CHAPTER 2

How the legal system works

Section 1: Classification of laws
Section 2: Courts and tribunals
Section 3: Precedent and statute law

LEARNING OBJECTIVES

On completion of this chapter, you should be able to:

LO 1 Identify the main sources of law in the Australian legal system

LO 2 Explain the role of police and the courts in administering law and resolving disputes

LO 3 Describe the hierarchy and jurisdiction of the courts in the state and territory court systems

LO 4 Describe the hierarchy and jurisdiction of the courts in the federal court system

LO 5 Explain the adversary system, and describe the various alternative methods of dispute resolution

LO 6 Discuss the function and purpose of state and federal tribunals

LO 7 Explain the role and purpose of the ombudsman

LO 8 Discuss the roles and purpose of the legal profession, judiciary, juries and parties in criminal and civil trials

LO 9 Discuss the various methods that can be used to locate relevant legislation and case law

LO 10 Explain the doctrine of precedent and the rules for its operation in the court system

LO 11 Explain the importance of statute law

LO 12 Explain the rules of statutory interpretation and how they are applied by the courts

LO 13 Explain how delegated legislation is created and what its purpose is

KEY TERMS

The following key terms are highlighted in the text and the accompanying definition can be found in the margin:

Act (or statute)
Bill
citation
civil law system
court hierarchy
Criminal Code
delegated legislation
extrinsic material
indictable offences
international law
jurisdiction
municipal (or domestic) law
ombudsman
prima facie
private law
public law
summary offences
sunset clause

This chapter begins by looking at some of the different ways in which the law can be classified, depending on the purpose of the classification and the needs of the classifier. It then goes on to examine the role and jurisdiction of the courts and tribunals, as well as alternative methods to the courts, to resolve disputes that arise out of the legal system, and identifies some of the key players involved in this system.

The chapter then looks at case law and some of the terminology that is commonly used when studying law—such as ratio decidendi and obiter dictum—and examines some of the more important features of precedent. It finishes with an examination of perhaps the most important and relevant area of law today for business: statute law. Knowledge of the basic principles of where to find, and then how to read and interpret, a statute can a very useful tool to have in business.

Section 1: Classification of laws

In this first section we look at the laws that make up the Australian legal system and how they are classified into various groupings according to the purpose and needs of the classifier.

While there are two main sources of law in our legal system (the common law system):

- **case law** (or judge-made law, made up of both common law **and** equity); and
- **statute law**

it should not be assumed that this is the only classification that you can have.

An understanding of the main principles underlying each source is important when trying to understand how the law and business interact. But first you need to understand what area of law may be applicable to the matter you are dealing with.

LO 1

Identify the main sources of law in the Australian legal system

HOW ARE LAWS CLASSIFIED?

Law can be classified in different ways depending on the purpose of the classification and the needs of the classifier. Common classifications include:

- international law and municipal (or domestic) law;
- public law and private law;
- substantive law and procedural law;
- criminal law and civil law; and
- common law and civil law systems.

BUSINESS RISK MANAGEMENT ALERT

It is not uncommon for business people to classify the law into two legal systems: a common law system and a civil law system. However, while they could be considered to be the two dominant legal systems of the West, it should not be assumed that they are the only two legal systems in the world. As the following 'In Brief' box illustrates, there are a number of legal systems in existence around the world (and even then the list is not exhaustive). For businesses involved in international trade, attempting to comply with often conflicting legal requirements between different jurisdictions can make a business transaction very complicated. A failure to appreciate these disparities can mean the difference between a profit and a loss, or business success and failure.

MAJOR LEGAL SYSTEMS IN THE WORLD

LEGAL SYSTEMS	CHARACTERISTICS
Civil law	Derived from Roman law, it is a complete code of written laws whose primary source of law is legislation. It is inquisitorial in nature and forms the basis of the legal systems of most Western European countries, Japan, and the former colonies of France, Spain and Portugal in Latin America, the Middle East, Indonesia, Thailand, Vietnam and parts of Africa.
Common law	Derived from case law (or precedent) and statute, it is accusatorial in form with an emphasis on remedies. It forms the basis of English law and can be found in the United States, as well as in Commonwealth nations, including Canada, Singapore, Malaysia, Australia, New Zealand, parts of Africa, India and Pakistan.
Sino-Soviet	Based on the philosophy of Karl Marx (i.e. the eradication of capitalism and the elimination of private ownership), its emphasis on codes means it is really only a variant of the civil law, but with an emphasis on public law. It applies to more than 30 per cent of the world's population.
Shariah (Islamic)	Shariah law is the body of Islamic law and is derived from the Qur'an (the Muslim holy book). It comes from a combination of sources including the Qur'an, sayings of the prophet Muhammad and fatwas (the rulings of Islamic scholars). It regulates the public and some private aspects of a Muslim's life, and coexists with other laws. It applies to approximately 20 per cent of the world's population.
Hindu	Hindu law is based on the doctrine of proper behaviour. It is followed by Hindus (who make up 20 per cent of the world's population), regardless of their nationality or where they live.
Talmudic	The Talmudic legal system is derived from the Old Testament and is the law of Jewish people, wherever they may be.

International and municipal (or domestic) law

International law

Nation states (or countries) could not enjoy the benefits of trade and commerce, exchange of ideas, or even normal routine communication without some system of international law. **International law is that body of law concerned with regulating for the most part the conduct between nation states.**

international law
That body of law concerned with regulating conduct between nation states

While international law is principally concerned with relations between states (known as **public international law**), there are also laws that apply to individuals engaged in international transactions (referred to as **private international law**).

Two main sources of international law that can affect businesses are as follows:

- **Customary rules** of international law. These are derived from international custom and from established practices between nations; for example, the concept of 'terra nullius' (see Chapter 1). Australian courts have recognised that these customary rules are deemed to be part of the law of the land, subject to the qualification that they must not be inconsistent with any statute or rule of common law.
- **Treaties and conventions.** These are agreements that have been ratified between nation states.

Some of the better-known trade agreements have been:

- **GATT** (the *General Agreement on Tariffs and Trade*)—a multilateral treaty that aims to encourage free trade in goods;
- **the Vienna Sales Convention** (the *United Nations Convention on Contracts for the International Sale of Goods 1980*)—a multilateral treaty that sets out standards of conduct for sales agreements between traders of signatory countries;
- **APEC** (Asia-Pacific Economic Cooperation)—a regional forum, of which Australia is a member, that provides special trading advantages to its member states;
- the free trade agreements between Australia and **Korea** (from December 2014), **Japan** (from January 2015) and **China** (from December 2015), which saw the removal of trade barriers and the opening up of export opportunities for each country with Australia (a free trade agreement (or FTA) is a contractual agreement between two or more states which gives each state preferential access to the other's markets); and
- the **CPTPP** (*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, from December 2018) between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

municipal (or domestic) law
That body of law concerned with regulating the relations or conduct between individuals and organisations within a state's borders

public law
That body of law concerned with regulating the relationship between the state and the individual; for example, criminal law and constitutional law

private law
That body of law concerned with regulating the relationship between individuals within the state; for example, contract law and tort law

Municipal (or domestic) law

Municipal (or domestic) laws come from statute **or** case law. They regulate the **relations or conduct between individuals** (natural persons) and **organisations** (legal persons) that come **within the nation state's borders**. This does not mean that the individual or organisation must be a citizen of the state making the law, just that they must be within the nation state's borders. For example, if you visit the United States, you are subject to the municipal or domestic laws of that country, **not** the municipal or domestic laws of Australia. Similarly, a visitor from the United States to Australia is subject to the municipal or domestic laws of Australia, not the municipal or domestic laws of the United States.

Public law and private law

Classification by public and private law is shown in Figure 2.1.

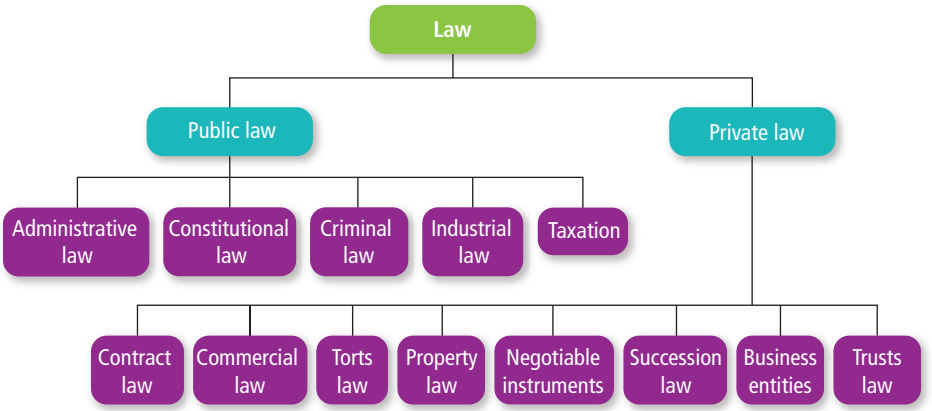
Public law

Public law is concerned with the organisation of government and the relationship that exists between the government and the people. It includes areas such as administrative law, constitutional law, criminal law, industrial law and taxation—areas in which the public has a determining interest.

Private law

While public law is especially applicable to or concerned with the state, **private law is concerned with those areas of the law that deal with situations involving disputes over rights**

FIGURE 2.1 Classification by public and private law



and obligations between people or organisations. While there are numerous branches of private law, some of the more important areas that are relevant to business include contract law, commercial law, law of torts, property law, negotiable instruments, succession, business entities, intellectual property, employment law and the law of trusts.

Substantive law and procedural law

Substantive law refers to the actual rights and duties that people have under the law.

Procedural law is concerned with the rules of civil and criminal procedure and evidence that must be followed in the enforcement of those rights and duties.

The common law and civil law systems

The term 'civil law' can have one of two meanings, depending on the context or way in which it is used, and the distinction is important. It can mean:

- **a reference to a legal system**—for example, the legal system used in Europe; **or**
- **a reference to an area of law within the common law system** governing relations between private individuals—for example, contract, tort, property, negotiable instruments, succession, intellectual property, business entities or trusts.

In the case of the former, the **civil law system** is a complete legal system with origins in Roman law and the (French) Napoleonic Codes. It is generally **non-adversarial or inquisitorial**. The law is set out in legislation that forms the primary source of law, with the courts basing their judgments on the provisions of codes and statutes.

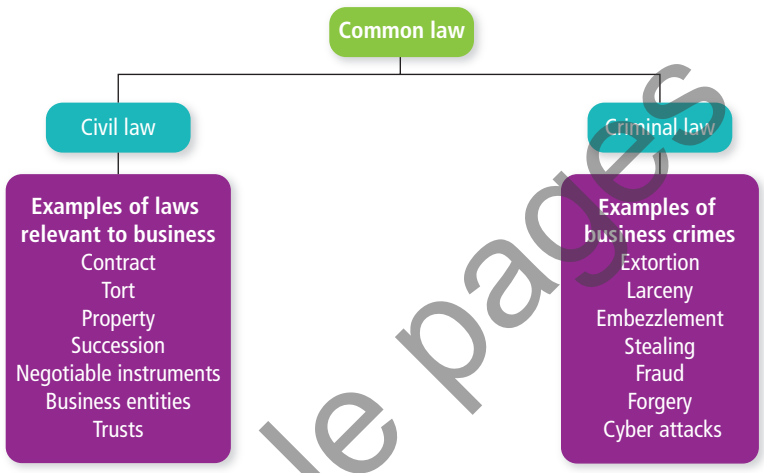
civil law system
A complete legal system with origins in Roman law and the Napoleonic Codes

Unlike the common law system, there is less reliance on case law (or judge-made law); however, it does appear that the two systems are converging. Common law jurisdictions are finding it increasingly difficult to rely on judge-made law and, as a result, are turning to codification of their laws, while the civil law systems are beginning to acknowledge the existence and use of precedent (a reference to the use of previously decided cases to assist in deciding a similar case today). It is possible that in the not-too-distant future the distinctions between the two systems may be blurred to the point where they are effectively one and the same system.

