1-1-2008

# Judicial decision-making in Australia – critique and redemption.

John Wade
*Bond University*, john_wade@bond.edu.au

# "Judicial" Decision-Making in Australia – Critique and Redemption

This paper has four parts, namely a description of:

**A. The Context**

- Australia (the place)
- The vast landscape of "judicial" or quasi-judicial decision makers

**B. The Commentary**

- Repetitive critiques of judicial decision-making
- Redemption of judicial decision making

**Plus** an Appendix on Court Structures with details and diagrams.

By Professor John Wade, Faculty of Law, Bond University, Gold Coast Queensland Australia john_wade@bond.edu.au. Thanks to Marian Pond for research, and writing the Appendix, and to Olivia Perazone for translation ideas.

# Les Decisions Judiciaires en Australie - Critique et Réhabilitation

Ce document comprend quatre parties, nommées ci-dessous:

A. La Situation de

- L'Australie (très brièvement)
- Le vaste domaine judiciaire ou les décisions quasi-judiciaires

B. Les Commentaires

- Critiques répétitives des décisions-judiciaires
- Rehabilitation des décisions-judiciaires

Rédigé par Monsieur le Professeur John Wade, Faculté de Droit, Bond University, Gold Coast Queensland.

10/11/2010

# A. The Context

## (1) Australia - The Place (Le Pays)

Australia is a large island. It is mainly desert, with a population of only 21 million people situated particularly along a narrow band of fertile coastline. In land size, Australia is 14 times larger than France, and approximately the same as mainland USA.

Since World War II, most Australians have experienced boom times. Waves of immigrants and refugees particularly from Italy, Greece, Vietnam and China have enriched the country with their hard work, diverse foods, emphasis on education and the arts, and large families. Industries such as sheep, cattle, wheat, wine, coal, iron ore and other minerals have contributed to Australia being known as "the lucky country". Australia has experienced no internal civil wars or invasions, apart from one significant settlement by white colonialists and convicts in 1778.

It was only by chance that Australia did not become a French colony. The French explorer Count de la Perouse arrived on the East Coast only days after Captain Arthur Philip settled the country for Great Britain in 1788 as a convict colony.

Australians are renowned by myth or reality for disrespect and distrust towards authority figures, informality, sunburn, skin cancer, thousands of kilometres of glorious beaches, addiction to sport, love of travel, unique wildlife and flora, mistreatment of the native aboriginal people, bravery during 20$^{th}$ century foreign wars, bad cooking, driving on the left hand side of the road, and many inspiring films and books.

In 1900, without revolution or bloodshed, Australia became a self-governing democratic nation in a deal negotiated with its colonial master/mistress, Great Britain. Australia became a federation consisting of six states and two territories. Its Federal capital is Canberra, an artificial, isolated and planned city created as a compromise between the jealous commercial centres of Sydney and Melbourne.

Australians appear to visitors to have an over-abundance of government officials with three levels of government – Federal (in Canberra), State (in each of the six State/Territory capitals), and local Council (hundreds of local councils spread across the vast land).

Australia currently has 30 law university schools; 60,000 lawyers registered for legal practice; and at least double that number of unregistered lawyers working in government and industry.

## (2) The Landscape of "Judges" (Le Domaine des "Juges")

In Australia, as in most countries, the landscape of judges is vast. Judicial activity can be categorised in many ways. For example, first there is a tiny minority of judges with "lifelong" appointments (ie to age of 72 years); appointed by the government in power; work in offices which look like traditional "courtrooms"; and whose decision-making processes are usually publicised by observers and publication of decisions and reasoning; and who importantly, are constitutionally protected from political interference.[1]

Secondly, there is a vast array of decision-makers, or conflict managers, or tribunals, who only have short-term appointments; who work by correspondence or in business-like offices; who are appointed by industry, sporting associations or governments', whose decision-making is usually accessible but is infrequently publicised; and who are subject to "interference", phone-calls, pressure, hiring and firing by lobby groups and paymasters.

For every lifelong judge, there are several thousand temporary judges and "conflict managers". For every one decision by a lifelong judge in Australia, there are thousands of decisions by temporary conflict managers, conciliators, registrars, mini-courts and tribunals.[2]

---

[1] See Appendix A for a more detailed framework and overview of the Australian Court System.

[2] For example, in the State of Queensland, a recent review of decision-making bodies included the following tribunals - see https://www.justice.qld.gov.au/ourlaws/papers/Tribunal-discussionpaper.pdf. These are bodies established by legislation whose members usually have an appointment lasting 3 to 5 years.

Anti-Discrimination Tribunal; Children Services Tribunal; Guardianship and Administration Tribunal; Mental Health Review Tribunal; Commercial and Consumer Tribunal; Retail Shop Leases Tribunal; Office of the Commissioner for Body Corporate and Community Management Queensland; Panel of Referees (tribunal); Appeal Tribunal (under; ATSI (Land Holding Act); Appeal Boards Appeals from disciplinary etc decisions relating to staff of local government; Misconduct Tribunal; Commissioners for Police Service Reviews; Fisheries Tribunal; Veterinary Tribunal; Animal Valuers Tribunal; Small Claims Tribunal; Information Commissioner; Legal Practice Committee/Legal Practice Tribunal (practitioner panel/lay panel); Racing Appeals Tribunal; Computer Games and Images Appeals Tribunal; Film Appeals Tribunal; Publications Appeals Tribunal; Commissioner of State Revenue (Appeals Functions); Gaming

Thirdly, below tribunals are thousands of panels, committees and bosses in the workplace, universities, sporting clubs and churches. This army of informal judges settle disputes and rule upon disputes every day.[3]

Strangely, the historic attention of law schools and legal scholarship have been upon the formal and recorded decisions of the tiny minority of lifelong judges. The behaviour and decisions of the empires of "temporary" judges have been mainly ignored by "legal scholarship", or relegated to the subject of "administrative law" or to business schools.

