and who represents and is appointed by the Queen of Australia (i.e. currently Queen Elizabeth II). It is the governor who commissions the Premier of New South Wales, the leader of the political party that holds a simple majority of the votes in the Legislative Assembly. In addition to the Legislative Assembly (informally known as the "lower house"), the New South Wales Parliament is also comprised of the Legislative Council (informally known as the "upper house")

CHAPTER 2 - JURISDICTION OF COURTS IN NEW SOUTH WALES AND THE COMMONWEALTH

3. Commonwealth Courts

3.1 There are four main federal courts in Australia:

- (a) High Court of Australia;
- (b) Federal Court of Australia;
- (c) Family Court of Australia; and
- (d) Federal Circuit Court.

High Court of Australia

3.2 The High Court of Australia was created by Chapter III of the Constitution headed “The Judicature”, which also confers power to establish other federal courts and to vest federal jurisdiction in State courts. Section 71 under Chapter III of the Constitution provides:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other justices, not less than two, as the Parliament prescribes.

3.3 The High Court is the highest court in Australia. Its functions include deciding cases of constitutional significance or of special federal significance and to hear appeals from Federal, State and Territory courts, with special leave (i.e. there is no right of appeal to the High Court). In exercising all of these functions, the High Court applies and interprets the law of Australia

3.4 The High Court sits in Canberra and its principal registry is also based in Canberra. However the High Court has registries in the States and Territories and may also sit in the States and Territories from time to time.

3.5 The Sydney registry of the High Court is at the following address:

Level 23, Law Courts Building
Queens Square, Sydney NSW 2000
Telephone: 02 9230 8369
Facsimile: 02 9230 8376

3.6 The Melbourne registry of the High Court is at the following address:

Level 17, Commonwealth Law Courts Building,
305 William Street
Melbourne VIC 3000
Telephone: 03 8600 3001

Federal Court of Australia

- 3.7 The Federal Court of Australia is a superior court of law and equity, created by the *Federal Court of Australia Act 1977* (Cth) and began to exercise its functions on 1 February 1977.
- 3.8 The Federal Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law and some summary and indictable criminal matters. The original jurisdiction of the Federal Court is set out in section 39B of the *Judiciary Act 1903* (Cth). It includes, by virtue of section 39B(1A)(b) of the *Judiciary Act*, jurisdiction to determine any matter arising under the Constitution.
- 3.9 The Federal Court also has jurisdiction in the following matters:
- (a) cases arising out of a Federal statute and matters where a federal issue is properly raised as part of a claim or a defence: section 39(1A)(c) of the *Judiciary Act*;
 - (b) where the subject matter of the dispute owes its existence to a federal statute: section 39(1A)(c) of the *Judiciary Act*;
 - (c) judicial review of decisions and conduct involving Commonwealth statutes and the exercise of Commonwealth powers on the legality of a decision, rather than the merits of the decision. This includes judicial review applications pursuant to section 39B of the *Judiciary Act*, under the *Administrative Decisions (Judicial Review) Act 1977*, and under sections 476A and 476B(3) of the *Migration Act 1958* (Cth);
 - (d) appeals on questions of law from the Administrative Appeals Tribunal (including taxation matters), Superannuation Complaints Tribunal and the Native Title Tribunal;
 - (e) complaints about unlawful discrimination which are no longer being dealt with by the Australian Human Rights Commission;
 - (f) a first instance jurisdiction regarding objections to decisions made by the Commissioner of Taxation;
 - (g) a first instance jurisdiction (which it shares with the Supreme Courts of the States and Territories) in intellectual property (being copyright, trademarks, designs and patents);
 - (h) concurrent jurisdiction with the Supreme Courts of the States and Territories to hear maritime claims that arise under the *Admiralty Act 1988* (Cth);
 - (i) various industrial matters;
 - (j) a wide range of corporations matters arising under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* including

the winding up of companies, corporate management and misconduct by company officers, a jurisdiction which it exercises concurrently with the Supreme Courts of the States and Territories;

- (k) matters arising from the *Bankruptcy Act 1966*;
 - (l) cases arising out the provisions concerning restrictive trade practices and the Australian Consumer Law, arising from the *Competition and Consumer Act 2010* such as mergers, false advertising, exclusive dealing and misuse of market power; and
 - (m) other matters which bear a federal element including in defamation, negligence, civil aviation and election-related disputes.
- 3.10 The criminal jurisdiction of the Federal Court includes (but is not limited to) matters concerning cartel conduct under the *Competition and Consumer Act 2010*, summary offences arising from various Commonwealth statutes, and applications involving application for criminal contempt arising from examinations conducted by various federal agencies. Related to its criminal jurisdiction, but which are civil matters, is that the Federal Court also has jurisdiction in dealing with proceedings for the forfeiture of proceeds of crime.
- 3.11 The Federal Court also has a diverse appellate jurisdiction, hearing appeals from decisions of single judges of the Federal Court, appeals from the Federal Circuit Court in non-family related matters such as migration matters. The Federal Court also has a general appellate jurisdiction in criminal and civil matters on appeal from the Supreme Court of Norfolk Island.
- 3.12 The Sydney registry of the Federal Court is situated at:

Level 17, Law Courts Building
184 Phillip Street
Queens Square, Sydney NSW 2000

Telephone: 02 9230 8567
Facsimile: 02 9230 8535 (general); 02 9230 8295 (filing of documents)

- 3.13 The Melbourne registry of the Federal Court is situated at:

Owen Dixon Commonwealth Law Courts Building
305 William Street
Melbourne VIC 3000

Telephone: 03 8600 3333

Family Court of Australia

- 3.14 The Family Court of Australia is a superior court of record established by Parliament in 1975, pursuant to its powers to create courts of federal jurisdiction under Chapter III of the Constitution. The Family Court of Australia is a specialist arm of the Federal Court

created under section 21 of the *Family Law Act 1975* (Cth) as a superior court of record and as a court of law and equity.