Civil law and criminal law under the common law system

Within the common law system, two basic areas of law can be identified: **civil law** and **criminal law**. Both can have an impact on business. However, as a general rule, a lack of understanding of business law principles (which form part of civil law), their application and compliance are far more likely to create problems for a business (because of their breadth of application) than the criminal law (see Figure 2.2).

FIGURE 2.2 Civil and criminal law



Civil law

Where the term **'civil law'** is used in the context of the common law system, it refers to an action brought by one individual against another. The **mode of procedure is accusatorial and the emphasis is on remedies**, usually an award of damages (monetary compensation) to the plaintiff if they can prove their claim on **the balance of probabilities**.

Business law is primarily about civil disputes that result in remedies for the winning party and liabilities for the losing one (although areas such as environmental, corporations, consumer protection and work health and safety legislation increasingly contain what are termed 'civil penalties' if their provisions are breached). Civil penalty proceedings are reserved for conduct that falls short of criminal behaviour. The legislation provides for pecuniary penalties for such conduct, but without the stigma attached to a criminal conviction, as an offence has not been 'committed'. The advantage for the prosecution in these type of cases is that civil penalty proceedings generally require a lower standard of proof than in criminal proceedings and so are easier to prove.

Two of the better-known types of civil action that are relevant to business are:

- **tort law**, where the plaintiff must prove on the balance of probabilities that the defendant's actions caused injury or loss to the plaintiff (see Chapters 7 and 8); and
- **contract law**, where the plaintiff must prove on the balance of probabilities that the defendant broke a legally enforceable promise to the plaintiff (see Chapters 3 to 6).

BUSINESS RISK MANAGEMENT ALERT

Be a good record-keeper or else. In a civil action, the party that succeeds is usually the party that keeps a detailed account of what has happened (a paper trail if you like), with relevant dates and documents, and can produce it in a cohesive and comprehensive form for the court or tribunal to establish what happened on the balance of probabilities.

Criminal law

In criminal cases the action is brought by the Crown on behalf of 'the people' (not the police, as they enforce the law). It is an action against a 'person' for the commission of an act that the state considers to be a crime and that should be **punishable by a penalty** if it can establish its case against the accused **beyond reasonable doubt** (i.e. burden of proof established by evidence that would satisfy a reasonable judge or jury that the accused committed the crime). Note that this is a higher degree of proof than is required in a civil case, where the plaintiff has to prove their case only on the balance of probabilities (i.e. burden of proof that a case should be decided in favour of the party whose claim is the more believable).

BUSINESS TIP

Who is a 'person' in law?

All rules of law are concerned with the activities of persons. For the purposes of the law, the reference to a 'person' includes not only human beings but also entities or organisations, which can have rights and obligations in much the same way as natural persons. Examples of entities include the Crown, companies and incorporated associations.

REVIEW QUESTIONS

2.1 Explain why an understanding of different legal systems around the world might be useful in business.

2.2 Explain the main differences, if any, between a common law system and a civil law system.

2.3 Indicate which of the following fall under the head of 'public law' and which fall under the head of 'private law': industrial law, contract law, tort law, constitutional law, taxation, the law of trusts.

2.4 Why is it important to know who a 'person' is for the purposes of the law?

KEY POINTS

An understanding of the following points will help you to better revise material in this section.

1. **What are the various classifications of law?** Laws may be classified in a number of ways, including:
   - the **common law system** (based on precedent and statute law) and the **civil law system** (established on a code-based system);
   - international law **(which regulates conduct between states)** and **municipal or domestic law** (a state's internal laws);

- **public law** (concerned with the organisation of government and with the relationship that exists between the community and government; e.g. constitutional law, industrial law, taxation) and **private law** (concerned with relations between natural and legal persons; e.g. contract law, torts law, property law, company law);
- **substantive law** (actual rights and duties under the law) and **procedural law** (the rules of civil and criminal procedure, and evidence).

2. **What is the distinction between civil law and criminal law?** Civil law involves an action between individuals, where the plaintiff has to establish on the balance of probabilities that their case is the more believable, and aims at compensating the injured party. Criminal law involves an action brought by the state, with the state having to establish beyond reasonable doubt that the accused has committed a wrong for which they should be punished.

TUTORIAL QUESTIONS

1. Explain the difference between a 'natural person' and a 'legal person', and give an example of each.
2. Explain how an understanding that the world has more than two major legal systems can assist you if you are in a business that involves international trade and commerce.
3. Why do most, if not all, legal systems distinguish between criminal law and civil law? What is the purpose of each and how do they differ? Discuss.
4. Name two types of civil law actions that are relevant to business, explaining why and how each one is relevant.

Section 2: Courts and tribunals

Having considered the ways in which laws may be classified, we now need to think about how those laws are administered and how disputes may be resolved. In the case of Australia, this is principally through a hierarchical court system in each jurisdiction for both civil and criminal matters. However, it should be noted that in the case of civil matters, each jurisdiction is increasingly resorting to alternative methods to the use of the courts, such as tribunals and alternative dispute resolution.

WHAT IS A COURT SYSTEM?

jurisdiction
The power and authority conferred on a court, generally by enabling statute but sometimes evolved from the common law, to hear and determine a matter

Australia has two main court systems, organised in terms of **jurisdiction** (i.e. the types of cases or matters that each court can hear):

- the federal court system; and
- the court system of each of the states and territories.

Each of these systems has jurisdiction to hear different types of cases, as do the courts within each system. (The jurisdiction of each court is established by the Act that created it, known as an 'enabling' Act.) Because of the importance of the legal framework to the business environment, it is necessary to understand how each system operates. In the event that a dispute leads to litigation, a plaintiff can make an informed choice about which jurisdiction might be able to hear the matter (i.e. federal or state), which court may be able to hear the matter (i.e. which court has jurisdiction) and how much it might cost.

Unlike the federal court system, **the jurisdiction of each state and territory stops at the border**. This means, for example, that New South Wales law does not apply outside the borders of New South Wales, and Queensland law does not extend beyond the borders of Queensland. The same is generally true in all Australian state and territory jurisdictions. However, there is an exception, and that can be found in an initiative between Western Australia (*Cross-Border Justice Act 2008*), South Australia (*Cross-Border Justice Act 2009*) and the Northern Territory (*Cross-Border Justice Act 2009*) called the 'Cross-Border Justice Scheme'. In this scheme there are effectively no legal state or territory borders in the outback region where they meet. The Cross-Border Justice Scheme enables police, magistrates, fines-enforcement agencies, community corrections officers and prisons of one jurisdiction to deal with offences that may have occurred in another participating jurisdiction.

The process of bringing and maintaining, or defending, a legal action (called **litigation**) is both time consuming and costly (the higher up the court hierarchy you go, the more expensive it becomes) owing to the complex procedural rules (or rules of evidence) employed within our court systems. This partly explains why there has been a shift in recent times towards alternative methods of dispute resolution such as tribunals, mediation, arbitration and neighbourhood dispute centres.

The legal system in Australia is adversarial in nature (compared with civil law systems such as those found in **Europe, which are inquisitorial**) and if the matter involves going to court, while using a solicitor or barrister is not compulsory, most parties will inevitably use them when they are involved in litigation. The solicitor will be used in pre-trial matters, while the barrister will represent the party in court. In the case of a matter being heard by a tribunal or alternative dispute resolution, it is not unusual for legal representation for the parties **not** to be allowed.

WHAT ARE THE ROLES OF THE POLICE AND THE COURTS?

LO 2

Explain the role of police and the courts in administering law and resolving disputes

The role of the police

In theory, everyone in the community is responsible for apprehending law-breakers. However, in practice this is a function that is usually better left to the police force. **The police force plays no direct role** (although it certainly plays an indirect role) **in the creation of new laws. Nor is it concerned with the punishment of wrongdoers**.

IN BRIEF

THE ROLE OF THE POLICE

The main function of the police is to enforce the laws created by other authorities. They serve the law itself, and are independent of the government.

The police are the **community guardians of the peace**. (The armed forces are the guardians of the state.) The duties of the police include:

- the prevention of crime;
- the apprehension of offenders against the criminal law;
- the protection of life and property;
- the enforcement of the law; and
- the safety of the public.

To achieve these ends, each of the states and territories, as well as the Commonwealth, have under their exclusive control their own police force.

A considerable amount of police time is spent working in, and for, the courts. Some of their court work includes:

- acting as Crown prosecutors in the lower or inferior courts (Magistrates' and Local Courts);
- appearing as witnesses of fact in criminal and traffic cases;
- acting as enforcers of court judgments; and
- initiating and conducting the majority of prosecutions for **summary offences** (minor offences, such as shoplifting) and the less serious indictable offences (such as assault). Offences that are more serious—**indictable offences**, such as armed robbery and murder—are brought in the intermediate and superior courts, but initially start as **committal proceedings** in the Magistrates' Court or Local Court (depending on what jurisdiction you are in). Here, the police are required to present their evidence so that the magistrate can determine whether or not the accused has a case to answer in a higher court.

summary offences
The less serious crimes, which are heard and decided by a magistrate in the Magistrates' Court or Local Court

indictable offences
The more serious crimes, which are usually dealt with in the intermediate and superior courts before a judge and jury

The role of the courts

The role of the courts is **administration of the law** and the **resolution of disputes.** This involves imposing a legally binding decision on the parties to a dispute. The more serious the case or matter, the higher within the court hierarchy will be the court that will hear it.

Criminal and civil jurisdiction

The courts have a **criminal** and a **civil jurisdiction**. A crime is an act or conduct by a person that is against the interests of the community as set down by statute and established by case law. The offender (generally known as the 'accused') may be arrested and charged by the police, and subsequently brought before the relevant court to answer the charge. **The court where the case will be heard is determined by the Act that created the court and the seriousness of the offence.** For example, a summary offence—that is, a minor offence—is dealt with (or 'heard') in an inferior court such as the Magistrates' or Local Court. On the other hand, if it is a serious offence such as murder (an indictable offence), there will be a committal hearing held first in the Magistrates' or Local Court to determine whether there is enough evidence to send the accused to trial. If there is, the case will be heard an intermediate or superior court, depending on the seriousness of the offence and the jurisdiction (Tasmania, the ACT and the Northern Territory do not have intermediate courts).

If the accused is found guilty, the court will then sentence them based on the seriousness of the offence. The sentence could range from a good behaviour bond to a fine or even a prison sentence. If it is a prison sentence, the **penal services**—prison, probation and parole—will then be responsible for the convicted person's punishment and rehabilitation.