**"Lifetime" Judges – Comparative Chart of Stereotypical Behaviours**

**(Les Juges "à long terme" - Tableau Comparatif des Comportements Stéréotype)**

| **Australian Judges**<br>**(Juges Australiens)** | **French and European Judges**<br>**(Juges Français et Européens)** |
|---|---|
| ▪ Ask few questions<br>(Peu de questions posées) | ▪ Ask a lot of questions<br>(Beaucoup de questions posées) |
| ▪ Write very long judgments (50-100 pages)<br>(Très longue rédaction d'un judgement (50 – 100 pages)) | ▪ Write short judgments<br>(Courte rédaction d'un judgement) |
| ▪ Give written judgment and reasons together<br>(Jugement écrit et justification rendus simultanément) | ▪ Give oral judgment first and written reasons later<br>(Jugement verbal rendu en premier et justification écrite plus tard) |
| ▪ Rely on research by lawyers<br>(Application de la recherche des | ▪ Rely more on their own research<br>(Application de leur propre |

Commission; Health Practitioners Tribunal; Nursing Tribunal; Medical Assessment Tribunals (general and specialist); Specialist tribunals under the Workers' Compensation and Rehabilitation Regulation 2003 include:
Cardiac Assessment Tribunal; Dermatology Assessment Tribunal; Disfigurement Assessment Tribunal; Ear, Nose and Throat Assessment Tribunal; General Medical Assessment Tribunal; Neurology/Neurosurgical Assessment Tribunal; Ophthalmology Assessment Tribunal; Orthopaedic Assessment Tribunal; Independent Assessor; Land Court; Land Appeal Court; Land Tribunal; Planning and Environment Court; Building and Development Tribunals; Industrial Magistrates Court; Industrial Court.

[3] M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) *J. Legal Pluralism* 1.

| | |
|---|---|
| avocats) | recherche) |
| ▪ Appointed from practising lawyers<br>(Nomination après expérience d'avocats) | ▪ Trained as career judges<br>(Formation de juges de carrière) |

# B. The Commentary on the Judicial System

## Critiques of "Judicial" Conflict Management: Why such a Chorus in Australia? (Critque de la Gestion Conflictuelle Judiciaire: Pourquoi un si grand problème en Australie?)

In Australia as elsewhere, the critiques of judicial processes are many and constant. Why is the chorus of critics (like the critics of legal education) so loud? There are many possible reasons –

- The critics of *all* human decision-making processes are increasing in visibility and number perhaps as the insights of social psychology filter across to other disciplines and common knowledge.
- These are usually not attacks on the personalities and competence of the judges themselves – rather the systemic and generic methods of "managing conflict".
- In a democracy like Australia, there is a strong tradition of critical commentary of those in positions of power by the press, pub-talk and regular "scholarly" journals.
- Australia has enduring habits and traditions of establishing independent investigatory bodies to write a flow of reform recommendations for the "legal system". Notable institutions include the Australian and State Law Reform Commissions; Family Law Council; and ombudspersons.
- State and Federal politicians are under constant pressure to reduce expenditure on court systems by reforming their methods of operation. In a society which has not been traumatised by civil war, violence or corruption, there are few votes to be gained by spending on courts and tribunals.

- Of course, the volume of criticism is relative to the basis of comparison. Many visiting lawyers who come to Australia from cultures where corruption and inefficiency are endemic, use the Australian system as an aspirational model.

The above reflects a strange double standard. Australians expect government "officials" to be inefficient, yet are deeply disappointed when they are!

## What are the Critiques of Conflict Management by Judges and Tribunals? (Quelles sont les Critiques de la gestion des conflits par les juges et les tribunaux)

In Australia, the critiques of the process of conflict management through the courts or tribunals are constant and repetitive. To repeat, these critiques may sometimes reflect unrealistic expectations of human decision-making and of human organisations. They also echo psychologists, historians and philosophers' more general laments about the management of conflict in human societies!

What are those critiques? No doubt there are similar versions in France. Every lawyer expresses these critiques with varying degrees of intensity.

- The waiting times to reach a full judicial decision are too *slow*.
- The *high cost* of preparing evidence and arguments makes the courts inaccessible to any but the wealthy.
- There is only very limited *legal aid* provided to the poor and middle class.
- The legal requirements of *blame*, assertion and denial create a fog of words, and defensiveness.

> "Because litigators rarely win or lose cases, they derive job satisfaction by recasting minor discovery disputes as titanic struggles. Younger lawyers, convinced that their future careers may hinge on how tough they seem while conducting discovery, may conclude that it is more important to look and sound ferocious than to act co-operatively, even if all that huffing and puffing does not help (and sometimes harms) their cases. While unpleasant at first, nastiness, like chewing tobacco, becomes a habit… Without guidance as to appropriate conduct from their elders, either at the firm or at the bench, it is easy for young lawyers not only to stay mired in contumacious, morally immature conduct, but to actually enjoy it."[4]

[4] D Yablon, "Stupid Lawyer Tricks: An Essay on Discovery Abuse" (1996) 96 *Columbia Law Rev* 1618.

- Many lawyers who act as gladiators, are incapable of switching hats to become effective *diplomats*.
- Clients progressively *lose control* as a dispute moves towards a full hearing.
- Judges do not "discover the truth", but rather *reconstruct* a version of history ("It's a lucky client who can identify himself in his own case").
- Multiple mandatory settlement conferences and judicial settlement practices put *considerable pressure* on over 90% of disputants to agree.
- Clients who hope to make speeches, or be heard, or have time to ask questions, find themselves "cut off" by *time constraints* and tactical questioning.
- Experienced lawyers play *tactical games* over delay, costs, adjournments, missing witnesses, arguing every point, making wild claims, and using embarrassing publicity.
- "Success" at any hearing depends substantially on the skill by *hired* lawyers and other experts.
- Judges have a *limited range of remedies* available, usually in the form of ordering monetary payments or transfer of property.

These, and many other criticisms come from repeat customers (eg governments, banks and insurance companies); from experienced litigation lawyers; from government funders of courts, from law reform commissions, and also from insider judges themselves.

For example, Justice Fitzgerald in one famous case commented:

> …it is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organized, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive

> activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow.[5]

Lawyers try to educate clients eager for "justice" about the many risks and side effects of litigation. For example, some require clients to complete and sign "Transaction Cost" analyses such as the following:

[5] Supreme Court of New South Wales Court of Appeal, Handley, Sheller and Fitzgerald JA, *Studer v Boettcher* [2000] NSWCA 263. See also judicial critique by G Davies, "Fairness in a Predominantly Adversarial System" in H Stacy and M Lavarch (eds), *Beyond the Adversarial System* (Sydney: Federation, 1999).