3.15 The jurisdiction of the Family Court is set out in section 31 of the *Family Law Act* and includes matters concerning:

- (a) marriage and which arise from the *Marriage Act 1961* (Cth);
- (b) property and children of opposite-sex and same-sex de facto couples;
- (c) the adoption of children; and
- (d) the rights and status of a person who is an ex-nuptial child, and the relationship of such a person to his or her parents.

3.16 The Family Court may also sit as a full bench of 3 judges to hear appeals from decisions made by a single judge of the Court.

3.17 The registry of the Family Court in Sydney is situated at the following location:

Lionel Bowen Building
97-99 Goulburn Street
Sydney NSW 2000

Telephone: 1300 352 000
Facsimile: 02 9217 7136

3.18 The registry of the Family Court in Melbourne is situated at the following location:

Owen Dixon Commonwealth Law Courts Building
(Cnr Latrobe street) 305 William Street
Melbourne VIC 3000

Telephone: 1300 352 000

3.19 There are also registries of the Family Court in major cities/towns in New South Wales including in Parramatta, Albury, Dubbo, Coffs Harbour, Lismore, Newcastle and Wollongong.

Federal Circuit Court of Australia

3.20 The Federal Circuit Court of Australia (**FCC**) was established by the *Federal Circuit Court of Australia Act 1999* (Cth). The jurisdiction of the FCC is concurrent with that of the Family Court and the Federal Court and it has no exclusive jurisdiction. The FCC does not deal with criminal matters. The FCC has jurisdiction in family law and child support, migration law and general federal matters in areas such as administrative law, bankruptcy, consumer matters, industrial law, admiralty, human rights, intellectual property and consumer law matters.

3.21 In Sydney, the FCC is located at the following address for matters regarding family law and child support:

Lionel Bowen Building
97-99 Goulburn Street
Sydney NSW 2000

- 3.22 In Sydney, the FCC is located at the following address for matters regarding general federal law (including migration):

Level 17, Law Courts Building
Queens Square
Sydney NSW 2000

- 3.23 In Sydney, the FCC also has courts at

Terrace Tower Group Building
Levels 8, 9 and 13
80 William Street
Sydney NSW 2000

And

Levels 3 and 4, Lionel Bowen Building
97-99 Goulburn Street
Sydney NSW 2000

- 3.24 In Melbourne, the FCC is located at the following address:

Owen Dixon Commonwealth Law Courts Building
(Cnr Latrobe street) 305 William Street
Melbourne VIC 3000

Telephone: 1300 352 000

4. Courts of New South Wales

- 4.1 In New South Wales, the primary courts of law are as follows:

- (a) Supreme Court of New South Wales, including the Court of Appeal and Court of Criminal Appeal;
- (b) District Court of New South Wales; and
- (c) Local Court of New South Wales.

- 4.2 Many types of matters are also heard in the New South Wales Civil and Administrative Tribunal (**NCAT**) such as building matters, professional disciplinary matters, consumer matters and administrative law matters.

Supreme Court of New South Wales

- 4.3 The Supreme Court of New South Wales is the highest court in New South Wales. The Supreme Court was first established by the 1823 Charter of Justice and now operates

pursuant to the *Supreme Court Act 1970* and the *Civil Procedure Act 2005*. The Supreme Court is a court of law and equity and has an unlimited civil jurisdiction. The Supreme Court hears the most serious criminal matters.

- 4.4 The Supreme Court has two divisions: the Common Law Division and the Equity Division.
- 4.5 The Common Law Division concerns civil, criminal and administrative law matters. This includes matter such as personal injury claims (including concerning historical abuse by clergy and others), defamation, professional negligence, breach of contract and possession of land matters. Criminal matters dealt with in the Common Law Division include murder and manslaughter, major conspiracy and drug matters, Commonwealth prosecutions for serious breaches of the Corporations Law. In relation to administrative matters, the Common Law Division concerns legal challenges to decisions made by Government Ministers, officials and organisation.
- 4.6 The Common Law Division has specialist lists to deal with defamation matters and professional negligence matter.
- 4.7 The Equity Division deals with a wide range of matters including corporations matters, commercial disputes, probate and family provision, adoptions, admiralty, real property disputes and general equity. The specialist lists which come under the Equity Division include:
 - (a) General Equity;
 - (b) Admiralty;
 - (c) Corporations;
 - (d) Adoptions;
 - (e) Commercial, Commercial Arbitration, Technology & Construction;
 - (f) Expedition;
 - (g) Family Provision;
 - (h) Probate and Protective;
 - (i) Real Property; and
 - (j) Revenue.
- 4.8 The main registry of the Supreme Court is located at:

Level 5, Law Courts Building
184 Phillip Street
Sydney NSW 2000
- 4.9 The Supreme Court operates at different locations in the Sydney CBD, including:
 - (a) Law Courts Building, 184 Phillip Street, Sydney;
 - (b) Wentworth Chambers, 180 Phillip Street, Sydney (there are 2 courtrooms on level 1);

- (c) Hospital Road Complex, Hospital Road, Sydney (this is situated behind the Sydney Mint Museum);
 - (d) King Street Courts, Corner King and Elizabeth Streets, Sydney; and
 - (e) St James Road Court, St James Road, Sydney.
- 4.10 It is therefore advisable if you are attending the Supreme Court (for example, to drop off documents to a solicitor during a hearing or to transport a file trolley before a hearing starts), that you check the location of the courtroom you leave the office.

District Court of New South Wales

- 4.11 The District Court of New South Wales is the intermediate court of New South Wales established by section 8 of the *District Court Act 1973* (NSW) and has a civil and criminal jurisdiction. The District Court is a court of trial and also has an appellate jurisdiction.
- 4.12 Under its criminal jurisdiction conferred by Part 4 of the *District Court Act*, the District Court may deal with all criminal offences except for murder, treason and piracy.
- 4.13 The District Court's civil jurisdiction is conferred by Part 3 of the *District Court Act*, and includes:
- (a) any action which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court and which does not exceed \$750,000;
 - (b) any action to recover an amount not exceeding \$20,000, being the whole or part off an unliquidated balance of a partnership account or which is the distributive share under an intestacy or of a legacy under a will;
 - (c) commercial actions where the amount claimed does not exceed \$750,000;
 - (d) any action concerning a motor accident claim (where the Court has unlimited jurisdiction);
 - (e) any claim for work injury damages (where the Court has unlimited jurisdiction); and
 - (f) limited equitable jurisdiction in respect of the granting of injunctions (section 46 of the *District Court Act*).
- 4.14 The District Court also has a summary jurisdiction to hear offences committed under the *Work Health and Safety Act 2011* (NSW).
- 4.15 In Sydney, the District Court is situated at:
- John Maddison Tower
86 Goulburn Street
Sydney NSW 2000
- 4.16 The registry is on level 4 of the John Maddison Tower.
- 4.17 The District Court also operates at many locations all over New South Wales.