Civil jurisdiction

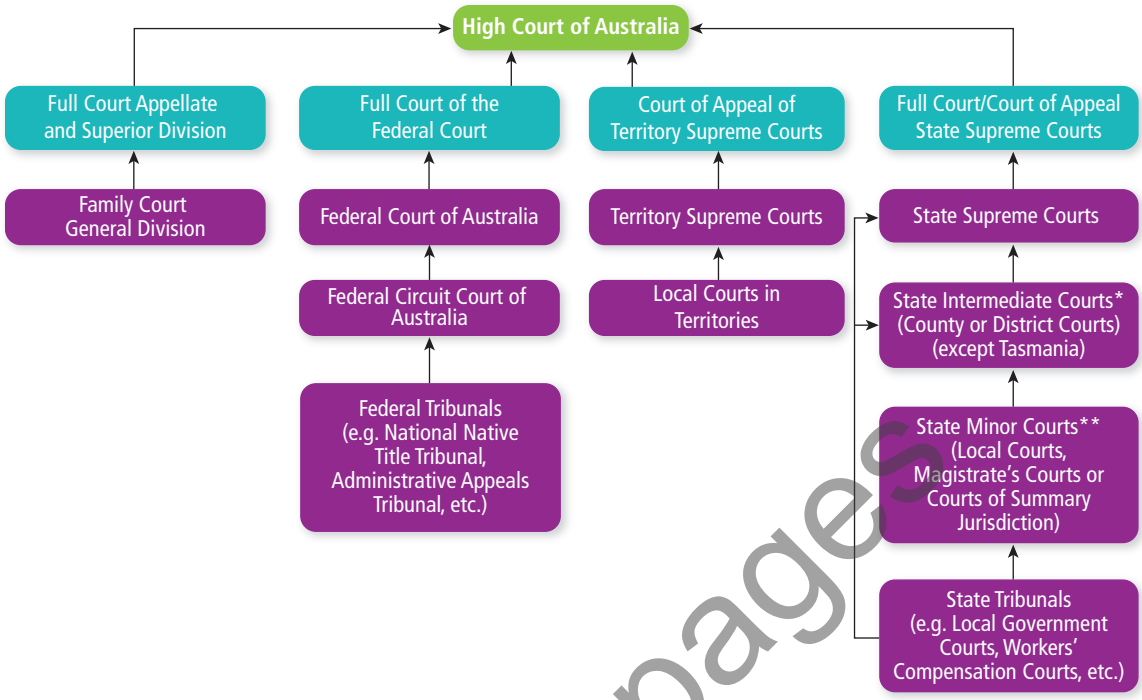
A **civil case** is brought before the courts when **an individual or business commences an action against another individual or business.** Which court will hear the matter is determined by its jurisdiction.

WHAT IS A COURT HIERARCHY?

court hierarchy
A ranking of courts by their importance

Each state has its own tiered system of courts (see Figure 2.3), formally organised by an enabling statute in terms of establishing its jurisdiction. **This tiered system of courts forms what is known as a court hierarchy.** Each Australian jurisdiction possesses a court hierarchy, though the number of courts within the hierarchy and the names of the courts vary between jurisdictions.

FIGURE 2.3 The court system



*The jurisdiction to hear appeals is conferred on courts by legislation. In the case of state tribunals and boards, appeals can go to either the District Court (or in Victoria, the County Court) or the Supreme Court, depending on the matter and the Act under which the matter was first heard.

**The jurisdiction in which these inferior courts are found are as follows: Local Courts—New South Wales; Magistrates' Courts—South Australia, Tasmania, Queensland, Victoria, Western Australia, Australian Capital Territory; Courts of Summary Jurisdiction—Northern Territory.

To ensure that each court system operates efficiently and effectively, jurisdictions are clearly defined both horizontally and vertically:

- **Horizontal demarcation** attempts to ensure that there is minimal jurisdictional overlap between courts.
- **Vertical organisation** is necessary to provide an opportunity for judicial review of decisions of lower courts by higher courts, and it operates where there is a hierarchy of courts and there are established rights of appeal. However, it should not be assumed that every decision can automatically be the subject of an appeal. Generally, the right of appeal is limited to issues involving questions of law, rather than questions of fact.

WHAT IS THE DIFFERENCE BETWEEN ORIGINAL AND APPELLATE JURISDICTION?

Where a matter is brought to court, the court can be one of two kinds:

- A **court of first instance** where a matter is being heard for the first time and the court is said to have an **original jurisdiction**.
- An **appellate court (or court of appeal)** where a party appeals the decision to a higher court, and the court is said to have an **appellate jurisdiction**.

In either case, the jurisdiction of the court is set out in the Act that created the court.

BUSINESS RISK MANAGEMENT ALERT

It should be noted that the majority of disputes that go to court nowadays will be argued before a judge alone on issues of fact, rather than issues of law. It is therefore important for businesses to ensure that they not only keep good records of all their important transactions, but that records are also kept of any disputes they may have had with customers, particularly now with the operation of the *Australian Consumer Law* (ACL).

LO 3

Describe the hierarchy and jurisdiction of the courts in the state and territory court systems

WHAT CASES CAN STATE, TERRITORY AND FEDERAL COURTS HEAR?

Because of problems with one-level legal systems—for example, appeals—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** (see Figure 2.3). But whatever position the court occupies in a court hierarchy, its paramount duty is the impartial administration of justice on a case-by-case basis.

As a general rule, the procedures (or the 'rules of evidence' as they are known to lawyers) in the inferior courts are not as complex as those in the intermediate and superior courts.

While copies of decisions of inferior and intermediate courts are not kept in law reports, most jurisdictions now keep electronic records of lower and intermediate court (and tribunal) decisions; for example, those of the Federal Circuit Court of Australia, Magistrates' or Local Courts, District Court (or County Court in Victoria), as well as numerous tribunals, including consumer tribunals, anti-discrimination tribunals, planning tribunals and administrative appeals tribunals, to mention but a few. (See, for example, state and territory government websites, which contain extensive information on court and tribunal cases and procedures.) In addition, decision of courts and tribunals can be found on public websites such as the AustLII website (www.austlii.edu.au) and private websites such as LexisNexis (www.lexisnexis.com.au).

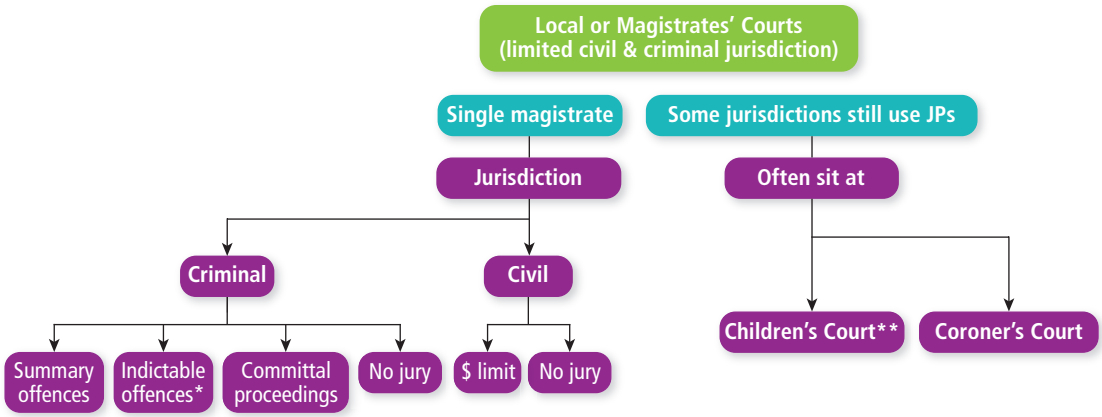
State and territory court systems

Inferior (Magistrates' or Local) courts

Magistrates' or Local Courts (see Figure 2.4) are located at the bottom of the court hierarchy. They are the most numerous of the courts and deal with relatively minor matters, which make up around 90 to 95 per cent of the matters that come into the court system. For example, it is estimated that the Victorian Magistrates' Courts deal with around 250 000 criminal and civil cases each year. They are generally presided over by persons called magistrates, although some states still allow Justices of the Peace to preside over their courts (see 'The judiciary' later in this section). Different names are given to these courts in the various states, and in some states the civil and criminal jurisdictions are conducted by separate courts (see Table 2.1).

The aim of these courts is to settle disputes locally, quickly and cheaply where possible. There is also less emphasis on formality than is found in the higher courts, though they are still expected to follow procedural rules and the laws of evidence. (A statutory exception is often the small claims jurisdiction of the Magistrates' or Local Court, where the aim is to settle disputes quickly with minimum formality and expense to the parties.)

FIGURE 2.4 Inferior courts



*Offences that can be heard summarily.

**Separate court in South Australia, Victoria and Western Australia.

TABLE 2.1 Inferior and superior courts and their civil jurisdiction limits (April 2019)

STATE/ TERRITORY	LOWER COURTS	INTERMEDIATE COURTS	SUPERIOR COURTS
Australian Capital Territory	Magistrates' Court To $250 000 Small claims to $25,000 are dealt with by the ACT Civil and Administrative Tribunal (ACAT)	No court	Supreme Court Generally only deals with matters over $250 000
New South Wales	Local Court In the Small Claims Division, claims to $20 000; in the General Division, claims over $20 000 and up to $100 000 (up to $120 000 if the parties agree) NCAT consumer claims up to $40 000	District Court $100 001–$750 000 (if the parties consent it can be extended by 50%) All motor vehicle accidents	Supreme Court >$750 000
Northern Territory	Local Courts Max: $250 000 Small claims to $25 000*	No court	Supreme Court >$250 000
Queensland	Magistrates' Court To $150 000 QCAT $25 000	District Court $150 000–$750 000	Supreme Court >$750 000
South Australia	Magistrates' Court General civil claims: $12 001–$100 000 Minor civil claims: $12 000	District Court >$100 000 >$100 000 for personal injury but essentially as for Supreme Court	Supreme Court PI & property unlimited

TABLE 2.1 Inferior and superior courts and their civil jurisdiction limits (April 2019)

STATE/ TERRITORY	LOWER COURTS	INTERMEDIATE COURTS	SUPERIOR COURTS
Tasmania	Magistrates' Court (Civil) $5000 minor civil claims Max: $50 000 (civil claim but unlimited if parties consent)	None	Supreme Court >$50 000
Victoria	Magistrates' Court Arbitration to $10 000* Mediation on claims over $40 000 Max for debt recovery claims and equitable relief: <$100 000 VCAT unlimited	County Court All PI claims Unlimited and concurrent with the Supreme Court	Supreme Court Unlimited but generally >$200 000
Western Australia	Magistrates' Court Civil matters to $75 000 Minor cases to $10 000 Consumer/trader claims to $75 000 Minor consumer claims to $10 000	District Court $75 000–$750 000 Unlimited for PI Unlimited for claims for damages for motor vehicle accidents	Supreme Court Over $750 000

*If the amount claimed by a plaintiff is less than $10 000 in Victoria, the matter goes to arbitration before a magistrate but without the formal rules of evidence applying. If the amount is less than $10 000 in New South Wales or the Northern Territory, the matter will be heard in the Small Claims Division of the Local Court. In Western Australia, the matter will be heard in the Magistrates' Court. These amounts are subject to change and should be regularly reviewed on the respective state or territory Department of Justice website.

NCAT—NSW Civil and Administrative Tribunal; PI—personal injury claims; VCAT—Victoria Civil and Administrative Tribunal

Criminal jurisdiction of the inferior courts

The criminal jurisdiction of the Magistrates' or Local Courts includes:

- All **summary offences**, such as failure to pay traffic fines, drink driving, drunk and disorderly behaviour, and shoplifting. These matters are disposed of by the magistrate in a summary manner, generally by fine, but repeat offenders may get imprisonment or both.
- **Indictable offences** are generally heard in intermediate or superior courts before a judge and jury, as they are **more serious criminal offences**. However, provision is made by statute in most states for some less serious indictable offences to be heard summarily in the Magistrates' Court or the Local Court, generally with the consent of the accused. (In Western Australia, these are known as 'either way' offences.) For example, stealing and breaking and entering may be heard in the Magistrates' or Local Court.
- **Committal proceedings** are preliminary hearings before a magistrate of the more serious indictable offences, such as murder, manslaughter, armed robbery, rape, fraud and the like. Here, the police must produce enough evidence to satisfy the magistrate that the

accused has a **prima facie** case to answer in a higher court. If the magistrate is satisfied that there is enough evidence for a jury to convict the accused of the offence charged, the person will be remanded for trial at a later date in a higher court before a judge and jury; otherwise, the matter will be dismissed and the person charged will have the charges dropped.

prima facie
'On the face of it'

New South Wales removed contested committal hearings from its justice system on 30 April 2018 and, in an attempt to streamline the committal process, introduced a new process called 'charged certification and case conferencing'. A senior prosecutor reviews the brief of evidence as soon as it is served on the accused and 'certifies' the charges that are to be heard. Lawyers for the prosecution and defence will then participate in a case conference to narrow the issues to be dealt with at trial and to finalise a case conference certificate (and to maximise opportunities for early guilty pleas). At this stage the accused must enter a plea to the offences and, unless the Magistrate accepts a plea of guilty, will be committed to trial.

