



Chapter 2

Legal systems

Answers to Questions

REVIEW QUESTIONS

Question 2.1

What is the original jurisdictional limit of inferior courts in civil matters where you live? Can it be exceeded?

All jurisdictions set a maximum monetary limit for damages claims. This maximum cannot be exceeded, although it is continually being revised upward. Table 3.2 shows the maximum monetary limitations on civil jurisdictions of these courts at the time of writing.

Question 2.2

Explain why an inferior court has no appellate jurisdiction.

As the local courts are found at the bottom of the court hierarchy, they only have original jurisdiction. However, in most states and territories they have a limited ability to review and deal with objections to some administrative decisions.

Question 2.3

Why do Magistrate's or Local Courts handle around 90 per cent of all matters that come into the court system?

The Magistrate's or Local Courts are located at the bottom of the court hierarchy. They are the most numerous of courts, and they deal with relatively minor matters, which make up around 90 per cent of all matters that come into the court system.

Question 2.4

Explain why you think that there has been a growth in specialist courts.

The large growth in specialist courts has been designed to:

- relieve the workload of the inferior (and intermediate) courts;
- establish courts with specialist expertise to deal with growing community concerns with issues such as drugs and family violence; and
- deal with high-volume specialist areas, such as workers' compensation.

Question 2.5

Explain the difference, if any, between a Supreme Court and a court of appeal.



A Supreme Court is a court of first instance—that is, it has original jurisdiction to hear matters brought to court for the first time.

A court of appeal hears appeals from decisions made in cases heard by courts lower in the same hierarchy.

Question 2.6

How does the original jurisdiction of the High Court differ from that of the state superior courts?

The High Court of Australia was established in 1901 under s 71 of the Constitution. Under ss 75 and 76 of the Constitution, the court has original jurisdiction in cases that affect foreign affairs, constitutional issues, and matters concerning the legislative power of federal Parliament. It includes indictable offences against the laws of the Commonwealth, matters in which a state/s, territory/ies and the Commonwealth are parties, and matters involving residents of different states and/or territories, and/or between the states themselves.

The original jurisdiction of the state Supreme Courts is in theory unlimited with respect to original civil and criminal matters of an intra-state nature, unless that jurisdiction has been removed by statute or falls within the exclusive jurisdiction of the Commonwealth under the Commonwealth Constitution.

Question 2.7

Upon what grounds does the High Court of Australia rely for appellate jurisdiction in both state and federal matters?

The High Court of Australia's appellate jurisdiction is found in s 73 of the Commonwealth Constitution, which provides that the court can hear appeals from a single judge exercising the original jurisdiction of the court, any other federal court and any state Supreme Court.

The High Court became the final court of appeal in Australia when appeals to the Privy Council from federal courts were abolished in 1968 and from state Supreme Courts in 1986.

Question 2.8

Is the High Court of Australia a state or a federal court? Explain your answer.

The High Court of Australia was created by the Commonwealth Constitution and is therefore strictly a federal court, although it is the highest court of appeal in each of the state court systems.

Question 2.9

What reasons can be put forward for the growth in eCourts?



The courts are increasingly turning to e-technology to try to provide lawyers and the public with timely and cost-effective access to courts, as well as to reduce litigation costs.

Question 2.10

List the reasons that have led to the rapid growth in administrative tribunals and alternative methods of dispute resolution.

The rapid growth in alternative methods of dispute resolution outside formal court proceedings is an attempt to overcome some of the traditional problems associated with the court system—for example, lack of accessibility, delays, costs, ignorance and intimidation.

Question 2.11

In what ways do the procedures of the tribunals differ from those of the traditional courts?

Tribunals use mediation, conciliation and arbitration procedures with the aim of providing a cheap, quick and fair dispute settlement process in accordance with community needs.

Traditional courts operate using an adversary system whereby two opposing sides in a dispute argue their cases in a court presided over by a neutral third party (a judge or magistrate). While a tribunal hearing is similar to a court hearing, formalities are kept to a minimum.