Local Court of New South Wales

- 4.18 The Local Court of New South Wales was established in its current form by the *Local Courts Act 1982* (NSW) (which also abolished the predecessor to the Local Court, the Court of Petty Sessions by changing its name to the Local Court).
- 4.19 The Local Court is where the majority of court work occurs in New South Wales. The Local Court has civil and criminal jurisdictions. In its criminal jurisdictions, the Local Court deals with the majority of criminal and summary prosecutions in the state and it also conducts committal proceedings to determine whether indictable offences are to be committed for the District Court Supreme Courts.
- 4.20 In its civil jurisdiction, the Local Court may deal with actions up to a value of \$100,000 and also has a limited jurisdiction with respect to family law matters where the Court may deal with applications such as property settlements and residence orders.
- 4.21 The Local Court may also deal with various applications such as apprehended violence orders and appeals related to drivers licences.
- 4.22 The Local Court also sits in specialist jurisdictions including the Children's Court, the Chief Industrial Magistrate's Court and the Coroners Court.
- 4.23 The Local Court sits in many locations across the State. In Sydney, the registry of the Local Court is situated at the same place as the District Court. Courtrooms are situated in both the John Maddison Tower and the Downing Centre Complex at 143-147 Liverpool Street, Sydney NSW 2000. It is therefore advisable to check the precise location of the courtroom before you leave the office when you are attending the Local Court.

5. Courts of Victoria

- 5.1 The courts which operate in Victoria are:
 - (a) Supreme Court of Victoria;
 - (b) County Court of Victoria;
 - (c) Magistrates' Court of Victoria;
 - (d) Children's Court of Victoria; and
 - (e) Coroners Court of Victoria.
- 5.2 In addition to the above courts, the Victorian Civil and Administrative Tribunal (**VCAT**) is a tribunal which deals with a range of disputes and has divisions for civil, administrative, human rights and residential tenancy matters.

Supreme Court of Victoria

- 5.3 The Supreme Court of Victoria is the highest court in the state and was established by s 75 of the *Constitution Act 1975*. The Court is comprised of the Trial Division and the Court of Appeal: s 75A (1) of the *Constitution Act* (Vic).

- 5.4 The Trial Division has 3 divisions: Crime, Common Law and the Commercial Court. In addition, s17C of the *Supreme Court Act (Vic)* establishes the Costs Court in the Trial Division which deals with questions relating to legal costs, including the assessment of costs for matters from other courts.
- 5.5 The most serious cases in the state are heard in the Crime Division, including murder, treason, attempted murder and other serious crimes. In the Supreme Court of Victoria, all criminal cases are heard before a judge and jury.
- 5.6 The Common Law and Commercial Court divisions hear civil matters which includes:
- (a) probate matters (like the Supreme Court of New South Wales);
 - (b) claims for unlimited amounts of money;
 - (c) urgent applications for injunctive relief;
 - (d) civil cases where there are complex issues;
 - (e) corporations matters; and
 - (f) judicial review of administrative decisions.
- 5.7 The Court of Appeal hears criminal or civil cases decided in the County Court or Supreme Court Trial Division, and some appeals from VCAT. Under some circumstances, there is no right to an appeal and a litigant must first seek leave from the Court of Appeal for its appeal to be heard by the Court.

County Court of Victoria

- 5.8 The County Court of Victoria is the main trial court in the state which sits below the Supreme Court and above the Magistrates' Court in the state's court hierarchy. The Court has 3 divisions: Criminal, Common Law and Commercial.
- 5.9 The Criminal Division hears all criminal matter except for the most serious ones (which are set out above as being heard in the Supreme Court). The Court deals with a wide-range of offences including indictable offences under Victorian law and Commonwealth law. This includes armed robbery, fraud, drug offences, sexual assault, serious assault, fraud and tax offences.
- 5.10 The Criminal Division conducts its business through 4 lists:
- (a) the General list;
 - (b) the Sexual Offences List;
 - (c) the Long Trial List; and
 - (d) the Koori Court.
- 5.11 All trials are heard before a judge and a jury.
- 5.12 The Court also has an appellate jurisdiction and hears appeals from the Magistrates' Court. Appeal hearings take place as judge alone hearings.

- 5.13 The Court exercises its civil jurisdiction in the Common Law and Commercial Divisions.
- 5.14 The Commercial Division has 4 lists:
- (a) the General List;
 - (b) the Expedited List;
 - (c) the Banking and Finance List; and
 - (d) the Building Cases List.
- 5.15 Matters commonly dealt with in the Commercial Division include debt recovery, contract law disputes, property disputes and matters concerning trusts.
- 5.16 The Common Law Division a number of lists dealing with matters in specialist areas including:
- (a) the Applications List;
 - (b) the Defamation List;
 - (c) the Family Property List;
 - (d) the General List;
 - (e) the Serious Injuries Application List;
 - (f) the Confiscations List;
 - (g) the Family Property List;
 - (h) the Medical List; and
 - (i) the WorkCover List.
- 5.17 There are also judges who deal with matters:
- (a) involving certain costs applications;
 - (b) where there is a self-represented litigant; and
 - (c) requiring expedition.
- 5.18 Matters dealt with in the Common Law Division include:
- (a) actions for compensation for injury arising out of medical negligence, workplace accidents, transport accidents and many other situations which give rise to personal injury;
 - (b) defamation;
 - (c) claims brought by a person for entitlement under an estate;
 - (d) some de facto property disputes; and
 - (e) proceedings for the confiscation of a person's assets where the assets are alleged to be proceeds of crime under the *Proceeds of Crime Act 2002* (Cth) and the *Confiscation Act 1997* (Vic).