Civil jurisdiction of inferior courts

The civil jurisdiction of inferior courts is restricted to the hearing of relatively minor matters such as debt claims, minor contractual matters and motor accident claims. All states and territories set a statutory maximum monetary limit for damages claims, which is being continually revised upwards by regulation and differs in every state and territory (see Table 2.1). The courts also hear matters outside those involving claims for damages arising from state and federal legislation.

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

Other functions of inferior courts

The functions of inferior courts are quite diverse. They may function as:

- a **Coroner's Court to investigate unexplained deaths**;
- a **Children's Court** (or **Youth Court** in South Australia and **Youth Justice Court** in the Northern Territory) to hear all summary and most indictable offences (except particularly serious crimes like murder) by persons under the age of 18 at the time the offence was committed or under the age of 18 when appearing in court; and
- a **Small Claims Court**. (Some jurisdictions have created a separate tribunal, such as the New South Wales, Queensland and Victorian Civil and Administrative Tribunals, to try to resolve disputes between consumers and traders, although Tasmania and South Australia will allow disputes between private individuals.)

REVIEW QUESTIONS

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

2.6 Explain why an inferior court has no appellate jurisdiction.

2.7 Why do Magistrates' or Local Courts handle around 95 per cent of all matters that come into the court system?

Intermediate (District or County) courts

States and territories with no intermediate court

Because their populations are too small to support such a court and its staff,

- Tasmania;
- the Northern Territory; and
- the Australian Capital Territory

have no intermediate court between the inferior courts and the superior courts. Appeals from the Local Courts go directly to their respective Supreme Court.

States with intermediate courts

Intermediate courts (known as 'County Courts' in Victoria and 'District Courts' in most other states—Tasmania and the two territories do not have them) form the middle level of the court hierarchy. In practice and procedure there are few differences between these courts and the superior courts **except** that they are not 'courts of record' in the sense of being capable of creating precedent.

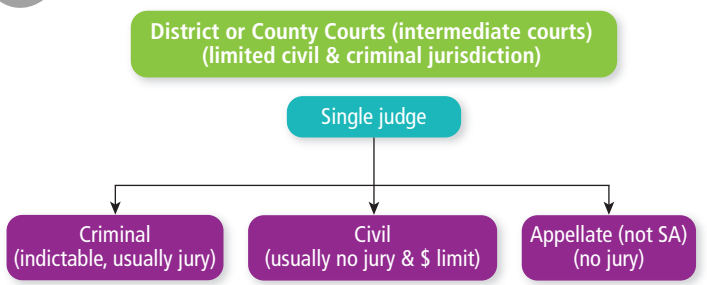
The **original civil jurisdiction** of these courts is determined by a statutory monetary jurisdictional limit (see Table 2.1). As a general rule, in most jurisdictions today the case will be heard before a judge alone (who decides questions of both law and fact). Where a jury is used, it will be a jury of four or six people (who decide all questions of fact).

In their **criminal jurisdiction**, intermediate courts deal with the bulk of indictable offences except for capital offences such as murder and treason.

In New South Wales, Queensland, Victoria and Western Australia, these courts also have limited **appellate jurisdiction**. They can hear appeals from inferior courts and some tribunals (although it should be noted that there is no appeal on civil matters from the Magistrates' Court in Victoria). These are known as 'de novo appeals' because the judge re-hears the matter and can overturn any finding of fact or point of law decided in the lower court or tribunal, as well as being able to substitute their own decision (see Figure 2.5).

The decisions of inferior and intermediate courts are becoming available in electronic form online on sites such as AustLII (www.austlii.edu.au) and Jade (https://jade.io).

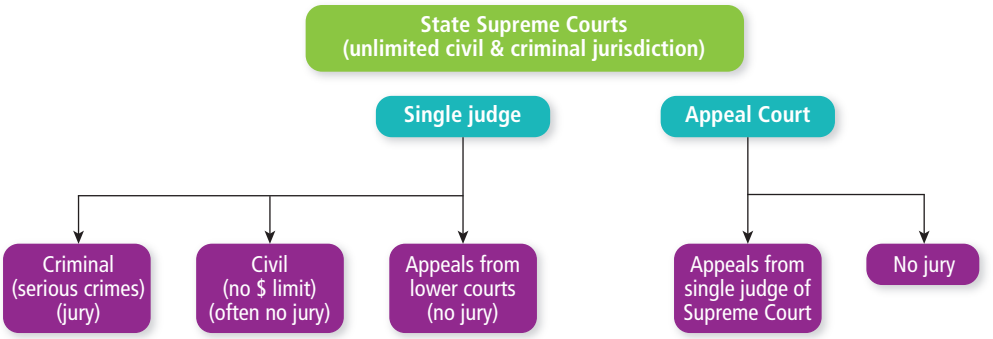
FIGURE 2.5 Intermediate courts (not Tasmania, ACT or NT)



Superior (Supreme) courts

The highest court within a state or territory court hierarchy is the **Supreme Court**. It has unlimited **original jurisdiction** (there is no upper monetary limit; see Table 2.1) and it can, in theory, hear any matter at all. However, in practice, it hears only the most serious matters, or cases involving difficult points of law (see Figure 2.6).

FIGURE 2.6 Superior courts



The superior courts of New South Wales, the Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia are all established under their enabling legislation as 'courts of record', and only these courts are accepted as being capable of creating binding precedent. However, as a result of changes in technology, the decisions of intermediate and inferior courts are becoming available online.

In the Supreme Court's criminal jurisdiction, a judge will sit with a jury of 12. Most civil cases are heard by a judge alone; however, where there is a jury, a judge will usually sit with a jury of four, although a jury of six or 12 may be empanelled in rare cases.

In each state the Supreme Court also exercises an appellate jurisdiction. Four states and both territories have established **courts of appeal**:

- New South Wales (which has a separate Court of Criminal Appeal);
- Queensland;
- Victoria;
- Western Australia; and
- Australian Capital Territory and Northern Territory (appeals from the Magistrates' Courts are heard by a single judge).

In Tasmania, there is a right of appeal from a single judge to the Full Court of the Supreme Court. In South Australia, appeals from most decisions in the Magistrates' Court and District Court, as well as decisions of single judges of the Supreme Court, are decided by the Full Court. In each jurisdiction, an appeal is normally heard before three judges.

Special leave of the **High Court of Australia** is necessary to appeal from a decision of a state superior court or the Federal Court.

Specialist courts

In addition to the state and territory courts, there has been a large growth in other specialist courts (and tribunals) designed in part 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.

While of considerable practical importance, many of these courts have little to do with commercial law but are included here to show the growth in specialist courts that has taken place in recent years. These courts include:

- **Family Court** (a federal court);
- **Indigenous courts** (NSW, Qld, SA and Vic);
- **Drug courts** (NSW, Qld, SA and WA);
- **Compensation or Work Health Court** (NSW and the NT);
- **Land and Environment Court** (NSW);
- **Environment, Resources and Development Court** (SA); and
- **Liquor Commission** (WA).

REVIEW QUESTIONS

2.8 In your opinion, why has there been an increase in the number of specialist courts?

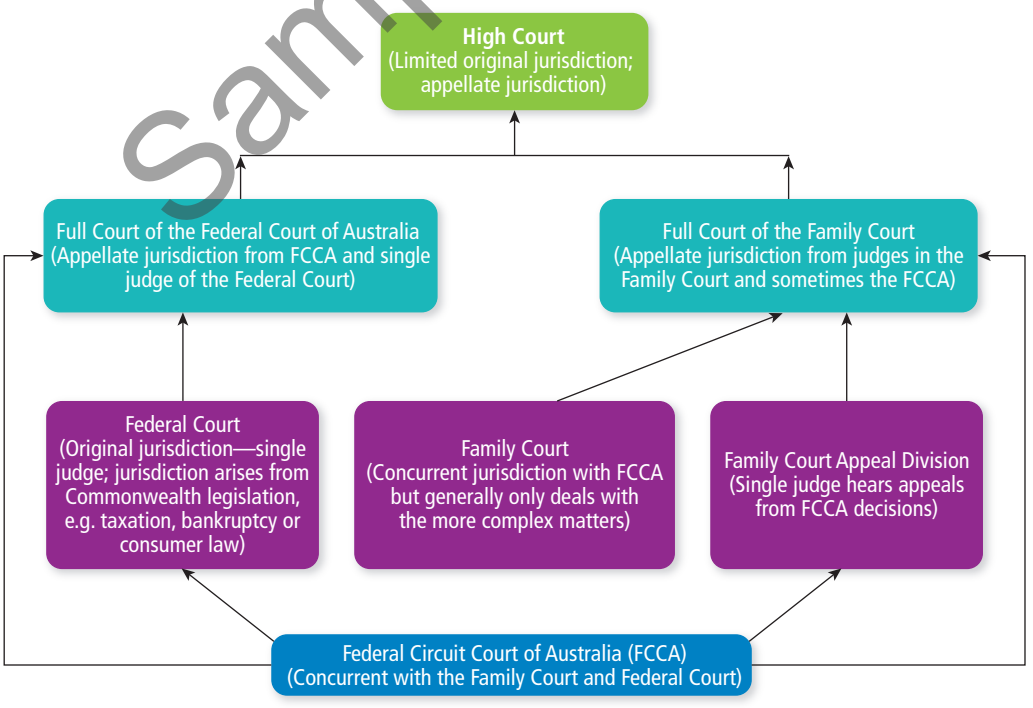
2.9 Explain the difference, if any, between the Supreme Court and the Court of Appeal.

LO 4 WHAT ARE FEDERAL COURTS?

Describe the hierarchy and jurisdiction of the courts in the federal court system

In addition to the state court hierarchy, provision exists under Chapter III, s 71, of the *Constitution* for a federal court hierarchy (see Figure 2.7).

FIGURE 2.7 Federal court system



There are currently four federal courts: the High Court, the Federal Court, the Family Court and the Federal Circuit Court of Australia (also known as the Federal Circuit Court or FCCA), which shares its jurisdiction with the Federal Court and the Family Court. The Federal Court will continue to be the single court dealing with all general federal law matters.

The High Court, the Federal Court and the Family Court have both original and appellate jurisdiction and are all courts of record as well as courts of law and equity. In their original jurisdiction, the judge decides both questions of law and questions of facts; there is no provision for juries in the federal courts.

Federal Circuit Court of Australia

The Federal Circuit Court was established by the *Federal Circuit Court of Australia Act 1999* (Cth) as a simpler and more accessible alternative to litigation in the Federal Court and the Family Court, as well as to reduce the workloads of these courts. Nearly all of the Federal Circuit Court's jurisdiction is shared with the Federal Court or the Family Court. The matters this court can deal with that are of particular relevance to business include:

- identical jurisdiction with the Federal Court in relation to all matters arising under the *Bankruptcy Act 1966* (Cth), *Australian Human Rights Commission Act 1986* (Cth) and *Administrative Decisions (Judicial Review) Act 1977* (Cth), and appeals from the Administrative Appeals Tribunal transferred to it by the Federal Court;
- concurrent jurisdiction with the Federal Court to review visa-related decisions of the Migration Review Tribunal, the Refugee Review Tribunal and the Administrative Appeals Tribunal;
- consumer matters arising under Schedule 2 of the ACL and limited matters under the *Competition and Consumer Act 2010* (Cth), including misuse of market power (s 46) and industry codes (s IVB), with the power to provide injunctive relief and award damages of up to $750 000;
- civil jurisdiction with respect to claims under the *National Consumer Credit Protection Act 2009* (Cth);
- jurisdiction to hear and determine civil copyright matters under the *Copyright Act 1968* (Cth); and
- jurisdiction to hear and determine matters under the *Fair Work Act 2009* (Cth).