It is possible to identify a number of differences between tribunals and traditional courts:

- The jurisdiction of a tribunal is usually limited to a particular and narrow area, and the chairperson is usually a specialist in that area.
- Courts are presided over by lawyers who are judges, whereas tribunals can often be presided over by non-legal experts.
- The atmosphere, procedures and rules of conduct are generally less formal in a tribunal.
- Legal representation is often prohibited in tribunals in an attempt to try to limit costs.
- Appeals are restricted in tribunals. In many tribunals the decision of the tribunal is final unless the losing party can show that there has been an error of law.
- Tribunals can take into consideration matters that would be excluded from a court by the rules of evidence.
- A court generally is restricted to ensuring that a decision-maker has correctly followed relevant procedures, whereas a tribunal is generally given the power to be able to substitute its own decision in place of the decision-maker.
- A tribunal exercises administrative authority, not judicial authority.

As a result of the different procedures and rules of evidence, tribunals do not make law that is to be followed and applied by other courts or judicial bodies—that is, they do not create precedent.

Tribunals are subject to a degree of control by the courts under what is referred to as Administrative Law. All tribunal procedures are reviewable by a superior court to ensure



that justice has been properly administered—that is, that there has been no denial of natural justice and that the tribunal has correctly followed the procedures set down for it. Similarly, the tribunal (or court) must reach its decision in good faith and, as a general rule, must publish its reasons for arriving at a decision.

Question 2.12

What is the importance of a court hierarchy in the legal system?

The hierarchy of courts serves a threefold purpose:

1. It provides a system of appeal.
2. It allows different forms of hearing according to the gravity of the case.
3. It is instrumental in the building up of precedent.

Question 2.13

What essential elements need to be present for a class action to be commenced?

Class actions, or grouped or representative proceedings, allow individuals or businesses with similar, or substantially similar, claims to combine together in the one legal action against the same person or organisation.

The essential elements that are needed to commence a class action can be summarised as follows:

- there must appear to be seven or more persons with a claim against the same person or organisation;
- the claims must arise out of related circumstances; and
- the claims must give rise to a substantial common issue of law or fact.

Question 2.14

What are some of the advantages and disadvantages of representative or class action proceedings?

A class action enables those who would be deterred from seeking compensation because of factors such as:

- time;
- the relatively small size of their claim; and
- legal costs—for example, where the defendant has sufficient financial resources to take the fight all the way through the court system, to gain access to the law.

Class actions are relatively easy to commence.

Advantages include:

- efficiency in the use of court resources, because there is one action instead of several on the same subject matter in dispute;
- consistency in determination of common issues; and
- making the law more accessible, enforceable and effective.



Class actions can be contrasted with conventional forms of litigation where the parties know the identities of the claimants and it is possible to ascertain both the quantum of the claim and the nature of the loss from an early stage in the proceedings.

Representative or class action proceedings may have disadvantages, including the following:

- individual members of the class may receive less in the way of compensation or award of damages than they may have if they had issued proceedings independently;
- there is less control over the proceedings;
- there may be a lack of certainty for litigants while commencing, maintaining, and defending proceedings; and
- costs—for particularly large cases, it may be necessary to secure litigation funding, which may bring with it a range of complex issues.

TUTORIAL QUESTIONS

Question 1

Explain why the role of the jury appears to be declining in civil trials but not in criminal trials.

The main reason would appear to be cost. The use of juries in civil cases has been largely abolished in most jurisdictions, unless required in the interests of justice. If a plaintiff wants to have a matter heard before a jury, most jurisdictions now provide that, before the case starts, the plaintiff has to pay into the court the costs of having a jury.

By contrast, in Australia everyone accused of an indictable offence has the right to a trial by a judge and a jury of 12 persons in an intermediate or superior court.

Question 2

Explain the difference between the burden of proof in a civil case and the burden of proof in a criminal case.

The burden (or onus) of proof is always born by the person who initiates the action.

In a criminal case, the burden of proof is on the Crown to establish *beyond reasonable doubt* that the accused committed the crime of which they have been accused.

In a civil case, the burden of proof on the plaintiff is to establish on the *balance of probabilities* that their evidence should be accepted by the court.

Question 3

Explain what a representative or class action is and when it is likely to arise.

Class actions, or grouped or representative proceedings, allow individuals or businesses with similar, or substantially similar, claims to combine together in the one legal action against the same person or organisation.



They arise when a group of seven or more people have a claim against the same person or organisation arising out of related circumstances and which gives rise to a substantial common issue of law or fact.