- 5.19 Matters are usually heard by a judge, however there are some situations where litigants can seek for the matter to be heard by a judge with jury.

Magistrates' Court of Victoria

- 5.20 The Magistrates' Court of Victoria has civil and criminal jurisdictions.
- 5.21 In respect of criminal matters the Magistrates' Court hears summary offences, that is, less serious charges which the magistrate hears on his or her own and decides. This includes traffic offences, less serious assaults and property damage. The Magistrates' Court can also hear indictable offences (more serious offences) such as burglary and theft. These offences can be heard in a higher court or by a magistrate sitting in the Magistrates' Court if the accused agrees.
- 5.22 In relation to civil matters, the Magistrates' Court may hear proceedings involving disputes arising out negligence, contract law, debt recovery and property damage for claims (generally and with some exceptions) valued at up to \$100,000.
- 5.23 The Magistrates' Court has specialised areas also, including the Family Violence Court, the Drug Court and the Koori Court.

Children's Court of Victoria

- 5.24 The Children's Court is on the same level in the court hierarchy as the Magistrates' Court but it deals with matters specific to persons under the age of 18 years. It has two divisions:
- (a) the Family Division which deals with applications for the care and protection of children, young persons at risk and intervention orders; and
 - (b) the Criminal Division which deals with matters relating to offending by children and young persons.
- 5.25 The Children's Koori Court (Criminal Division) hears matters concerning criminal offending by Koori children and young persons, except for sexual offences.
- 5.26 The VCAT deals with smaller civil disputes involving discrimination, debt, guardianship and the purchase and supply of goods and services. Many of the disputes dealt with by the VCAT involves parties such as corporations, tenants and landlords. Many litigants in the VCAT are self-represented.

CHAPTER 3 - CRIMINAL v CIVIL

6. Distinctions

- 6.1 In addition to the distinction between common law and equity, a distinction lies between matters of a civil nature and matters of a criminal nature.
- 6.2 A civil proceeding may be commenced by a person or other legal entity (such as a corporation or the government) where that person or entity wants to enforce a private duty owed to him/her or it by another person or legal entity. In other words it is a claim brought by one party for the enforcement of a private obligation owed to it by another. The party bringing the claim is known as the plaintiff or applicant and the party defending the claim is the defendant or respondent. There may be one or more plaintiffs and, similarly, there may be one or more defendants.
- 6.3 Civil claims proceed by way of a document which sets out the nature of the claim and relief sought. The terminology for this document can vary from court to court but it is often called a "Statement of Claim" or a "Summons" In NCAT, the claim is set out the "Points of Claim".
- 6.4 If the claim is set out in a document which pleads the basis upon which the claim is brought (often called a Statement of Claim), then the defendant must file a document in response. A defendant will often file a defence if the claim is to be contested. However the defendant can also file a document confessing or admitting the claim. A defendant may also admit some of the claim and contest other parts of the claim.
- 6.5 When a civil matter goes to final hearing, the judge (or other person presiding over the hearing) will make a decision based on the issues in dispute brought before him or her by the parties. In other words, the parties to a civil claim decide the scope and nature of the issues in dispute which are to be decided by the court or tribunal.
- 6.6 A criminal case is one which is instigated by the government against an individual in respect of an allegation that the person has engaged in conduct (which may also be an omission) which constitutes to an offence under the law and which is subject to punishment under the law.
- 6.7 What constitutes a crime is defined under various statutes and, in order for a person to be convicted of a crime, the elements of that crime as set out under the relevant law must be made out by the government. The elements are the checklist of criteria that need to be found in order for the person to be convicted of having committed the crime. In a criminal proceeding, the person who represents the government is called a prosecutor.
- 6.8 Whereas civil matters often deal with the payment of money from one party to another, criminal matters deal with the liberty or rights of a person.
- 6.9 Sometimes a set of circumstances can give rise to both criminal and civil proceedings. For example, in a situation concerning a rape, the perpetrator of the rape may be charged and convicted of the crime of rape. However, the victim of a rape may bring a

civil action against the perpetrator for monetary damages for the physical and psychological injuries caused by the rape.

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CHAPTER 4 - THE ROLES OF THE JUDGE, BARRISTER AND SOLICITOR

7. The Judge

- 7.1 Matters which are brought in a court or tribunal will involve a person who will ultimately decide the outcome of the proceedings. This person is often called the judge (for example, this is the case in the District and Supreme Courts of NSW, Federal Court and the High Court), however may have a different title depending on the court or tribunal. In the Local Court, the “judges” hold the title of “Magistrate”. In NCAT, proceedings are decided by “Members”. In the Coroner’s Court, a Magistrate will preside, however while they are sitting in the Coroner’s Court, they are referred to as the “Coroner”.
- 7.2 In this section, all of these roles will be referred to as “judge”, although it must be kept in mind that the role will have a different name depending on the court or tribunal.
- 7.3 In proceedings, the role of the judge will often include case management of the proceedings. This means that the judge may preside over any interlocutory appearances such as mentions, directions hearings and hearings of any interlocutory application or notice of motion, although this function is sometimes performed by other judicial officers such as registrars. At a mention or directions hearing (or sometimes they are called “pre-trial conferences”, “status conferences” or “case management conferences”), the judge will have the role of ensuring that the proceedings is conducted by the parties in a manner which is acceptable to the Court and to the parties. This is in relation to matters such as the time allowed for the service of evidence, the nature of the evidence to be relied upon by each party and the filing of pleadings.
- 7.4 Judges may also need to decide the outcome of interlocutory applications or notice of motion. These are disputes which arise between the parties in the course of conducting the proceedings, but which often do not determine the final outcome of the proceedings (the exception is if the application is one for summary dismissal or summary judgment). Interlocutory applications and notices of motion often concerns matters of court practice and procedure.
- 7.5 Ultimately, of course, judges will also decide the final outcome of the proceedings.
- 7.6 Another feature of the Australian legal system with which you are likely familiar, is that litigation is carried out in an adversarial style. This means that it is up to the litigants or, in criminal cases being heard by a judge (rather than a jury), the accused and the prosecution, to present their cases to the judge and for the judge to decide. However, when you sit in Court you will often find that the judge will ask questions of the witnesses while they give evidence. Some judges do this more than others – it is a matter of personal style. Judges will also often ask questions of the barristers and solicitors that appear before them regarding the matters that they see as being important to their decision. When this happens, it is important that the judge’s question is answered as quickly as possible and, more importantly, that the answer is correct.