Family Court

The Family Law Act 1975 (Cth) introduced what are essentially no-fault divorce laws and established the **Family Court of Australia** in 1976 as a court of record. The jurisdiction is concurrent with the Federal Magistrates' Court and, while of considerable practical importance, this court has little to do with commercial law.

Federal Court of Australia

The **Federal Court of Australia** was established under the *Federal Court of Australia Act 1976* (Cth) with its original jurisdiction extending to traditional Commonwealth matters and to over 150 statutes, including:

- competition and consumer law (discussed in Chapters 9 and 10 of this text)—perhaps the most important area of business law;
- intellectual property;
- bankruptcy;

- industrial law;
- federal taxation;
- native title matters;
- maritime matters;
- corporation law;
- immigration and social services; and
- review of federal administrative decisions.

Most matters coming before the Federal Court are heard before a single judge. These decisions can be appealed to the **Full Court** of the Federal Court, comprising three judges. The court can hear appeals from:

- the Supreme Court of Norfolk Island in both its civil and criminal jurisdictions;
- decisions of single judges of the Federal Court and the Federal Circuit Court (in non-family matters); and
- state Supreme Courts exercising federal jurisdiction in such matters as income tax, bankruptcy, trademarks and patents.

Special leave of the **High Court** is necessary to appeal from a decision of the Federal Court.

The High Court

The **High Court** was established in 1901, under s 71 of the *Constitution*, with three aims:

1. to exercise a defined **original jurisdiction**—for example, to hear cases involving indictable offences against the laws of the Commonwealth, where the Commonwealth itself is suing or being sued, or where there is a dispute between two or more states, or matters involving residents of two or more states;
2. to **guard** and **interpret** the *Australian Constitution*; and
3. to serve as the **final court of appeal** within the Australian legal system—it can hear appeals from state Supreme Courts and the Federal Court, but **only if it first grants special leave and agrees to hear the case**. This will generally be granted only where the case involves some important issue of law, or in a criminal case if there appears to be a serious miscarriage of justice.

The court consists of a Chief Justice and six other justices and, while it is permanently situated in Canberra, it can still sit in other places around Australia.

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. In its original jurisdiction, the High Court is usually presided over by a single judge. However, in those cases concerning the *Commonwealth Constitution* the court is usually composed of five judges and is referred to as the 'Full High Court'.

The bulk of the High Court's work is in its appellate jurisdiction. Its appellate jurisdiction is found in s 73 of the *Constitution*, which provides that the court can hear and determine appeals from:

- a justice or justices exercising the original jurisdiction of the court;
- any other federal court, or court exercising federal jurisdiction; and
- any state Supreme Court (sourced from the Federal Register of Legislation at 11 December 2018).

Appeals are usually heard before three justices, although important cases may be heard before a Full Bench or Full Court.

While the High Court is a 'court of record', it does **not** consider itself bound by its own previous decisions, and it will overrule a previous decision, although only with the greatest caution and then only in a clear-cut case.

Abolition of appeals to the Privy Council

It is no longer possible for Australian courts to appeal to the Privy Council, making the High Court the final court of appeal.

REVIEW QUESTIONS

2.10 How does the original jurisdiction of the High Court differ from that of the state Supreme Courts?

2.11 On what grounds does the High Court rely for appellate jurisdiction in both state and federal matters?

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

2.13 Do you think there is a need for six state, two territory and a federal court system in a country of only 25 million people? Explain why you think there is or is not such a need.

eCourts

The courts in all jurisdictions 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 reduce litigation costs. This is reflected in changes that are taking place to the civil procedure rules of the courts. For example, in the case of the **Commonwealth**, the Federal Court provides a range of services online, including:

- allowing the public to search for information on specific cases **(Search)**;
- allowing the parties to lodge documents electronically **(eFiling)**;
- allowing parties and their legal representatives to participate in a virtual courtroom **(eCourtroom)**; and
- allowing practitioners or parties to communicate with chambers' staff on case-related matters **(eCase Administration)**.

In addition, the **Commonwealth Courts Portal**, which is an initiative of the Federal Circuit Court of Australia, the Federal Court and the Family Court, provides web-based services to judicial officers, lawyers, litigants and court staff about cases before the courts.

WHAT ARE THE FEATURES OF A COURT HIERARCHY?

The hierarchy of courts serves a threefold purpose:

- It provides a **system of appeals** through which dissatisfied litigants may appeal from a decision of a lower court to a higher court to have the matter reconsidered.
- It allows different forms of **hearing** according to the gravity of the case; the more important or more serious cases will get the best legal advice, while minor matters will be dealt with quickly, cheaply and conveniently.
- It is instrumental in the building up of **precedent** (see Section 3 of this chapter).

Right of appeal

In theory, if either party is dissatisfied with the outcome of their case, they may apply to a higher court (perhaps all the way to the High Court, depending on the choice of the party appealing, the nature of the case, whether they can afford it, and, most importantly, in the case of the High Court, whether the High Court gives leave) for reconsideration of the decision. However, **there is no common law right of appeal**.

The jurisdiction to hear an appeal is conferred on courts by Acts of Parliament, and in many cases 'leave' or permission of the court must first be obtained. The relevant Act under which a decision is made will determine:

- whether the decision is appealable (it is wrong to assume that all decisions are appealable, because they are not);
- what kind of appeal is allowed (e.g. is it to re-hear the matter afresh—a hearing de novo—or an appeal 'as of right'?);
- whether permission to appeal is required (e.g. an appeal to the High Court will be heard only if the High Court gives leave or agrees to hear the appeal); and
- what matters can be appealed.

Even where there is a right of appeal, in practice this right is limited because of the expense involved in mounting an appeal to a higher court. The higher you go up a court hierarchy the more expensive it becomes (because of the solicitor's and barrister's fees, rather than the court filing and hearing fees).

The right of appeal is an important part of our system to safeguard against injustice. In the case of criminal matters, the appeal may be against either of two elements in the decision: its direction or its severity. In civil cases, appeals are generally restricted to questions of law rather than findings of fact.

LO 5 WHAT ALTERNATIVE METHODS ARE THERE TO COURTS?

Explain the adversary system, and describe the various alternative methods of dispute resolution

A basic legal principle of modern society is that no person must suffer punishment or pay damages for any conduct not expressly forbidden by law. This principle is reinforced by the fact that the legal rights of both individuals and corporate bodies should be determined by the courts. However, community pressure has forced governments, both state and federal, to provide the means whereby both citizens and entities can obtain easier (and cheaper) access to decision-making bodies.

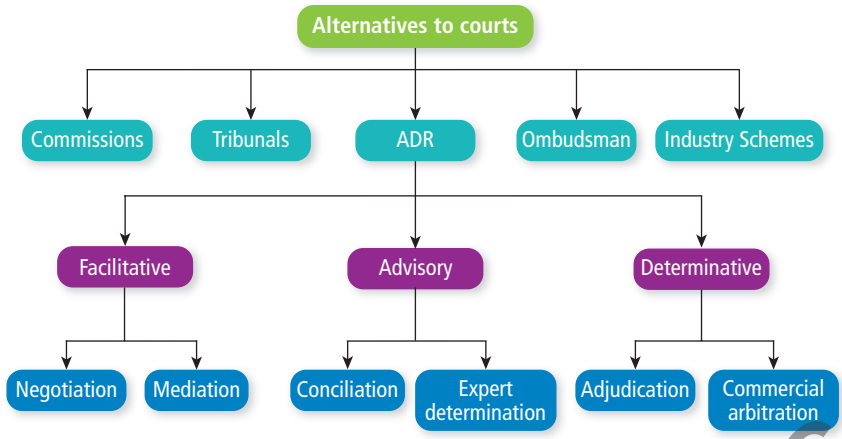
IN BRIEF

ALTERNATIVE METHODS OF DISPUTE SETTLEMENT

In an attempt to overcome some of the traditional problems associated with the court system—for example, lack of accessibility, delays, costs, ignorance and intimidation—government, business and the community have turned to alternative methods of dispute resolution, such as:

- tribunals;
- ombudsmen; and
- alternative dispute resolution (ADR) (see Figure 2.8).

FIGURE 2.8 Some alternatives to going to court



This has been achieved through judicial or quasi-judicial powers or by authority being given to officials who stand more or less in connection with the government of the day, and who may also be subject to government influence. Examples of decision-making bodies that are outside the court system but exercise jurisdictions and perform functions similar to those of courts of law include licensing, fair rent and arbitration courts.

Transport regulation boards and town planning appeal tribunals are examples of special administrative tribunals that not only resolve disputes between people by the application of legal rules, but also make or recommend decisions that are in accord with government policy. They are said to perform 'quasi-judicial' functions.

The past few years have seen a rapid growth in alternative methods of dispute resolution both within formal court proceedings (e.g. the Neighbourhood Justice Centre and the Dispute Settlement Centre in Victoria) and outside them. This has arisen because of a number of major criticisms of the traditional court system by lawyers, governments and other concerned groups about the delays, costs, ignorance and intimidation within the traditional court system. **Alternative methods of dispute resolution can provide expedient, private and efficient methods of resolution of commercial disputes** where the disputing parties generally feel satisfied with the result, as these methods are not accusatorial and there are no winning and losing parties.

Mediation, conciliation and arbitration procedures are now commonplace in court and tribunal procedures. For example:

- In Victoria, s 102 of the *Magistrates' Court Act 1989* provides that the magistrate must refer claims under $10 000 to arbitration, while the Civil and Administrative Tribunal, or the principal registrar, may refer a proceeding to mediation. Mediation is also encouraged in the great majority of civil cases in the District and Supreme Courts.
- In New South Wales, the Local Court Rules provide for compulsory mediation for claims up to $10 000, while the *Civil Procedure Act 2005* (NSW) provides for compulsory arbitration in certain matters in the District and Supreme Courts. Mediation is also available in the majority of civil cases even after a case has started.
- Industrial disputes under s 777 of the *Fair Work Act 2009* (Cth) may be dealt with by arbitration, while the Fair Work Commission may deal with a dispute in such other ways as it considers appropriate, including mediation or conciliation (s 776).

- The Small Claims or Consumer Claims Tribunals work on the principle of mediation and arbitration. Under these tribunals, a referee will attempt to mediate a dispute between a consumer and a trader and will make an order only if the parties fail to compromise.
- The Dispute Settlement Centre of Victoria provides free mediation services to try to resolve a wide range of disputes, including neighbourhood disputes, workplace disputes and even disputes involving incorporated associations.

Facilitative processes

Negotiation

Negotiation is a **facilitative process** that involves **voluntary and confidential discussion between two parties**, either with or without a third party, to try to mutually resolve a dispute. The outcome generally remains confidential between the parties.

Mediation

Mediation is also a **facilitative process** for resolving disputes. Like negotiation, it is a **voluntary confidential negotiation process**, but an independent and neutral third party (the **mediator**) will assist the parties to try to find a way to resolve their dispute. If an outcome is reached, it can be kept confidential between the parties. It is not an adversarial process.

Mediation is particularly useful in complex matters where the parties may have ongoing contact and/or the dispute involves multiple parties, because the parties, with the assistance of the mediator, may find a solution that is satisfactory to all parties. The mediator **cannot** impose a decision on the parties.

Mediation can be implemented before, or at the same time as, other forms of dispute resolution such as arbitration or court proceedings. Mediation is being increasingly used in commercial, non-commercial and non-criminal matters by the courts to try to reach settlement quickly and cheaply.

If mediation fails, the parties may then turn to arbitration or the courts to have the matter in dispute settled.

Advisory processes

Conciliation

While the terms 'mediation' and 'conciliation' are used interchangeably, they are different processes because of the role played by the independent third party. The parties to a dispute, again with the assistance of a neutral third party (the **conciliator**), identify the dispute, develop options, determine what alternatives are available, and try to reach an agreement. The conciliator may exercise an **advisory role** on the content of the dispute, and suggest options and possible solutions. Their role is generally more directive than that of a mediator, but the role is not a determinative one.