**PROGRESSIVE TRANSACTION COST ANALYSIS**
**(ANALYSE PROGRESSIVE DE FRAIS DE TRANSACTIONS)**

NAME _____

| Normal transaction costs of filing a formal court claim and proceeding to the door of the court (or occasionally even to the Umpire) | Applicable to me ☑ *or* ☒ | Estimated $ value Best to worst | Applicable to other disputants ☑ *or* ☒ | Estimated $ value Best to worst |
|---|---|---|---|---|
| 1. …….Years of personal stress and uncertainty | ❒ | | | |
| 2. …….Years of stress of family members | ❒ | | | |
| 3. …….Years of stress on others and my work associates | ❒ | | | |
| 4. …….Weeks of absenteeism from work | ❒ | | | |
| 5. …….Weeks of lost employee time preparing for court | ❒ | | | |
| 6. …….Years of lost concentration and focus at work | ❒ | | | |
| 7. Life/business on hold for …….years | ❒ | | | |
| 8. Inability to “get on with life” for …….years | ❒ | | | |
| 9. Embarrassment and loss of good will when relatives/friends/ business associates are subpoenaed to court | ❒ | | | |
| 10.Negative publicity in press or business circles | ❒ | | | |
| 11.My lawyer’s fees | ❒ | | | |
| 12.My accountant’s fees | ❒ | | | |
| 13.My expert witness’s fees | ❒ | | | |
| 14.Possible costs order against me | ❒ | | | |
| 15.Interest lost on money received later rather than sooner | ❒ | | | |
| 16.Loss of control over my life to professionals | ❒ | | | |
| 17.Post litigation recriminations against courts, experts and lawyers | ❒ | | | |
| 18.Loss of value by court ordered sale/appointment of receiver etc | ❒ | | | |

| | | | | |
|---|---|---|---|---|
| 19.Lost future goodwill with and "pay backs" by opponents | ❒ | | | |
| 20.Cost and repeat of all previous factors if there is an appeal | ❒ | | | |
| ESTIMATED TOTAL of Transaction Costs (best to worst)* | | $ | No. | $ |

Date _____

Signed _____
(client)

NB: These are only rough estimates. All these figures will fluctuate up or down as the conflict develops and as more factors emerge.

* The best-worst transaction cost estimates should be deducted from best to worst BENEFITS of LATE SETTLEMENT (or umpired decision).

## (2) Redemption of Courts and the "Legal System" as Conflict Managers (Réhabilitation des cours et du système judiciaire comme gestionnaires de conflits)

This ongoing avalanche of criticism of the court systems in Australia, should be balanced by many redeeming factors. However, these redeeming factors receive little publicity. Why? What are the redeeming factors?

- Importantly, judges universally attempt to apply the rule of law, and the law of rules. Judges carefully attempt not to apply their own hobby-horses, passions or currently fashionable views.

- Lifelong judicial appointees in Australia are assisted by habit, peer support, legal rules, secure salaries and personal integrity to avoid pressure from wealthy lobby groups, sensationalist media, friends or from phone calls from politicians. They enjoy and aggressively defend "judicial independence".

- Despite movies and media depicting an epidemic of filing and "full blown" litigation, the rate of "litigation" in Australian is low. "Full blown" litigation (ie reaching judicial judgment) appears to have been declining in all courts in Australia and USA since the mid-1980s.

- In almost all courts in Australia, over 90% of disputes initiated by filing, are abandoned or settled. (Of course, it can be argued that a "healthy" society needs more litigation than this in order to create better legal precedents and publicity of corruption).

- This very high rate of abandonment and settlement of claims made in court is encouraged by many *formal* and *informal* pressures. (Again there is an ongoing debate about whether these strong "settlement pressures" are a strength or weakness of Australia and other societies).

- The *formal or institutionalised* pressures to settle and agree, include:

    (a) Mandatory mediation in almost all courts paid for by disputants.

    (b) Mandatory mediation in all disputes about children, initially paid for by the government.

    (c) Ethical rules imposed on all lawyers to explore carefully any possible avenues of settlement.

    (d) Mandatory "conciliation" conferences before a court official before a trial can occur.

    (e) Mandatory "conferences" between duelling expert witnesses.

    (f) Making costs awards against parties or their lawyers if reasonable written offers were not accepted.

    (g) Expensive requirements for all disputants to make "full documented disclosure" of all material facts to the Courts and to each other. This requirement is enforced by serious monetary and professional sanctions against disputants and their lawyers. These expensive and embarrassing disclosure requirements appear to be far higher in Australia than in France.

    (h) Multiple listing of cases before the same judge on the same day when only one will be actually heard.

- The *informal* pressures to settle claims filed in a court are also many! (Again, some commentators argue that too many Australians are deprived from "access"

to an independent judicial decision because of these multiple pressures to settle). These informal pressures include –

(a) The gradual escalation of legal costs.

(b) The withdrawal of limited state legal aid once a settlement conference has occurred.

(c) Escalating pressure from lawyers upon their own clients to "settle", thereby avoiding client trauma from litigation, keeping control of outcomes, and reducing the chance that the client will criticise his/her own lawyer.[6]

(d) Avoidance of public embarrassment in a court where disclosures will occur in relation to violence, tax evasion, illegal business activities or social security fraud.

(e) Avoiding strained relationships with friends and business associates who are called to be witnesses, and to disclose confidences.

(f) With the passage of time and attrition, clients move through a grieving process and have less energy and emotion left to fuel the litigation.

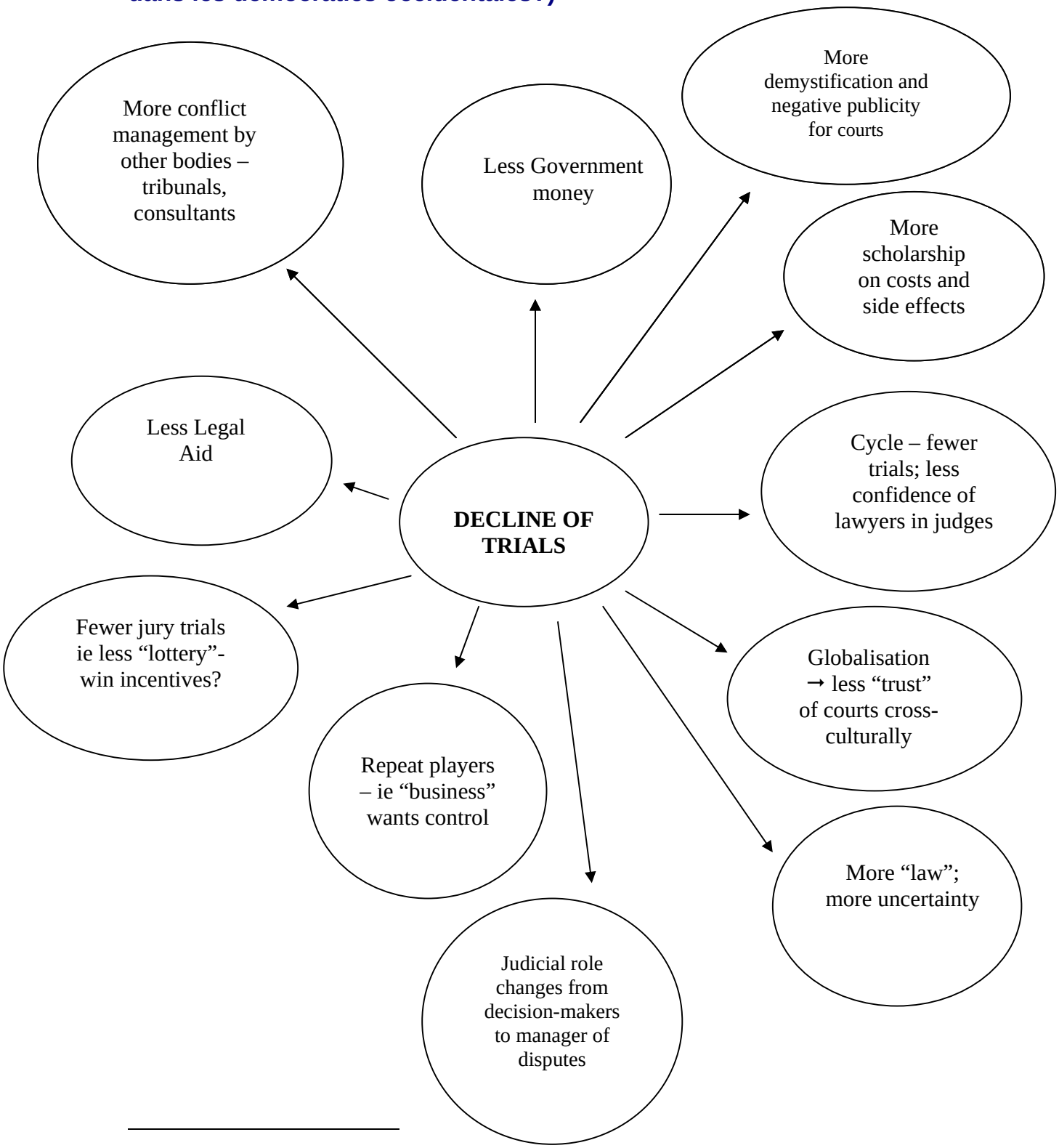
(g) At the door of the court, a client experiences considerable loss of control, anxiety about judicial behaviour, and pressure from lawyers and judges to settle before it is "too late".[7]