8. Barristers

- 8.1 Barristers are lawyers who are independent advocates specialising in court work and advice. Many barristers worked as solicitors prior to going to the bar. Barristers are required to hold a practising certificate issued by the Bar Association of New South Wales in order to be allowed to practice as a member of the Bar.
- 8.2 Barristers specialise in dispute resolution, both in the courtroom (where they present the client's case) and in alternative dispute resolution. Barristers can be brought into a matter at any time (prior to the commencement of proceedings, for the mediation or just before the final hearing) and, ideally, they work in concert with the solicitor that has briefed them. At what stage in a matter a barrister is briefed depends on many things: the complexity of the matter, costs or whether you want to limit their work to specific tasks (e.g. conducting the final hearing).
- 8.3 The standard of conduct for barristers in New South Wales is set out in the *Legal Professional Uniform Conduct (Barristers) Rules 2005 (NSW)* (**the Bar rules**); a formal set of rules, many of which reflect conventions and rules that have grown out of the common law tradition.
- 8.4 The most important aspects of practice as a barrister are reflected in these rules:
- (a) Barristers must be honest at all times and must not engage in conduct which would be prejudicial to the administration of justice or which would be likely to diminish public confidence in the legal profession or the administration of justice or which would otherwise bring the legal profession into disrepute (Bar rule 8);
 - (b) Barristers must be independent advocates and, as such, they are forbidden from practising as an employee of any person, in partnership with any other person, as a director of an incorporated legal practice or in practise through an unincorporated legal practice. Consequently, all barristers must operate as sole traders (Bar rule 12);
 - (c) Barristers must operate in accordance with the "cab-rank principle" which means that they must accept a brief from a solicitor to appear before a court in a field in which the barrister practises if the barrister is sufficiently skilled to do the work, the barrister is available, the fee offered is acceptable and the barrister is not otherwise permitted to refuse or accept the brief (there are special rules where this is allowed) (Bar rule 17);
 - (d) Barrister must "promote and protect fearlessly and by all proper and lawful means the client's best interests" to the best of the barrister's skill and ability and without regard to the barrister's own interests (Bar rule 35); and
 - (e) Barristers have an overriding duty to the court to act with independence in the interests of the administration of justice which includes a duty not to mislead the court (Bar rule 23).

8.5 In practice, when it comes to dealing with barristers, you should keep in mind that there are tasks which the barrister cannot do because it would breach the Bar rules (or could give rise to a breach of the Bar rules in the future). This includes:

- (a) Barristers cannot file documents in Court unless it is from the Bar table during the course of a hearing;
- (b) Barristers will most likely refuse to witness any affidavit or statutory declaration (as doing so may potentially make the barrister a witness in the proceedings); and
- (c) Barristers will not conduct conferences with witnesses without a solicitor present (again, as doing so may potentially make the barrister a witness in the proceedings). This also means that barristers will likely refuse to do tasks such as liaising with witnesses to facilitate their attendance at Court.

8.6 Tips for dealing with barristers:

- (a) Barristers work on their own. Many of them do not have secretaries. Nor do they have the office resources that a firm would have in terms of computer software, printers and photocopiers. If you brief a barrister to perform urgent work, and their time to do that work is limited, keep this in mind when preparing the brief. Of course, most barristers do not mind doing tasks like printing out their own briefs, but where time is scarce, you should consider if it is best to prepare the brief in such a way that they can devote more of their time to the legal issues that require urgent attention;
- (b) Barristers are often in Court. A good time to catch a barrister on the phone is often before 9:30am and after 4:30pm;
- (c) If a barrister is out of chambers a lot and you cannot catch them on the phone or they do not seem to be checking their email, then a detailed message can be left with their clerk. You can also make appointments for conferences with a barrister through their clerk;
- (d) Barristers will often be juggling many urgent tasks for different solicitors on different briefs. Be upfront about any deadlines that need to be met (particularly Court-ordered deadlines or deadlines which cannot be missed like limitation periods) so that you can arrive at a plan together to get the work done on time;
- (e) If the matter is cost-sensitive and/or you need to keep the client informed of legal costs as they are incurred, do not hesitate to ask the barrister how much their work-in-progress is and/or how much they expect to incur in the future; and
- (f) Do not hesitate to tell the barrister about any special billing practices you would like them to adhere to such as addressing their tax invoices, when you want them to send bills or any amendments the client requires to the barrister's cost agreement.

9. Solicitors

- 9.1 Solicitors are also lawyers who provide expert legal advice to their clients. Unlike barristers, solicitors deal directly with the client and are often the first point of contact for the client in accessing legal services. A solicitor is the one with direct and detailed knowledge of the client. In the conduct of a matter, the solicitor will be the lawyer who manages the client's expectations. Whereas a barrister may be brought in to deal with discrete aspects of the litigation, a solicitor will prepare the matter from start to finish.
- 9.2 In order to work as a solicitor in New South Wales, you must be admitted to practise and must hold a current practising certificate (issued annually) by the Law Society of New South Wales.
- 9.3 Solicitors often work in partnership with other solicitors, as directors of incorporated legal practices or as employed solicitors. Solicitors may also work on their as sole practitioners.
- 9.4 The standard of conduct for solicitors is set out in the *Legal Professional Uniform Law Australian Solicitors' Conduct Rules 2005* (NSW) (**the Solicitors' rules**), many of which, like the Bar rules, reflect rules about standards of conduct that were previously in place through practice and convention. These duties include:
- (a) A paramount duty to the court and to the administration of justice. Where this duty is inconsistent with any other duty the solicitor owes, this duty will prevail (Solicitors' rule 3);
 - (b) A solicitor must:
 - (i) act in the best interests of a client in any matter;
 - (ii) deliver services to the client diligently, competently and promptly;
 - (iii) avoid any compromise to their integrity and professional independence; and
 - (iv) be honest and courteous in all dealings in the course of legal practice.(Solicitors' rule 4)
 - (c) A solicitor has a duty to keep client information confidential (Solicitors' rule 9);
 - (d) A solicitor has a duty of candour to the court and must not deceive or knowingly or recklessly mislead the court (Solicitors' rule 19);
 - (e) A solicitor who makes an undertaking must honour that undertaking and perform the undertaking in a timely manner. Undertakings are enforceable! (Solicitors' rule 6);
 - (f) A solicitor must not mislead or deceive an opponent;