Expert determination

Expert determination, or independent expert appraisal, is a process that provides for an **independent expert** to be appointed by the parties to give a determination on some disputed point of fact or law. The process is **advisory** and is generally effective in settling disputes that are simple in content—for example, what is an accepted trade or industry practice—or technical in nature.

The independent expert adopts such procedures that are suitable for obtaining the information from the parties, giving each party a reasonable opportunity to put their case and deal

with that of the opposing party. The parties will decide beforehand whether the determination is to be final and binding on them. If it is not, it may form the basis for negotiating a settlement, or at least clarifying the issues.

Determinative processes

Adjudication

An independent person (an **adjudicator**) is appointed under the relevant legislation or is chosen by the parties. Adjudication, which is widely used in the construction industry, is carried out on the basis of the documents that the parties submit, although the adjudicator can call a conference. The adjudicator will then make a determination as to the amount of money (if any) that the respondent must pay the claimant, when it is to be paid, and whether any interest should be paid.

Commercial arbitration

Commercial arbitration has long been used as a means of **settling commercial disputes**. It is a consensual process between the parties and is one where the parties have agreed to accept the arbitrator's decision, right or wrong. Once the arbitrator has made a decision, the rights of the parties that were in dispute are ended and then replaced by the arbitrator's award. All the states and territories have enacted essentially uniform domestic Commercial Arbitration Acts, while the Commonwealth has enacted the *International Arbitration Act 1974* (Cth).

Commercial arbitration is a **formal dispute resolution process** that involves the hearing of a dispute by an independent third party (an **arbitrator**). The arbitrator will be of the party's choosing and will be someone who is familiar with the professional or technical background of the matters in dispute. Typically, on appointment the arbitrator will call a preliminary conference with the parties to agree on how the arbitration will be conducted. This will help ensure that the outcome will be acceptable to all parties.

Providing that the arbitration is conducted according to the principles of natural justice—that is, that all parties are treated equally and fairly—the manner in which it will be conducted may be varied by the parties to suit the circumstances. For example, in the case of a small matter, the parties and the arbitrator may agree that the matter be dealt with just by the submission of documents, which would significantly reduce each party's costs. Where the matter is more complex, there may be the submission of formal claims and the lodging of defences; evidence may be submitted by each party and be subject to cross-examination, so that the whole process is more in the form of a judicial-style hearing.

At the end of the hearing, the arbitrator will make an **award**. Unless the parties have expressed a contrary intention when agreeing to arbitration, the award will be **final and binding** on the parties, which is why arbitration is referred to as a **determinative process**. One of the important advantages of arbitral awards is that they can be enforced in the same manner as a court judgment.

While commercial arbitration is an expedient, efficient and private alternative to the courts, a decision on legal issues arising from the dispute (or the arbitration; for example, the denial of natural justice) can still be appealed to the courts. The Rules of Court of all Australian jurisdictions also allow a judge to refer questions of fact out to arbitration.

Commercial arbitration is generally chosen by the parties because not only can the matter be dealt with more quickly, in private and without the formality of the courts, but also an arbitrator (unlike a judge in a court) can be chosen with the necessary professional or technical background to arbitrate on the matters in dispute.

BUSINESS TIP

Use of arbitration clauses

While the parties to a commercial contract will often assume that a dispute between them will never arise, commercial reality shows otherwise. It is good commercial practice to consider including an 'arbitration clause' in a commercial contract, because it is:

- **quick** (the courts have long waiting lists for commercial matters);
- **private** (the courts are public forums, although confidentiality can be obtained on settlements);
- **confidential** (the public are not admitted and the arbitration is held in private);
- **cheap** (legal costs in a court case are significantly higher than in arbitration);
- **handled by an arbitrator who will have a professional or technical background in the matters in dispute** (judges will not generally have a similar professional or technical background to an arbitrator); and
- **final and enforceable** in its awards, like a court judgment.

Two points are worth noting. First, an agreement to submit a dispute to arbitration can be made by the parties after a dispute has arisen. Second, arbitration awards can be enforced in Australia and overseas.

LO 6

Discuss the function and purpose of state and federal tribunals

WHAT ARE JUDICIAL AND QUASI-JUDICIAL TRIBUNALS?

In addition to the alternative methods of dispute settlement, there has been a growth, at both the state and federal level, in the number of permanent and non-permanent tribunals. As society has grown more complex, so has the range of legal issues. As a result, there has been a spectacular growth in specialisation within the legal system, and the response of state and federal parliaments has been to pass legislation setting up a number of specialist tribunals to deal with specific problems. **Such tribunals can deal with only those matters over which they have been given specific jurisdiction under the enabling Act that created them.** They are not courts in the strict sense, although they do perform many of the functions and have many of the powers associated with courts; hence the use of the term 'quasi-judicial'.

IN BRIEF

REASONS FOR THE GROWTH OF JUDICIAL AND QUASI-JUDICIAL TRIBUNALS

The reasons for the creation and growth of judicial and quasi-judicial tribunals include enhancing accessibility and responsiveness; improving efficiency; increasing accountability; providing informal, timely, fair and inexpensive methods of dispute settlement; providing an avenue for people seeking to have executive action reviewed; and keeping formalities 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, while tribunals are often presided over by non-legal experts who cannot create precedent.
- The atmosphere, procedures and rules of conduct in a tribunal are generally less formal and strict, making them far less intimidating to a potential litigant.
- Legal representation is often prohibited or restricted in an attempt to try to contain the costs of bringing an action (e.g. in consumer actions).
- Appeals are restricted. In many tribunals, the decision of the tribunal is final unless the losing party can show there has been an error of law.
- Tribunals can take into account factors that would not necessarily carry a great deal of weight in a court because of the rules of evidence.
- A court is generally 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.

IN BRIEF

TRIBUNALS

While a tribunal hearing is similar to a court hearing, formalities are minimal. As a result of different procedures and rules of evidence, tribunals **do not create precedent**, even though their reports can often nowadays be found online on site such as austlii.edu.au. Tribunals are subject to judicial review by a superior court.

Tribunals are subject to a degree of control by the courts under an area of law known as administrative law. All tribunal procedures are reviewable by a superior court to ensure that there has been no denial of natural justice—that is, both sides **must** be given the opportunity of being heard (if one side elects to say nothing, they cannot complain later)—and that the tribunal has correctly followed the procedures set down for it (known as 'procedural fairness'). 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.

Tribunals created under federal legislation, such as the Administrative Appeals Tribunal (AAT) and the Australian Competition and Consumer Commission (ACCC), are subject to review in the Federal Court or the Federal Circuit Court, while tribunals created under state legislation, such as the Civil and Administrative Tribunals found in New South Wales (NCAT), Queensland (QCAT), South Australia (SACAT), Victoria (VCAT) and the State Administrative Tribunal of Western Australia (SAT), are subject to control of the Supreme Courts. When reviewing an administrative decision, the court is not concerned with the merits of the decision but with the existence of a ground for review. Grounds for review include:

- breach of natural justice in the making of the decision;
- procedural irregularities in the making of the decision;
- that the decision-maker did not have the authority to make the decision;
- that the decision was not allowed under the Act;

- that the decision was an improper exercise of power conferred by the Act, such as having taken into account an irrelevant, or failed to take into account a relevant, consideration, or having exercised a discretionary power in bad faith;
- that there was an error of law;
- that the decision was induced or affected by fraud;
- that there was a lack of evidence to justify the making of the decision; and
- that the decision was contrary to law.

Some federal tribunals

Two well-known federal tribunals are the Administrative Appeals Tribunal and the Australian Competition and Consumer Commission.

Administrative Appeals Tribunal (AAT)

The **Administrative Appeals Tribunal** was established in 1975 by the *Administrative Appeals Tribunal Act 1975* (Cth) to review the decisions of Commonwealth Government departments, including Ministers and officials, and statutory bodies. The tribunal does not have a general power to review any decision made under Commonwealth legislation. **It can review a decision only if an Act or regulation specifically provides that the decision is subject to review by the tribunal**, and to date it has power to review decisions made under more than 400 separate Acts and regulations. Some of the better known areas over which the tribunal has jurisdiction include taxation, social security, customs, corporations, freedom of information, veterans' entitlements, immigration and citizenship.

The tribunal's function is to determine whether a particular decision is the correct or, in the case of a discretionary area, the best decision based on the facts.

Any person who is affected by an administrative decision of a Commonwealth Government department can appeal to the AAT, seeking a review of that decision. Once the tribunal has heard all the evidence, it then has the power to affirm, vary or set aside the original decision, or even impose its own decision.

The Australian Competition and Consumer Commission (ACCC)

The **Australian Competition and Consumer Commission** (ACCC) derives its power under s 6A of the *Competition and Consumer Act 2010* (Cth). Its main functions are:

- **administration and enforcement** of the restrictive trade practices and consumer law provisions of the *Competition and Consumer Act 2010* (Cth);
- **granting of authorisations** of certain restrictive trade practices that would ordinarily be prohibited but that give the public a benefit that, to the satisfaction of the Commission, outweighs the adverse effect on competition; and
- **providing assistance to the public** by engaging in research and education of the public and the business community, and by providing consumer guidance.

The ACCC has the power to prosecute breaches of the Act, and to authorise anti-competitive behaviour that would otherwise be illegal on public benefit grounds.

BUSINESS RISK MANAGEMENT ALERT

Decisions of tribunals are generally subject to judicial review only if natural justice or procedural fairness has not been followed.

WHAT IS AN OMBUDSMAN?

LO 7

Explain the role and purpose of the ombudsman

ombudsman
The person who takes complaints from citizens or consumers, usually involving government or statutory agencies or service providers

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 in industries such as banking, insurance, private health and telecommunications, such as the Telecommunications Industry Ombudsman and the Financial Ombudsman Service. They investigate complaints about administrative actions and decisions made by government departments, statutory bodies, local authorities and the commercial areas noted earlier.

Unless the ombudsman considers that it would be reasonable to hear the matter first, a person who has a problem with a government department or statutory body should first try to exhaust all the normal avenues in an effort to resolve the matter. If this fails, they may then approach the ombudsman.

A complaint must be made in writing. If the ombudsman considers that it falls within their jurisdiction, a copy of the complaint will be sent to the relevant authority for comment. This may resolve the matter, but where it does not, the ombudsman will investigate the validity of the complaint. On completion of the investigation, the ombudsman makes a recommendation as to whether or not the complaint is justified, and the opinion will be forwarded to the appropriate authority. If, in the opinion of the ombudsman, the complaint is valid, recommendations are made to the appropriate authority for rectification.

If these recommendations are not acted on, then the ombudsman may make these recommendations, in the case of the Commonwealth, to the Governor-in-Council and both Houses of Parliament, or, in the case of the states or territories, to the Governor and to both Houses of Parliament (except in Queensland, where there is no upper House). The ombudsman has **no power to order rectification of a wrong** where it involves a government department or statutory body.

REVIEW QUESTIONS

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

2.15 List the reasons that have led to the rapid growth in administrative tribunals and alternative methods of dispute resolution as alternatives to the court system.

2.16 In what ways do the procedures of the tribunals differ from those of the traditional courts? Should the procedures be the same for both tribunals and courts?