---

[6] Note the repeated Australian studies which demonstrate that clients have high satisfaction with their own lawyers, until their dispute reaches a full hearing – then satisfaction plummets eg McDonald ed *Settling Up* (1986).

[7] Eg M Galanter and M Cahill, "Most Cases Settle: Judicial Promotion and Regulation of Settlements" (1994) 46 *Stanford L Rev* 1339; J Resnik, "Managerial Judges" (1982) 96 *Harvard L Rev* 375; ALRC *Managinag Justice* (2000); A Rogers, "The Managerial or Interventionist Judge" (1993) 3 *J of Judicial Admin* 96.

**Why are all kinds of full blown "trials" diminishing steeply in numbers since 1980s in western democracies?[8] (Les procès juridiques à grand échelle, pourquoi sont-ils en train de diminuer aussi dramatiquement dans les démocraties occidentales?)**




[8] M. Galanter, "A World Without Trials" (2006) *J Dist Resol* 7; D Spencer, "The Vanishing Trial Phenomenon" (2005) *NSW Law Soc J* 58.

## Individual Benefits from the Court System (Bénéfices individuels de la Cour Suprême)

There are a number of situations where the response of *filing* in a court, without actually reaching a preliminary or full hearing, is helpful.

Doctors, soldiers and litigation lawyers develop diagnostic lists to help clients and themselves make wiser decisions. Will my "invasive" response probably/possibly do more harm than good?

## Diagnostic Reasons for Beginning or Filing in Court (Raisons légitimes pour poursuivre en Justice ou faire un procès)

The following are some of the situations where *beginning* a court action *may* be helpful to an aggrieved individual:

- In an emergency where someone has engaged in self-help – eg moved money overseas; put a business up for sale; begins to destroy documents.
- As a method to gather key information by subpoena, or by court deadlines to disclose documents.
- To put wandering negotiations on a schedule with an ultimate door-of-the-court deadline.
- To compel a meeting in a court corridor or doorstep.
- To create embarrassing publicity and pressure to settle.
- The applicant gains several advantages such as meeting limitation periods, controlling the language of conflict and venue for filing.
- Where filing incorporates new people into the dispute such as experts and lawyers who bring new insights and codes of ethics to the conflict.

- As a demonstration of seriousness – "I will not go away".[9]

## Diagnostic Reasons for Actually Obtaining a Court Judgment (Raisons légitimes pour vraiment obtenir un jugement de la Cour)

The following factors overlap with, but also differ from, the "appropriate" reasons for going beyond filing, or beginning a court action, to actually obtaining the judgment of a court.

- One or more of the disputants, such as a middle manager or government department, needs to shift responsibility for outcomes to somebody else. ("It's not my fault, it was the foolish judge").

- A person who is engaged in many conflicts (a "repeat player"), such as a builder, or bank, wants to maintain a tough reputation as a negotiator, by litigating say every hundredth case. The other 99 are thereby intimidated to settle.

- "Repeat players" such as banks and construction companies need to litigate certain disputes to the end in order to control judicial precedents which may be used against them in many future disputes.

- One disputant, such as a minority group, wants a judicial hearing to continue for as long as possible so that the embarrassing spot light of publicity falls on a powerful group such as police officers, farmers, the medical profession, or stockbrokers.

- The disputants either have incompetent lawyers, or they do not listen to their lawyers, about the risks and side-effects of "full blown" litigation. They persist with the delusions of "winning" and "justice".

- One of the disputants has "nothing to lose" – (s)he is unemployed, poverty-stricken, angry and persistent – and is using litigation as a "scorched-earth" policy.

---

[9] For a more complete discussion of the possible diagnostic reasons for beginning or completing a court action, see J H Wade, "Don't Waste My Time on Negotiation or Mediation: This Case Needs a Judge: When is Litigation the Right Solution" (2001) 18 *Mediation Q* 259-280.

## Social Benefits of Litigation ("redemption" continued)
## (Avantages Sociaux des Litiges (rehabilitation continuè)

Society tends to take garbage collectors for granted until they go on strike. Then they are appreciated as a key element of "civilisation". Likewise with competent and independent judges and courts.

How much conflict and litigation does a healthy society need?[10] The answer is "some". In Australia, there is rarely public discussion of the following benefits from litigation to society. The overlapping benefits to *individuals* are mentioned in the previous section.

- Society needs a continuing bank of *publicised precedents*.[11] These provide a "market rate" to guide the "fair" settlement of hundreds of other similar disputes. The court system would become unbearably clogged if the settlement rates dropped below approximately 90% of commenced actions.

- A certain number of fully litigated cases is necessary *to keep judges competent* and in practice (just as brain surgeons and tennis players need regular practice).

- In similar fashion, a moderate diet of litigation *keeps litigation lawyers competent* and in practice. Thereby they can give better service to the public, and are more able to make realistic guesses about what might happen in a court case.