- (g) A solicitor must not engage in court processes for a collateral purpose and must ensure that there is a proper basis for any allegations made in the course of legal proceedings (Solicitors' rule 21);
- (h) A solicitor has a duty to take steps to ensure the integrity of evidence. This includes conferring with witnesses separately and not communicating with witnesses while they remain under cross-examination; and
- (i) A solicitor who supervises others in legal practice must exercise reasonable supervision over those people (Solicitors' rule 37). In practice, this means that the solicitor is responsible if those people make errors.

The obligations of a solicitor, and steps you can and should take to ensure that your conduct reaches the standard required in a law practice, are discussed further in later sections of this manual.

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CHAPTER 5 - CONTRACT LAW

10. Overview

- 10.1 A contract is a legally binding agreement that consists of various promises made by the parties. The notation of a contract arose out of the common law, although there are remedies available in contract law under equity.
- 10.2 In order for there to be a legally binding contract, there are elements which must be satisfied:
- (a) agreement between the parties: offer and acceptance
 - (b) intention to be legally bound;
 - (c) consideration; and
 - (d) the parties must have the legal capacity to enter into a contract.
- 10.3 A contract will comprise of terms which may have expressly been agreed between the parties or terms may also be implied into a contract. A contract may be written, oral or partly written and partly oral. There are many legal rules which govern the interpretation of a contract. There are also many remedies which may arise when the parties are in dispute about a contract.
- 10.4 The area of contract law is concerned with disputes between parties to a contract about their respective obligations, duties and benefits arising from the contract. It will often concern issues such as:
- (a) whether there was a contract in place at the relevant time;
 - (b) the terms of any contract;
 - (c) how the terms of a contract are construed (this is where the rules of interpretation come into play);
 - (d) the operation of a contract;
 - (e) when the contract came to an end and if that ending was within the terms of the contract. For example, whether a contract was properly terminated in accordance with its terms, whether a contract has been performed;
 - (f) breach of the terms of a contract and what damages arise from the breach;
 - (g) the application of any equitable remedies in the context of the contract. For example, rectification and repudiation; and
 - (h) whether the contract is subject to application of any legislation. For example, the Australian Consumer Law.

- 10.5 Contract law matters may be litigated, where a party was commenced proceedings for wrongful termination, or unlitigated, in that they may arise out of, say, a commercial dispute and a solicitor may be brought in to assist with the negotiation of the dispute.
- 10.6 As a paralegal or junior solicitor, in this area of law, you may be asked to perform such tasks as:
- (a) compiling the documents which make up the written parts of the contract;
 - (b) compiling other documents such as invoices or correspondence, relevant to the dispute; and
 - (c) conducting legal research into relevant questions of law that might arise, for example, rules of interpretation, the availability of certain remedies or the application of legislation.

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CHAPTER 6 - TORTS

11. Overview

- 11.1 In general, a tort is a wrongful act or infringement upon the rights of another, where such right does not lie exclusively in contract law, the law of restitution or the criminal law (this is, a tort is a civil wrong), which results in a liability on the wrongdoer that is owed to the person who has been wronged.
- 11.2 A tort may be accidental (or “negligent”) or it may be intentional (such as in the case of an assault).
- 11.3 A tort may have both civil and criminal elements. For example, a rape is an assault which is punishable under criminal law. However, the victim may also sue the perpetrator for an intentional tort. In the case of the criminal matter, the perpetrator faces punishment as prescribed by the law, whereas in the case of a civil action for an intentional tort, the perpetrator (or, as would be termed in such an action, the defendant) would be made to pay monetary damages reflective of the injury caused to the victim (or, as would be termed in such an action, the plaintiff).
- 11.4 Similarly, matters may have aspects of a tortious claim and a claim in contract law. For example, where a person provides professional services to another, there is in place a contract. If the service provider fails to provide services in accordance with the contract, then an action lies in breach of contract. However, there may also be a duty of care owed by the service provider, the breach of which would amount to a tort, giving rise to a cause of action in negligence. This is often the case with situations like a solicitor and client or an accountant and a client.
- 11.5 The principal aim of tort law is to provide compensation for the losses suffered as a result of the tort. Largely such compensation is compensatory in nature, that is, damages which are calculated to place the wronged person in the same position as if the tort had never occurred. Exemplary damages may be available, depending on the circumstances, in some cases, for example, in the case of a malicious assault.
- 11.6 Insurance plays an important part in tort law in New South Wales and in Australia. This is because there is often an insurance policy in place which covers a person who commits a negligent act against the losses that might arise from that negligence. In these cases, the insurer is subrogated into the role of the defendant so that, while the defendant is named in the proceeding as a party, it is actually the insurance company who pays for the defendant’s legal fees and who will pay for any damages awarded to the plaintiff by the court. A good example is where two cars collide and are damaged in a motor vehicle accident. In this case, assuming the cars are both insured, the insurance company of the at-fault, negligent driver will indemnify him or her against the property damage losses that occurred to the other vehicle in the accident.
- 11.7 Not all tort law is covered by insurance, however. Tort law can also arise in commercial litigation, say, where there is an allegation of a misrepresentation having been made by a party which gave rise to loss and damage for the party to whom the representation was made.

11.8 The basic elements of a tort are:

- (a) the existence of a duty of care. The person alleging the duty will need to establish on what basis the duty arises;
- (b) breach of the duty of care (that is, negligence); and
- (c) damages which are a direct result of the breach of the duty of care.