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

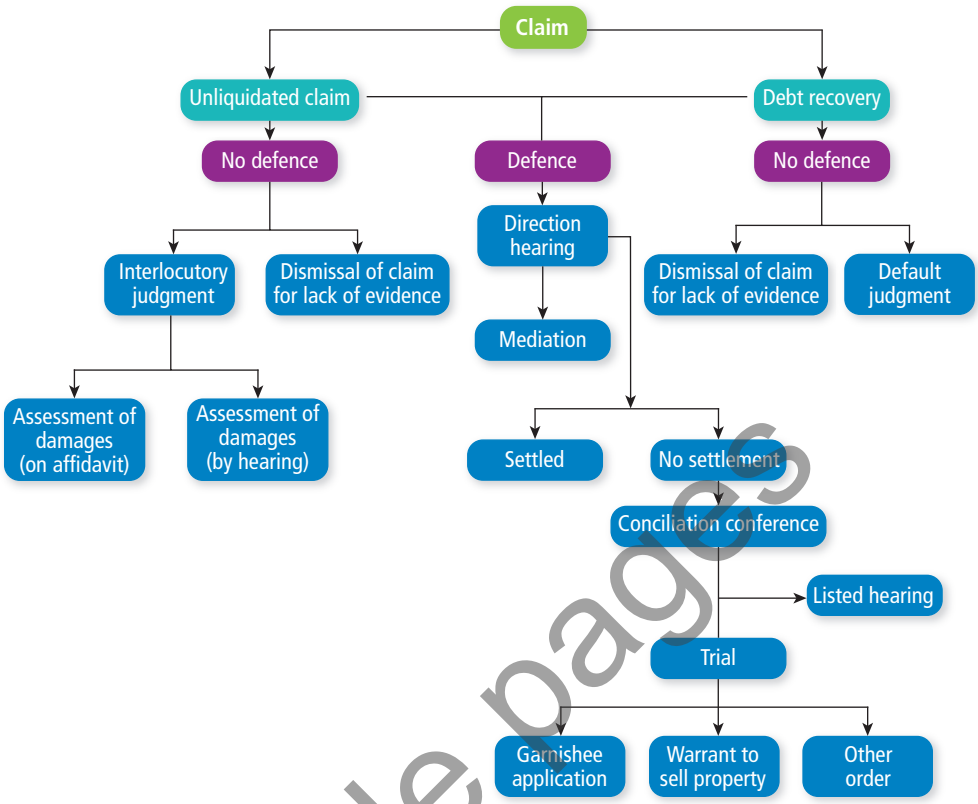
WHAT IS THE COMPOSITION OF AN ADVERSARY SYSTEM?

LO 8

Discuss the roles and purpose of the legal profession, judiciary, juries and parties in criminal and civil trials

In Australia, the basic method of dispute resolution is the **adversary system** of justice (compared with the inquisitorial system used in civil law countries). **This means that there are two opposing sides in a dispute who will argue their case in a court presided over by a neutral third party in the form of a magistrate or judge**, who will decide in favour of one party (so there will always be a winner and a loser). Depending on the case, the magistrate or judge—and occasionally still in civil matters, the jury—decides which of the parties' cases to prefer. This usually means that the side that can present the case the best will win (Figure 2.9).

FIGURE 2.9 Litigation process in a civil court



Subject to the rules of evidence, the parties are responsible for identifying the issues in dispute and have control over the witnesses they wish to call and the evidence they wish to produce. In reality, this means that there is a significant degree of self-interest on each side to make sure that they present the best evidence and that as a result the truth will come out. The truth of the evidence is tested by both sides asking questions (examination and cross-examination).

The main groups of participants in the adversary system are:

- the parties;
- the barristers and solicitors who will act on behalf of the parties;
- the judiciary (judge/s) who will preside over the court; and
- the jury (if there is one).

The course of an action through the litigation process in a **civil action** is similar in all jurisdictions. An action begins by the plaintiff making a claim against another person or organisation and then attempting to prove, on the balance of probabilities, that their version of the facts is the more believable.

In contrast to the adversarial system is the **inquisitorial system used in civil law jurisdictions** such as those in much of Europe. Here the judge (who is trained from law school to be a judge) or an investigator runs the case from the outset and decides which issues and evidence are most relevant. The case develops over a series of hearings, and the parties' advocates assist

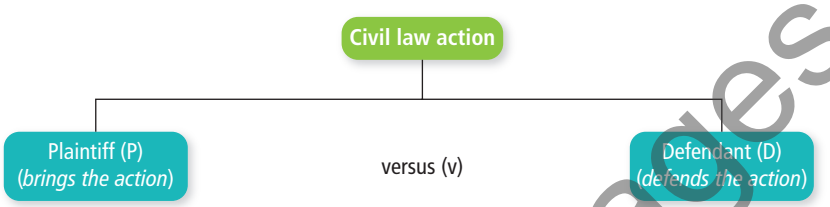
the court and put their clients' cases, when allowed; however, the judge or investigator runs the trial. The court is an inquisitor, actively involved in seeking out the facts in a case, and is not confined to deciding between the submissions of opponents.

The parties

Civil action

In a civil law action at first instance (when it comes to court the first time), the action is brought by one person (natural or legal), known as the **plaintiff**, against another, known as the **defendant** (Figure 2.10).

FIGURE 2.10 Parties in a civil action at first instance (the first time in court)



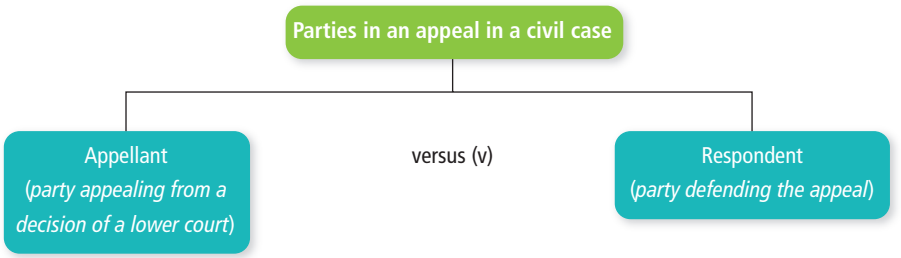
The burden (or onus) of proof is on the plaintiff to prove the case on the **balance of probabilities** (standard of proof), which basically means that it was more likely than not that the evidence presented establishes that the plaintiff's contention is true.

The plaintiff will be seeking a remedy from the court in the form of:

- **monetary damages** (the primary remedy for a court under common law); and/or
- **a discretionary court order** directing the other party to do (specific performance) or refrain from doing (injunction) some particular act or acts (discretionary remedies generally only available from a Supreme Court in its equitable jurisdiction).

If the losing party is unhappy with the court's decision, they may decide to try to lodge an appeal with a higher court. Note that the plaintiff may no longer appear as the first-named party, and that the terms by which the parties are referred to may have changed from 'plaintiff' and 'defendant' to '**appellant**' and '**respondent**' (Figure 2.11).

FIGURE 2.11 Names of parties in an appeal case



IN BRIEF

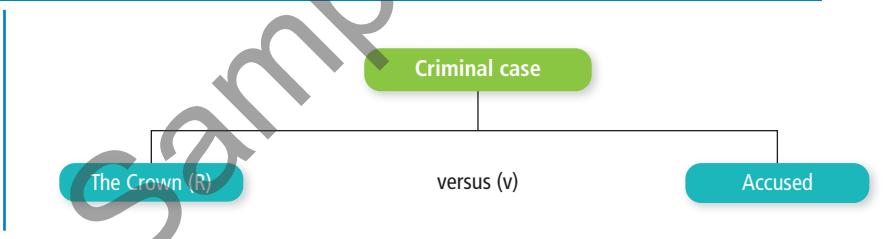
POSSIBLE REMEDIES FOR A PLAINTIFF IN A CIVIL ACTION

REMEDY	CHARACTERISTICS
Damages	The main remedy of the common law courts is monetary compensation.
Specific performance	A discretionary remedy in equity, it is an order to make the defendant do a particular thing or act.
Injunction	A discretionary remedy in equity, it is an order restraining the defendant from doing a particular thing or act.

Criminal action

In a criminal action, the Crown is bringing an action against an accused person (Figure 2.12). In the case of a summary offence—that is, a less serious offence that can be heard and decided only by a magistrate in a Magistrates' or Local Court—the matter is generally prosecuted by the police rather than the Crown. In the case of an indictable offence, these are divided into minor and major indictable offences. Minor indictable offences are dealt with in the Magistrates' or Local Court unless the accused/defendant chooses to have the charge dealt with in a higher court. Major indictable offences must be dealt with in the superior courts, and the Crown takes over the conduct of the matter after the committal proceeding at the Magistrates' or Local Court level.

FIGURE 2.12 Parties in a criminal case (the first time in court)



Criminal Code
A statutory code which compiles all, or a significant amount of, a jurisdiction's common law rules on the criminal law into one comprehensive statutory instrument (or one Act of Parliament)

Whether a matter is a summary or an indictable offence is largely determined today by statute—for example, a **Criminal Code** (in the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Western Australia) or a Crimes Act (New South Wales, South Australia and Victoria)—and the court that will hear the offence is decided under its enabling Act (the Act that created the court).

The **onus (burden of proof) is on the Crown,** through the actions of a prosecutor, to establish a case against the accused **beyond reasonable doubt (the standard of proof)**, a much higher burden of proof than is the case in a civil action. This generally requires the prosecutor to establish two things:

1. that the accused had the intention, or mens rea, to commit the crime—such as the intention to shoplift or the intention to kill; and
2. that the accused carried out the act or conduct (the actus reus)—such as the shoplifting or the killing. If the accused is found guilty, the court will then apply what it considers to be

the **appropriate penalty** for the offence based on guidelines set down in the relevant Criminal Code or statute—for example, a fine, imprisonment or a bond.

While it might seem that criminal law has no part to play in business law, the reality is quite different. Business activities are increasingly attracting criminal penalties. Fines for companies, and fines and possible imprisonment for directors and executives, are becoming common in all Australian jurisdictions; for example, at Commonwealth, state and territory level for breaches of environmental legislation. Breaches of the restrictive trade practices sections in the *Competition and Consumer Act 2010* (Cth) carry substantial fines for companies and persons. Under the *Corporations Act 2001* (Cth), insider trading, along with other market misconduct provisions such as market rigging, market manipulation, false or misleading statements and dishonest conduct (or market manipulation), can also result in both civil and criminal liability. Insider trading occurs when a person who is in possession of material information that is generally not available to the public, such as information about a takeover or profit results, trades on the basis of the inside information. It is seen by the courts as a form of fraud. For example, in the case of *R v Xiao* [2016] NSWSC 240, the former managing director of Hanlong Mining used market-sensitive information to engage in more than 100 illegal trades; he was charged with 65 counts of insider trading and jailed for eight years and three months. In *ASIC v Hochtief Aktiengesellschaft* [2016] FCA 1489, an Australian court for the first time determined a civil penalty for a corporation that had engaged in insider trading by 'procuring' its Australian subsidiary to acquire shares in Leighton Holdings, where it was already a substantial shareholder. The corporation admitted insider trading and the court imposed a civil penalty of $400 000.

There are also a number of statutory offences, called crimes of **strict liability**, where intention is not necessary for an offence to occur, such as some breaches of the *Corporations Act*. For example, s 952E provides that it is an offence for a financial services licensee to give a defective disclosure document or statement to another person, whether or not they know it is defective; s 952G makes it an offence for a financial services licensee to provide disclosure material to an authorised representative if the disclosure document or statement is defective, irrespective of whether or not they know it is defective; and s 1041E provides that it is an offence to make false or misleading statements that induce persons to apply for or acquire financial products, or have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market, irrespective of whether or not the person making the statement knows it is false.

It is worth noting that the principles that might apply in criminal prosecutions for breaches of legislation such as the *Corporations Act* are not always applicable in civil penalty cases. In criminal prosecutions, the court decides the penalty. However, in civil penalty proceedings, the High Court held in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; CFMEU v Director, Fair Work Building Industry Inspectorate (CFMEU)* [2015] HCA 46 that the regulators can take an active role in determining what is an appropriate penalty, as it is in the public interest to encourage corporations to acknowledge contraventions while at the same time avoiding lengthy and complex litigation. The court still has to decide whether the submitted penalty is appropriate. In *ASIC v Hochtief Aktiengesellschaft*, the maximum penalty that Hochtief faced was $1 million. The Australian Securities and Investment Commission (ASIC) thought an appropriate penalty was $600 000, while Hochtief suggested $100 000. The court decided on a penalty of $400 000.