A class action enables access to the law by those who would otherwise be deterred from seeking compensation due to factors such as time, the relatively small size of their claim, and legal costs.

Question 4

How successful has the appointment of 'ombuds' been in Australia? Discuss.

This question seeks personal opinion.

The term 'ombudsman' means 'agent or representative of the people', and the person occupying this role is the link between the people and the bureaucracy of a government or large commercial organisation, such as banking, insurance, private health, and telecommunications organisations. They investigate complaints about administrative actions and decisions made by government departments, statutory bodies, local authorities, and commercial organisations in the areas noted above.

The answer is likely to be affected by students' prior knowledge of ombuds and the areas they cover. It will also be affected by the powers of individual ombuds. Some are limited to mediation and recommendations, while others can order compensation and other forms of action.

Question 5

In commercial matters, is the common law adversarial system the best way of settling disputes? Discuss.

This question seeks personal opinion.

Students should indicate knowledge of the adversarial system and be able to apply it to a commercial context. Issues could include the following:

- Are most commercial disputes really matters of law or arguments as to the facts?
- Are the facts matters suitable for determination by a court, or are they of a specialised nature better assessed by persons more familiar with the particular profession/industry?
- Is arbitration more appropriate?
- What remedy is the most appropriate?

Question 6

Is there still a role for the jury in today's legal system? Discuss.

This question seeks personal opinion.

Students need to recognise that the role of the jury is to bring a non-legal perspective ('common sense') to the determination of questions of fact. They should also recognise



that the use of juries in civil cases has been largely abolished in most jurisdictions, unless required in the interests of justice. Matters that could be discussed include:

- the differences between a civil case and a criminal case—in terms of the standard of proof and the consequences;
- the extreme complexity of some cases;
- the time commitment required for complex cases;
- the difficulty in finding impartial jurors in controversial and highly publicised cases; and
- costs.

Question 7

Explain the reasons for the growth of judicial and quasi-judicial tribunals.

The main reason for the development of judicial and quasi-judicial tribunals is to provide people with cheap, quick and fair dispute settlement processes in accordance with community needs, keeping formalities to a minimum.

Question 8

List three methods of alternative dispute resolution, and briefly explain each.

Methods that could be considered include the following:

- **Negotiation**—involving voluntary and confidential discussion between the parties, either with or without the assistance of a third party.
- **Mediation**—where a neutral third party assists the parties to try to resolve their dispute.
- **Conciliation**—whereby the conciliator exercises an advisory role on the content of the dispute and suggests options and possible solutions. The conciliator's role is generally more directive than that of a mediator.
- **Expert determination or independent expert appraisal**—a process that provides for an independent expert to be appointed by the parties to give a determination on a disputed point of fact or law. It is an advisory process for simple disputes such as those of a technical nature.
- **Adjudication**—where an adjudicator is appointed to make a determination to ensure payment for work, goods or services under contracts in the construction industry.
- **Commercial arbitration**—a formal dispute resolution process involving the hearing of a commercial dispute by an independent third party. The arbitrator will be chosen by the parties and will be familiar with the professional or technical background of the dispute.

Question 9

Describe the federal and state court hierarchies, and explain their relationship to the doctrine of precedent.

Australia, like most countries, has adopted a hierarchical or tiered court system. Under this system, the position of a court in a hierarchy indicates the types of cases that it will hear, as well as providing an appeal process for a decision from a lower court to a higher court.



The state hierarchies consist of:

- **inferior (Magistrate's or Local) courts** with original jurisdiction to deal with minor matters;
- **intermediate courts** (except ACT, Tasmania and NT)—these have original civil and criminal and limited appellate jurisdiction, and are courts of record; and
- **Superior (Supreme) courts** with unlimited original civil and criminal jurisdiction and an appellate jurisdiction.

There are four federal courts: the Federal Magistrate's court, the Family Court, the Federal Court, and the High Court. The High Court, the Federal Court and the Family Court all have both original and appellate jurisdiction, and are all courts of record.

A court hierarchy is instrumental in the building up of precedent. The doctrine of precedent means that a judgment or decision of a court will be cited as an authority for deciding a similar set of facts in later cases.

A precedent may be binding if it is from a court in the same hierarchy and on a higher level. A precedent is said to be persuasive if it is from a court from a different hierarchy or on a lower level in the same hierarchy.