11.9 In New South Wales, a tort may be litigated in the Local, District or Supreme Courts, depending on the value of the damage which arose out of the tort, as well as the nature of the tort (for example, defamation is a type of tort and is litigated in the District or Supreme Courts; and also in the Federal Court). A tort may also be litigated in the federal courts (the Federal Court of Australia or the Federal Circuit Court), assuming one can satisfy the other requirements regarding jurisdiction.

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CHAPTER 7 - SUCCESSION LAW

12. Overview

- 12.1 Succession law involves estate planning including drafting wills and other documents (for example, health directives, and enduring powers of attorney) which assist in estate planning. Succession law is also concerned with the administration and finalisation of a person's estate after their death. This usually involved distribution of the estate in accordance with a person's will, a court order or, where the person died intestate, in accordance with a pre-determined formula set out in the legislation.
- 12.2 A will is a testamentary disposition intended to operate from the moment of death, transmitting an interest which up until the moment of death belongs indefeasibly to the deceased.
- 12.3 A Power of Attorney is an instrument which allows another person to act on your behalf in relation to tasks which you would normally be expected to perform yourself. The scope of the powers granted to an attorney under this kind of instrument depends upon the drafting of the instrument. For example, a Power of Attorney may allow another person to deal in your bank accounts, sell property which belongs to you, and manage assets in your estate. A Power of Attorney may be enduring, in that it continues to operate should you lose legal capacity. A Power of Attorney may also operate for a limited time, for example, while you are overseas. An attorney appointed under this instrument owes a fiduciary duty to the person for whom they act, in that, they can only act in the interests of that person and must not allow their own interest to dictate their actions.

13. Succession Act Law

- 13.1 In New South Wales, the relevant act governing succession law is the *Succession Act 2006* (NSW) which is structured as follows:
- a) Chapter 1: contains preliminary matters such as definitions under the Act;
 - b) Chapter 2: deals with wills including the making of wills, construction, rectification, wills by minors;
 - c) Chapter 3: deals with family provision (discussed in greater detail below);
 - d) Chapter 4: sets out the rules of intestacy, that is, the distribution of assets where the deceased has not made a will; and
 - e) Chapter 5: contains miscellaneous provisions including rules of court and services of documents.
- 13.2 Succession law includes uncontested areas of practice, being the preparation of wills and other documents designed to assist a person in the management of their estate. This can include taking steps to ensure that a person has sufficient capacity to make and execute such instruments, in which case it is essential that detailed file notes are taken at the time the assessment is made (see section on "File Notes" for further

information). It may also be necessary to obtain advice from a medical expert on such matters.

14. Probate

- 14.1 The area of probate within succession law deals with contentious and non-contentious matters. When a person dies and it comes to dealing with their estate, if the person died with a will, the executor/executrix or other person with standing to do so must apply for probate in order to deal with the assets of the estate.
- 14.2 In New South Wales, probate is a list within the Equity Division of the Supreme Court. A person therefore needs to make application for probate to the Supreme Court, which has the jurisdiction in respect of probate to determine the validity of wills where the deceased has died leaving property in New South Wales. The Court also has the power to determine matters of construction in relation to a will. The Supreme Court must grant probate over a valid will.
- 14.3 An application for probate is not a difficult process, however the proper checklist for probate needs to be followed, for example:
- (a) the original will must be deposited with the Court;
 - (b) person who may be affected by a grant of probate must be given notice (these people are called “eligible person” under the Succession Act);
 - (c) matters which may affect the validity of the will should be brought to the attention of the Court, for example, if the person married after the date of the will, this may invalidate the will; and
 - (d) the executor/executrix needs to set out the assets believed to form part of the estate in an affidavit under an “Inventory of Assets”.
- 14.4 Where probate is uncontested, the executor or executrix, upon obtaining probate, can proceed to take steps to distribute the assets of the estate to the named beneficiaries.
- 14.5 In cases where a person dies without a will, their estate must also be administered through the Supreme Court (unless it is exempt, for example, of a very low value). In cases of intestacy, letters of administration are applied for. If granted and not challenged, the estate may be distributed in accordance with the formula set out under Chapter 4 of the *Succession Act*.
- 14.6 Those who dispute the validity or construction of a will may file a Summons in the Probate list of the Supreme Court seeking relief. For example, a litigant may seek that probate (where it has been granted) be revoked. When probate is granted, it is done on an *ex parte* basis. This means that it is done in chambers without any parties being present. It may therefore be revoked where there has been mistake or fraud. Another example of the litigated matters that arise in probate, is where a person brings a suit in probate seeking to propound a different will to the one which the executor or executrix seeks to propound.

- 14.7 Another kind of matter which arises in relation to succession are forfeiture matters. These are matters where the deceased has been killed by a beneficiary. The rule in forfeiture prevents the beneficiary from inheriting either by will or under intestacy.
- 14.8 Probate matters are currently case managed by Senior Deputy Registrar Brown in the Supreme Court. The case management list takes place on Monday mornings, generally from 9am to around 11am. Matters may be referred to Justice Lindsay where an issue requires judicial attention. This may be for a Notice of Motion (in which case parties seek for a referral to the judge at the commencement of the case management list) or other issue beyond the power of a registrar, for example, the registrar is unable to order a mediation where a party does not consent or opposes mediation. In such cases, the parties will be referred to Justice Lindsay for case management on that issue.
- 14.9 Apart from matters in probate, in New South Wales succession law also deals with matters which concern the amount that a beneficiary or eligible person may receive from an estate. These are called family provision claims.