- A regular trickle of fully litigated cases has the benefit of *exposing hidden corruption in society*. The assembly of "secret" documents and fearful witnesses in a public courtroom, regularly exposes bribes, laziness, kick-backs, violence and exploitation amongst police, politicians, lawyers, airlines, banks and manufacturers.

- Regular and publicised litigation (ironically) also *enhances the reputation of courts*. Observers and the press are able to witness on a daily basis that judges are honest, intellectually vigorous, and apply the rule of law, and are independent from the pressures of politicians, bribes and lobby groups.

---

[10] For a lengthy discussion of some of the social benefits of litigation, see D Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 *Georgetown L J* 2619-62.
[11] R H Mnookin & L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale L J* 950.

- A decision by an accessible and independent judge, backed up by reasonably efficient enforcement mechanisms, provides a *vital refuge for the weak and oppressed in society*. There are many people who when left to the market place, negotiation, fear, force and fraud will be crushed emotionally and financially. These include victims of domestic violence, administrative error, racial discrimination, medical negligence, police brutality, financial fraud, and wrongful accusation of crime.

- Courts provide a publicised environment where *debates can take place on important social issues*. This role is especially important where such debates do not occur in any helpful or intelligent fashion in the press or in Parliament. In Australia, such grand dialogues have occurred in relation to many topics including native title, freedom of speech, protection of refugees, and equality of women.

- Courts provide not only the venue for grand dialogues, but also for *social change*. Courts are able to implement *gradual* incremental change to the legal rules and to patterns of social behaviour; and sometimes sudden change in areas of life where politicians are inert and fearful.

- Another important social function of courts is to *put an end* to a certain number of conflicts so that citizens can "get on with their lives". Disputants often disagree with the *substantive* outcome of a judicial decision. Nevertheless, like in a soccer game, *some* decision is necessary so that the players can return to business. (Of course, this "benefit" of litigation also highlights a common criticism that in many other cases, a judicial decision does not "resolve", but rather escalates the conflicts).

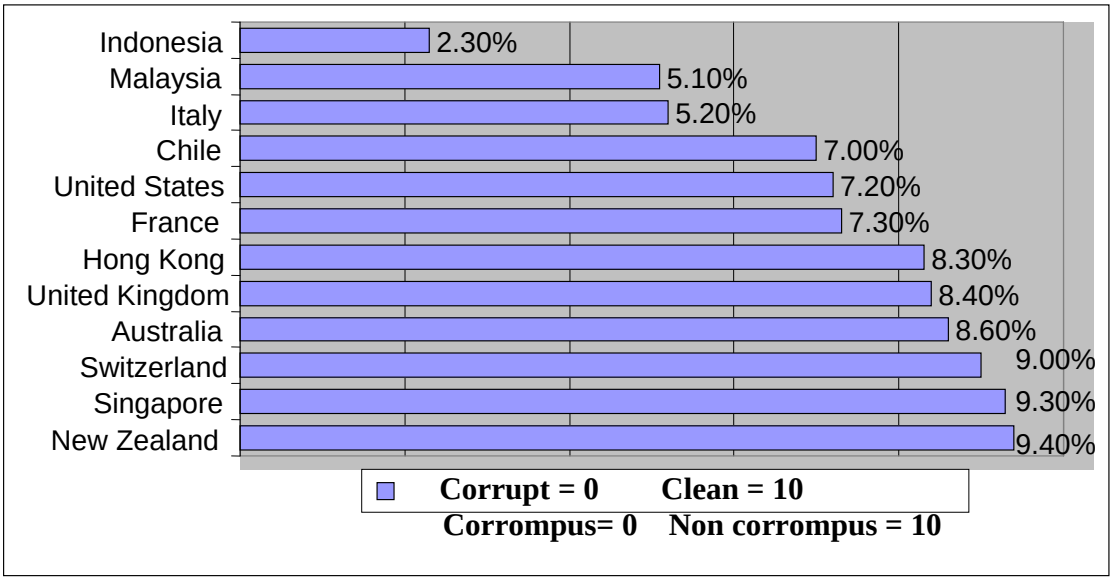
- The whole legal system of competent lawyers, police, rules and courts serves a vital function in a civilised society *to modify violent self help* and vigilante justice. Enraged citizens are often restrained from all sides with the double messages that there are (eventually) judicial remedies for illegal activities; and that their own violent self help will be punished.

- Where local courts consistently model independence and the rule of law, this can have the effect of *attracting global business* to that locality. Most global businesses are attracted by predictability, speed and absence of corruption in local

dispute resolution processes. Where these elements are missing, global business may move offshore, or try to relocate dispute resolution to relatively "independent" arbitrators. There are now various business "corruption rankings" of the judiciary and administrators in each country of the world. For example:

**Countries and Corruption** (La corruption des pays)

***Just how corrupt are certain countries? (Jus qu'à quel point certains pays sont-ils corrompus?)***




See www.transparency.org for yearly updates

## "Case Management" (Gestion de dossiers)

Courts in Australia have been profoundly affected by certain "management" theories and practices. These theories basically require courts to set "goals", collect information, and to measure numerically whether the goals have been met. Thus over the last twenty years, courts have been required to keep statistics on filing and settlement rates, number of adjournments, hours of court times and degree of litigant satisfaction.

This "case management" movement emphasises that judicial time is a *limited public resource* (like water and hospital time) and (a) *should not* be controlled by lawyers or customers; and (b) *should* be carefully allocated by court administrators. This managerial philosophy is reflected in Australia and elsewhere by the gradual emergence of court rules or practices requiring time–limited hearings; more written submissions and summaries; more judicial settlement pressure; more asking of questions by judges; more

informal meetings with judges; more rigid timetables for preparation; more compulsory negotiation and mediation; more dramatic costs orders against lawyers or clients who are slow, or use the court process as a bargaining tool; fewer adjournments; shorter judgments; use of only *one* expert (ie prohibition of "duelling experts"); court hearings extending into the night.

Lawyers often comment that these "managerial trends" have made courts "less friendly" for lawyers.

## Tribunals (Tribunaux)

Another positive trend in Australia and elsewhere[12] for the court system, is the proliferation of alternative "mini-courts", or tribunals.

Market forces have repetitively created mini-courts or arbitrators which are allegedly faster, cheaper, and more expert than "traditional" courts.[13] Traditional courts have usually not welcomed the implied criticism in these alternatives, and have often attempted to supervise the newcomers. Eventually, supervision of the competition becomes too onerous, and the newcomers are gradually set free to experiment with forms of cheap, fast and specialised expertise.

Following normal marketing patterns, the newcomers' "case management" features are copied to *some* extent by the older court system. As the new tribunals become more delayed, expensive, rigid and ritualistic, the old courts become less so. Competition provides both alternatives and reform to the traditional courts.