The legal profession

The term 'lawyer' is often used by the layperson to refer to both barristers and solicitors and is an expression commonly used in the United States, but this can be misleading. There is either a legal

separation or an unofficial separation of the legal profession in all of the states and territories. In the Commonwealth, the Australian Capital Territory, the Northern Territory, South Australia, Tasmania, Victoria and Western Australia, qualified persons are admitted to practise as both barristers and solicitors. In practice, an independent Bar exists in all states and territories, as some people choose to practise only as barristers. In New South Wales and Queensland, as a matter of law, a qualified person can practise as either a barrister or a solicitor, but not as both. The two branches are mutually exclusive, although it is still possible to change from one branch to the other.

While it is common for a solicitor to undertake court appearances for clients, especially in the Magistrates' or Local Courts, it is unusual for solicitors to undertake court appearances on behalf of their clients in higher courts. Solicitors and clients still prefer to employ a barrister in higher courts because of the barrister's experience in courtroom work.

Unlike solicitors, those admitted to the Bar will commence practice as 'juniors' (and be part of the 'junior' Bar). As they gain experience and attain recognition among their peers and the judiciary, they may apply for appointment as senior counsel (or 'silk', because they are entitled to wear silk robes instead of wool robes to court). Senior counsel are appointed by their respective Bar Association after consultation with members of the profession (the Bar, the Law Society or Institute, and other senior members of the legal profession) and the judiciary, and make up approximately 14 per cent of the practising Bar of each Australian jurisdiction.

Duties of a solicitor

Although solicitors do represent their clients in court, the majority of their work is non-litigious in nature; that is, it does not involve appearances in court. Examples of solicitors' work include:

- conveyancing and drafting (drawing up documents);
- the preparation of wills and the administration of estates;
- family law problems;
- taxation problems;
- litigation; and
- corporate and commercial matters such as preparation of various legal documents relating to the drawing up of contracts, the formation or dissolution of businesses, and the preparation of documents and all other relevant matters before trial in which a barrister is employed on behalf of the client (called a 'brief').

Duties of a barrister

When a barrister is admitted to the Bar they are sworn in as 'officers of the court', and so they are expected to **observe duties to the law and to the court**. This means that a barrister not only has a duty to their client to serve their needs by all legitimate means, but in doing so they must not mislead the court or an opponent, and they must acquaint the court with the law whether it favours their client's case or not.

Barristers work in private practice as independent sole practitioners, and collectively are known as 'the Bar'. While it is possible in some states for the public to go straight to a barrister, the tendency for a person seeking legal advice is to go to a solicitor first who will carry out the preliminary background work on a case to prepare a brief for a barrister. As a result, barristers are still almost completely dependent on instructing solicitors for work.

Barristers have two main functions:

- They give '**opinions**' to clients on the facts presented to them, setting out the relevant law and indicating the likely outcome of any action. This gives the client the opportunity to decide what course of action to take on the matter in dispute.

- They specialise in court advocacy, including the preparation of pleadings for court cases. A barrister may be '**briefed**' as 'counsel' for a client in either a civil or a criminal case, and be required to appear in court to represent and plead or argue a case for the client.

BUSINESS TIP

Cost–benefit analysis of suing

The cost of bringing a legal action can be very high. No guarantee can be given that you will win and, in the event that you should lose, you may find that the other side will ask the court that you be ordered to pay their legal costs as well as your own.

The choice of whether to sue or defend an action should be analysed like any other business decision you make. This means doing a cost–benefit analysis of the action. If you are the plaintiff, the analysis will help determine whether it is worth suing. For the defendant, it will help determine whether to settle out of court.

The following are some of the factors that should be taken into account:

- the probability of winning or losing (remember, no one can guarantee a win);
- the amount of money at stake if you win or lose (can you afford it?);
- legal costs (your legal representatives can provide an estimate);
- loss of time (cost your time and, if any, staff time);
- short-term and long-term effects on the relationships of the parties (in an adversarial situation, there is no win–win position, only a win–lose);
- short-term and long-term effects on the reputations of the parties (what will be the cost of lost reputation?);
- the aggravation and stress associated with the action (is your health up to it?);
- the propensity of the legal system for error (ask yourself if you can afford an appeal); and
- other factors peculiar to the parties and the action.

The judiciary

Justices of the Peace

Justices of the Peace hold honorary positions. They have limited or no legal training or experience, although many states have now introduced special law courses for them.

The bulk of their duties today are **witnessing documents** for members of the public and **issuing warrants** to enable the police to arrest offenders or search premises. In the case of a warrant, a Justice of the Peace has to be satisfied that there is 'good cause' before authorising its issue.

In Queensland, South Australia and Western Australia, Justices of the Peace are also entitled to preside in a Magistrates' Court.

Magistrates

Magistrates in the states and territories preside over inferior courts and are legally qualified. They are full-time salaried public servants (hence the expression 'stipendiary' magistrate) and are selected from among the clerks of court, barristers, solicitors, and government and academic lawyers. Federal magistrates are now called Judges of the Federal Circuit Court of Australia.

Judges

Judges are generally appointed from members of the Bar. However, in recent years solicitors have been appointed to the benches of both intermediate and superior courts.

The **duties** of a judge are:

- to ensure that the rules of evidence are followed;
- to ensure that each party is fairly treated according to the law;
- to instruct the jury on matters of law;
- to **decide on points of law** and make a ruling on their relevance in a matter before the court;
- to sum up the arguments impartially, and explain to the jury (when used) the law regarding the particular action;
- where a case is heard before a judge alone, to determine questions of fact and law before arriving at a decision;
- to ensure that the burden of proof has been discharged;
- in a criminal case, to pass sentence if the jury returns a guilty verdict;
- in a civil case, to assess damages;
- to discharge the jury, if a jury has been used; and
- to hear appeals.

The jury

A jury is a body of men and women summoned and sworn under oath to **determine questions of fact** fairly and objectively in a judicial proceeding. In a jury trial, juries are the exclusive judges of **fact**. Once the jury has made its decision, the judge then has to decide on the penalty (criminal cases) or remedy (civil cases).

The use of juries in **civil cases** has largely been abolished in most jurisdictions, with **the judge deciding questions both of fact and of law**. Where a civil case is heard with a jury, it will usually consist of four members. Only a majority verdict is required. If the 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 way of contrast, juries are still used in criminal cases in the intermediate and superior courts, although an accused can opt for a trial by judge alone. For example, if the issues in a case are very technical and there are a lot of expert witnesses that would make it hard for a jury to understand what is being argued, then the accused's legal team or the prosecution may opt for a judge-only trial. Where a jury is used, the judge decides questions of law, including the penalty if the accused is found guilty, while the jury decides questions of fact and whether the accused is guilty or not guilty of the charge/s laid against them.

WHAT TYPE OF ACTION IS A REPRESENTATIVE OR CLASS ACTION?

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 can be contrasted with conventional forms of litigation where the parties know the identity 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.

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,

to make a claim because:

- the use of court resources is more efficient (because there is one action instead of several on the same subject matter in dispute);
- the determination of common issues is consistent;
- the law is made more accessible, enforceable and effective; and
- class actions are relatively easy to commence.

Class actions are now firmly established in Australia; outside of the United States, it is now the most likely jurisdiction in which a corporation could face a significant class action. It has been estimated that, in the past decade, shareholder and investor class actions in Australia, including the settlement of securities class actions, have exceeded $1 billion.

All Australian jurisdictions, including the Commonwealth, allow representative actions (or class actions, as they are more commonly known) in accordance with the general Rules of Court. Representative proceedings in the state and territory Supreme Courts are commonly known as the 'same interest' procedure (in Victoria, 'group proceedings') and essentially provide that, where numerous persons have the same interest in any proceeding, the proceeding may be started or continued by or against one or more of the group on behalf of all of the group or part of it.

All Australian jurisdictions employ an 'opt-out' model. This means that every potential claimant who falls within the class definition—that is, they can be identified by a list of names or a set criterion, such as that they acquired shares in a company during a certain period—is a member of the class on the filing of the claim, whether they are aware of it or not. They will all be bound by the judgment of the court or any approved settlement unless they opt out of the proceedings before a date fixed by the court. The Court will require that all class members are notified of the action, their right to opt out and the process for doing so.

The 'opt-in' approach requires potential class members to indicate that they want to be part of the group on whose behalf the claim is being brought. If they do not opt in, then they are not members of the class and cannot be bound by the final judgment or settlement. However, they are not prevented from pursuing a claim in separate proceedings.

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;
- the claims must arise out of related circumstances; and
- the claims must give rise to a substantial common issue of law or fact.

If these elements are all satisfied, there is no limit to the subject matter of class actions.

A class action may be discontinued by the court in certain circumstances; for example, if the court considers that it would be more cost effective if each member of the class conducted a separate proceeding, or that a class action does not provide an efficient and effective means of dealing with the claims of all the class members, or that no reasonable cause of action is disclosed.

Where a class action is successful, the defendant will be ordered to pay the costs of each and every member of the class. Where the claim fails, generally the only party who can be required to pay the defendant's costs is the party who is named as the representative of the class; however, in *Cook v Pasminco Ltd (No 2)* [2000] FCA 1819, the plaintiff's solicitors were ordered to pay the defendant's costs because the court found they had failed to give any proper consideration of whether the claim had any chance of success.

In recent times, there has been a significant growth in class actions brought in Australia, with 40 actions launched in 2014–15, 35 actions in 2015–16 and 37 actions in 2017–18, with 85 representative proceedings in the court nationally (at 23 March 2018). The range of defendants is very diverse, largely as a result of the continued growth of third-party funding (with group members self-financing and law firms looking to establish their own litigation funding operations) and new types of class actions opening up, particularly investor-based claims involving trustees and professional services providers. Examples of actions include:

- **product liability claims** involving, for example, breast implants, knee implants, heart pacemakers, medical and pharmaceutical devices (in the financial year 2015–16, the biggest single settlement was the $250 million claim relating to DePuy International hip replacement products), tobacco, aircraft fuel, faulty home alarms, and foodstuffs;
- **actions against major public utilities and governments**—for example, the 2011 Wivenhoe Dam class action in relation to the Queensland floods, and the 2013 Blue Mountains bushfires;
- **financial class action litigation**—for example, in respect of failed investment schemes and trustees of failed funds (such as Storm Financial) and, in 2018, against Australia's banks, (with up to five million Australians preparing to sue them over how the banks have invested workers' superannuation, in what will probably be the largest class action in Australian history); and
- **shareholder litigation** in respect of corporate non-disclosure and misleading and deceptive conduct by companies to their shareholders in takeovers, prospectuses and releases to the Australian Securities Exchange (ASX). A potential legal action by shareholders against the Commonwealth Bank in 2017 over a share-price fall is connected to alleged breaches of anti-money laundering and counter-terrorism financing laws in 2015, affecting up to 800 000 shareholders. It is potentially worth hundreds of millions of dollars, exceeding the $494 million (including costs) recovered by way of settlement in proceedings against three defendants after the 'Black Saturday' bushfires in Victoria in 2009 (*Matthews v Austnet Electricity Services Pty Ltd* [2014] VSC 663).

In Australia, it is possible to find commercial funders of litigation, and two are listed on the ASX (IMF Bentham Ltd and Hillcrest Litigation Services Ltd). While each claim has its own funding arrangements, a litigation funder:

- agrees to pay the legal costs of the funded party;
- agrees to provide any security that may be required by reason of an order for security for costs;
- takes a percentage of the proceeds of litigation (usually somewhere between 25 and 40 per cent); and
- agrees to pay any adverse costs ordered against the funded party during the period the funding agreement is in place.

Non-insolvency claims are thought to account for over two-thirds of funded matters.

REVIEW QUESTIONS

2.18 What is a class action in law? How does it differ from a traditional lawsuit?

2.19 Explain how a class action is commenced and who can take part in that action.

2.20 Are there any essential elements that need to be present for a class action to be commenced?

2.21 What are some of the advantages and disadvantages of a class action proceedings?