15. Family Provision Claims

- 15.1 Family provision claims are managed in the General (Family Provision) List in the Equity Division of the Supreme Court. These matters are currently case managed by Justice Hallen and the case management list occurs on Fridays with the list usually taking place all day.
- 15.2 When a person makes a family provision, the basic elements which that person needs to show are as follows:
- (a) They are an **eligible person** to make a claim under s 57 of the *Succession Act* that sets out the categories of eligible persons. A person may rely on belonging to more than one category;
 - (b) The claim is brought within **12 months** of the deceased's death (or an extension to that limitation period is sought, with the plaintiff having to set out reasons warranting the extension): s 58 of the *Succession Act*;
 - (c) There has **not been adequate provision** for the proper maintenance, education or advancement in life of the person seeking an order for family provision in the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both: s59 of the *Succession Act*; and
 - (d) The person seeking an order for family provision has a **need** for provision from the deceased's estate. This involves identifying in real terms what the person needs now and into the future: s59 of the *Succession Act*.
- 15.3 The power of the Court to make an order for family provision is a discretionary one. Even if the person seeking such an order establishes all of the above elements, there is no entitlement to an award for family provision. The circumstances which the Court is to examine in order to determine whether to make an order for family provision are listed in s 60 of the *Succession Act*. This can include consideration of competing claims

brought by other beneficiaries or by other eligible persons, including consideration of their specific financial circumstances if they choose to put that evidence before the Court.

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CHAPTER 8 - LITIGATION

16. Overview

- 16.1 The area of litigation is a general area that covers many different fields of law and can be conducted in many different forums. The common thread in litigation is that proceedings have been commenced by a party (or parties, where there is more than one claimant) in relation to a private dispute with another party or other parties.
- 16.2 Litigation differs from investigative proceedings such as those carried out at the Coroner's Court, in the Independent Commission Against Corruption or in Royal Commissions. The term also generally refers to private disputes between litigants, that is, litigation is different to a criminal prosecution.
- 16.3 While terminology can differ from court to court and from tribunal to tribunal, common terms include:
- (a) For the party bringing the claim: plaintiff/applicant/claimant/cross-claimant; and
 - (b) For the party defending the claim: defendant/respondent/cross-defendant.
- 16.4 For the purpose of this discussion, the party bringing the claim will be referred to as the plaintiff and the defending party will be referred to as the defendant.
- 16.5 Litigation is commenced by way of an originating process which is filed by the plaintiff. This can be by way of a Summons or a Statement of Claim. A Summons is a kind of originating process supported by an affidavit, whereas a Statement of Claim is a pleading which sets out the facts underlying the claim as well as the law that the plaintiff relies on. In the Federal Court and Federal Circuit Court one files an Originating Process which is like a Statement of Claim.
- 16.6 Litigation usually follows familiar paths, no matter what forum it is brought in. Once proceedings are commenced, the following steps are normal, albeit the steps can vary from matter to matter:
- (a) The defendant files a defence (although note that a defence is not filed in answer to a Summons, rather the defendant proceeds to file affidavits they rely on);
 - (b) The parties may be ordered to file and serve lay evidence. Note that this differs between common law and equity. Traditionally under common law, litigants are required to give their evidence in chief orally. While this is changing (for example, in the Supreme Court, litigants must now file and serve statements of evidence), there remain some forums where this is still the usual practice (for example, in the District Court and Local Court). In Equity, evidence in chief is done by way of affidavit, where the affidavit becomes the witness' evidence in chief and leave must be sought to adduce any additional evidence in chief from the witness at hearing;

- (c) The parties may go through a process of discovery which is where parties must produce documents to one another relevant to the claim, including documents which may work against their interest in the proceedings. In modern litigation, generally in New South Wales, there is no right to discovery and an application must be made to set out the nature and extent of discovery sought and to explain why discovery is sought;
- (d) Interlocutory applications may be brought by the parties. These are applications concerning points of practice and procedure, for example, to seek discovery, the set aside subpoenas or to seek leave to amend a pleading. There is no limit to the number of interlocutory applications that may be brought in any one matter;
- (e) The parties may issue Notices to Produce or Subpoenas for Production. These are documents which compel another party to produce documents either to the Court or to the other party for inspection. Notices to Produce are served upon other parties to the proceedings, whereas Subpoenas are served on non-parties. There are many rules regarding the preparation of these documents and what may be sought. Please refer to the section entitled "Subpoenas" for further information;
- (f) In modern litigation, parties are generally obliged (or ordered by a Court, where a party objects) to participate in a form of alternate dispute resolution. This can take different forms; the common ones being a mediation (where there is an impartial facilitator to the negotiations) that can take place with a Court-appointed mediator or a private mediator, an informal settlement conference which is where the parties negotiate directly with each other or a hybrid such as a judicial settlement conference;
- (g) Parties may issue cross-claims which are separate and severable claims that concern the same circumstances as that upon which the original claim has been brought;
- (h) Parties may choose to rely on expert evidence. In some forums, leave is required to rely on expert evidence. In New South Wales, courts will also commonly manage expert evidence so that experts must conclave prior to a hearing, produce joint reports and give expert evidence concurrently.
- (i) Parties may request further and better particulars of another's claim or defence, whereby parties seek further information on the facts and circumstances to be relied upon by the other party to make out their claim or defence. Parties may also interrogate each other, a process similar to a request for further and better particulars but the purpose of which is to specifically obtain admissions from the other party which do not assist their case. Interrogation is a more formal process and, in some forums and in some types of litigation, leave must be sought before a party can interrogate another party.

16.7 In the performance of the steps up to a final hearing, litigated matters are usually case managed in some way by the court or tribunal. Again, case management differs from court to court and between tribunals. Usually case management involves the

attendance of the legal representatives of the parties to the court where orders are made as to when various steps will be done by, for example, a timetable which might be ordered by a Court could be as follows:

Example Timetable

- (a) Defendant to file and serve a defence by 15 April 2018;
- (b) Plaintiff to serve any affidavits upon which he relies by 2 May 2018;
- (c) Defendant to serve any affidavits on which she intends to rely by 15 June 2018;
- (d) Plaintiff to serve any affidavits in reply by 1 July 2018;
- (e) Matter listed for further directions on 9 July 2018.

16.8 In the Local Court and District Court, matters are often case managed by registrars or judicial registrars (District Court). In the Supreme Court, matters may be case managed by a registrar or, in some lists, by a judge. Generally, matters may be referred to a judge when there is a lot of delay by litigants in preparing the matter for hearing.

16.9 The Federal Court is different again in that it has in place a docket system, whereby the matter is assigned to a single judge who case manages it and then hears it.