## Conclusion

The formal court system in Australia reflects a corner of a vast landscape (or the tip of an iceberg) of many quasi-judicial decision-making bodies. These bodies are proliferating and acquiring "legal" characteristics. This pattern of expansion guarantees work for those with "legal" training.

---

[12] M Galanter, "A World Without Trials" (2006) *J Disp Resol* 7.
[13] See B A Cotterell, "Beware Tribunals?" – paper presented at 1999 Conference on "Beyond the Adversarial System" (Brisbane, Australia, 1999).

In Australia, there is a **chorus** of critiques of both formal and informal "judges". This is unlikely to abate. Are we a nation of complainers with unrealistic expectations? Or are eternal critiques and vigilance a necessary price for cherished liberties?

Whatever the chorus of complaints and ongoing cyclical reforms to Australian courts, it is vital that there also be a balancing dialogue of "redemption" of these court systems. Compared to other times and places, the advantages of what we have in Australia are immense.

## (Conclusion)

Le système judiciaire australien ne représente qu'une infime partie de l'ensemble des décisions judiciaires et quasi judiciaires rendues par tous les organismes légaux et para légaux.

Ces organismes, qui ne cessent de prolifèrer, acquièrent au fur et à mesure, des caractéristiques juridiques. Peut on dire, de cette prolifération qu'elle est une garantie d'emploi futur pour les juristes qui arrivent sur le marché du travail?

Il existe, en Australie, une critique constante tant de la part des juges « officiels » que de ceux « non officiels ». Cette tendance n'est pas prête de s'arrêter.
Ne sommes-nous dès lors que des critiqueurs emplis d'attentes irréalistes ?
Ces critiques persistantes et la vigilance qui en découle, ne sont –elles pas plutôt le prix à payer pour la préservation de notre si précieuse Liberté ?

Quels que soient l'ampleur de ce mouvement de critique et la quantité des réformes du système judiciaire en Australie, il est important qu'existe également un dialogue équilibré de réhabilitation de l'image du système judiciaire.
Comparés à ceux existant à certaines époques et dans certains pays aujourd'hui, les avantages procurés par le système australien demeurent, en effet, immenses.

John Wade
Faculty of Law
Bond University
March 2008

## APPENDIX A

# OVERVIEW OF THE AUSTRALIAN COURT SYSTEM

## (Vue d'ensemble du Système Judiciare Australien)

## History of the Australian Court System:

***Before 1900:***

– Before 1900, the individual States of Australia operated as independent self-governing entities.
– Each of the entities were based on the British court system, therefore having their own legislature, executive and judiciary.

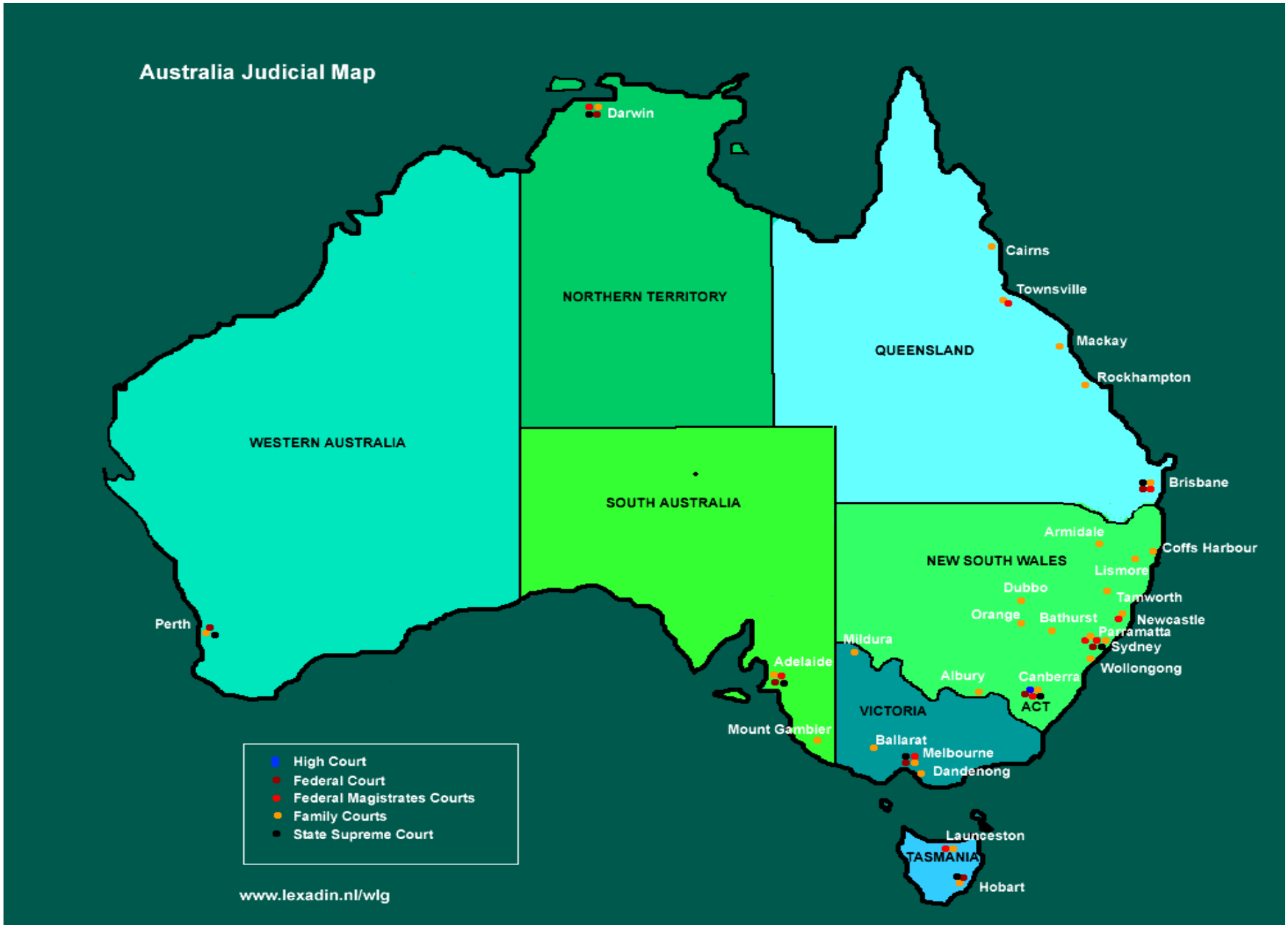
***After 1900:***

– In 1901, the *Commonwealth of Australia Constitution Act* ('*Constitution*') was established.
– The Constitution introduced a **federal system** and with it a long list of **new Commonwealth powers** (in relation to the legislature, executive and judiciary).
– In order to exercise the Commonwealth powers, a **new structure of courts** was established.

***Structure of Australian Courts:***

– Australia has **two hierarchical court systems**, one at the **Federal level** and the other at the **State level**:
  - **FEDERAL court system** is made up of **four** legal levels:
    1. High Court of Australia
    2. Federal Court of Australia
    3. Federal Magistrates Court of Australia
    4. Family Court of Australia.

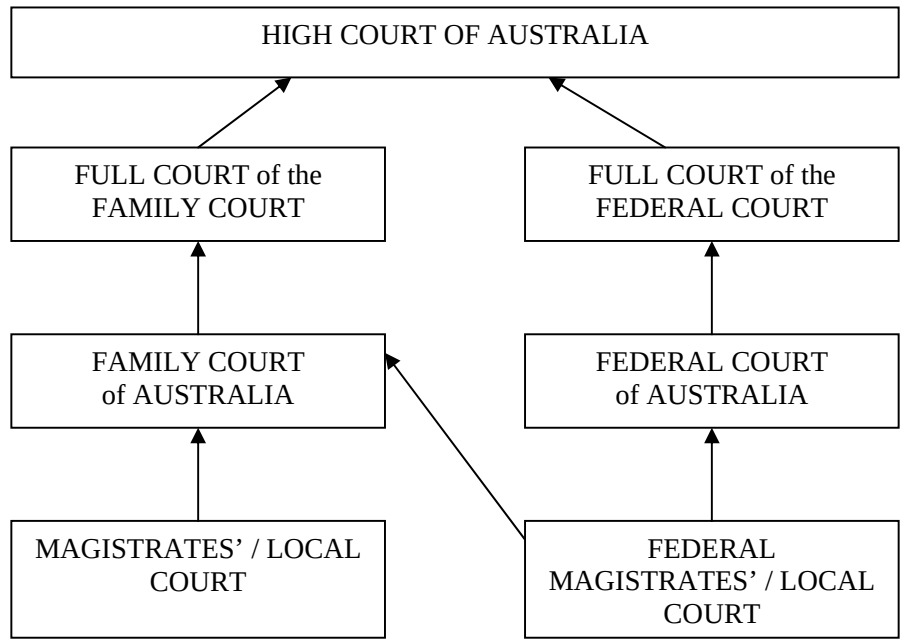
  - **STATE court system** is made up of **three** legal levels:
    1. Supreme Courts (superior courts)
    2. District courts (intermediate courts)
    3. Magistrates Courts / Local Courts (inferior courts).


Australia Judicial Map
Darwin
NORTHERN TERRITORY
WESTERN AUSTRALIA
SOUTH AUSTRALIA
QUEENSLAND
Cairns
Townsville
Mackay
Rockhampton
Brisbane
NEW SOUTH WALES
Armidale
Coffs Harbour
Lismore
Dubbo
Tamworth
Orange
Bathurst
Newcastle
Parramatta
Sydney
Wollongong
Mildura
Albury
Canberra
ACT
VICTORIA
Ballarat
Melbourne
Dandenong
Adelaide
Mount Gambier
Perth
Launceston
TASMANIA
Hobart
High Court
Federal Court
Federal Magistrates Courts
Family Courts
State Supreme Court
www.lexadin.nl/wlg

# FEDERAL COURT SYSTEM
## (LE SYSTEME JUDICIARE FEDERAL)

1. **High Court of Australia**
2. **Federal Court of Australia**
3. **Federal Magistrates Court of Australia**
4. **Family Court of Australia.**

**FEDERAL COURT STRUCTURE:**




## (1) High Court of Australia: (La Haute Cour de L'Australie)

- The High Court of Australia was established in 1901 by section 71 of the Constitution. It is now the highest court in Australia.
- The first sitting of the High Court was in Melbourne on the 6 October 1903.

***How the High Court was established:***

- Before 1968, the High Court's decisions could be **appealed** to the English Privy Council.
- After 1968, **two Acts** were established which **abolished** the right to appeal to the English Privy Council:
  - *Privy Council Limitations of Appeals Act 1968* – abolished the right to appeal to the English Privy Council regarding matters of federal jurisdiction.
  - *Privy Council (Appeals from the High Court) Act 1975* – all other rights of appeal was abolished.
- In 1986, the *Australia Act 1986* was established, making the High Court the **ultimate appellate court** for all Australian law.

***High Court of Australia in Canberra***

***Jurisdiction of the High Court:***

– The Australian Constitution gives **two types of jurisdiction** in the High Court

1. **<u>Original jurisdiction</u>**: section 75 of the *Constitution* grants "original jurisdiction" to hear a trial over such disputes as:
   - Matters arising under any treaty;
   - Matters affecting representatives of other countries;
   - Matters in which the Commonwealth of Australia, or a person suing or being sued on behalf of the Commonwealth of Australia, is a party;
   - Matters between States, or between individuals of different States;
   - Matters which involve an officer of the Commonwealth (including a judge).

   Such trials are very rare.

2. **<u>Appellate jurisdiction:</u>** section 73 of the *Constitution* grants "appellate jurisdiction" on the High Court to hear appeals from decisions of:
   - The High Court in its original jurisdiction;
   - Federal courts;
   - Other courts exercising federal jurisdiction; and
   - State Supreme Courts.

The High Court hears a **large variety** of legal cases, including:

- Contract;
- Company law;
- Criminal law
- Tax law;
- Insurance;
- Property law;
- Family law.

***Structure of the High Court:***

- The High Court has **seven justices** – including a Chief Justice and six other justices.
- However, not all seven justices sit on all cases. For example, cases involving:
    - **Original jurisdiction -** usually a **single justice**.
    - **Appellate jurisdiction -** at least **three**, and sometimes, **five justices** on appeal hearings (the High Court is the final court of appeal and the decision is binding on all other Australian courts);
    - **Constitutional matters and other important cases:** all **seven justices.**

***Seven justices***

***How to Appeal to the High Court:***

- Appeal to the High Court is normally granted only by **'special leave'** and not '**as of right'.**
- When asking for an appeal, the applicant lawyer receives **20 minute speaking time** to convince at least one of the justices that there is a reason for the matter to go before the High Court.
- The High Court receive a large number of appeal applications, however the High Court only accepts a **small number** of applications. Applications which are normally granted, include:
    - Cases involving serious violations of justice;
    - Cases involving large differences of opinion in the lower courts; or
    - Cases which involve the creation of policy and precedent for future disputes in Australia.

## (2) Federal Court of Australia: (La Cour Fédérale de L'Australie)

- The Federal Court of Australia is also called a "superior court".
- It sits in all capital cities in Australia and when necessary in other parts of Australia.

***Federal Court of Australia Act 1976:***

- The Federal Court of Australia was established in accordance with the *Federal Court of Australia Act 1976* (*'Federal Court Act'*)
- The Federal Court started exercising its jurisdiction on 1 February 1977.

– The *Federal Court Act* requires the Federal Court to consist of a **Chief Justice** and **other judges** who are appointed by the Federal Attorney General.
    - **Role of Chief Justice:** the Chief Justice is the **senior judge** of the Court and is responsible for overseeing the business of the Court.

– Under the *Federal Court Act*, the Federal Court has **two divisions:**
    1. **Industrial Division:** the Industrial Division hears disputes over federal industrial matters, including disputes between employers and employees.
    2. **General Division:** the General Division hears disputes over other matters, including disputes over bankruptcy and tax.

***Appellate jurisdiction of the Federal Court:***
– The Federal Court has appellate jurisdiction. It may hear appeals from:
    - Decisions of **single judges** of the Federal Court;
    - Decisions (except family law decisions) of the **Federal Magistrates Court**.
    - Decisions of **State Supreme Courts** (but only where the State court is sitting as a *Federal Court* under s 71); and
    - Decisions of the **Supreme Court of the Territories** in both civil and criminal matters.

***Appealing a Federal Court decision:***
– Federal Court decisions may be appealed to the High Court. However, the High Court filters the appeal applications and only hears a small number of appeals.

## (3): Federal Magistrates Court of Australia: (La Magistrature Fédérale de L'Australie)

– The Federal Magistrates Court of Australia was established by the *Federal Magistrates Act 1999*. It conducted its first sittings on 3 July 2000.
– The Federal Magistrates Court is an **independent federal court** under the Australian Constitution.

***Jurisdiction of the Federal Magistrates Court:***
– The Federal Magistrates Court exercises hears a **large variety of cases**, including:
    - Family law;
    - Administrative law;
    - Bankruptcy law;
    - Privacy;
    - Discrimination;
    - Migration.

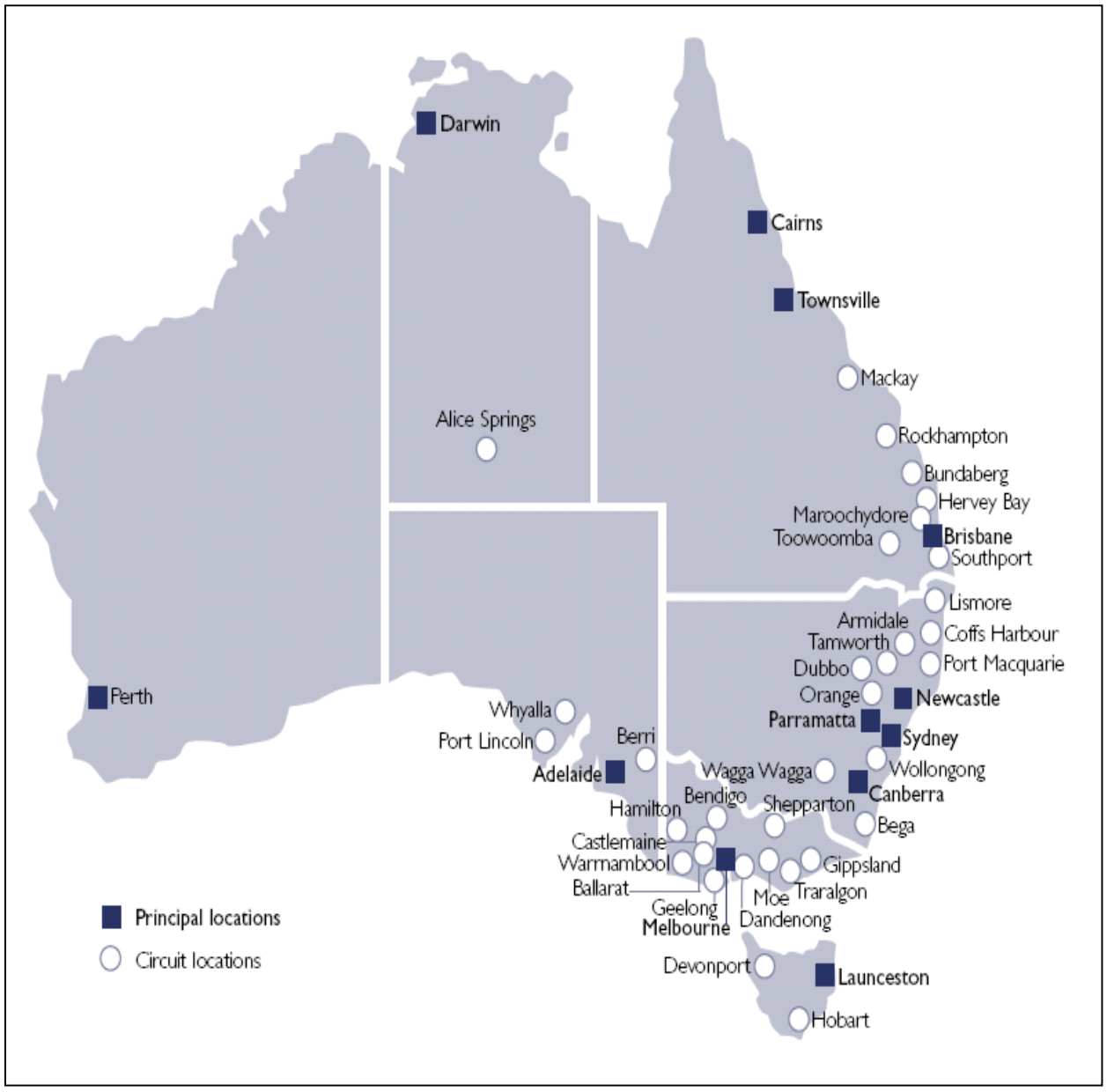
– The Court **shares its jurisdiction** with the Family Court of Australia and the Federal Court of Australia. Therefore, depending on the **seriousness** of the **legal issues** involved or the **evidence** in the matter, cases can be appropriately transferred between the Courts.

– Of course it could be questioned – why does Australia have so many layers of courts?

***Purpose of the Federal Magistrates Court:***

- The purpose of the Federal Magistrates Court is to provide a **simpler and easier alternative to litigation**. The Federal Magistrates Court deals with **less complex disputes**, thereby supposedly reducing the overall workload of other superior courts.
- Since 2000, the Court has heard a **larger number** and **variety** of cases. The Court deals with:
    - Over 50% of all migration matters;
    - Over 75% of all family law matters (approximately 80% of the Court's workload is in the area of family law).

***Locations of the Federal Magistrates Court:***




* There are **12 major locations** that the Federal Magistrates Court hears cases. The other locations indicated are where the Federal Magistrates Court occasionally hears cases.

## (4): Family Court of Australia: (Le Tribunal des Affaires familiales de L'Australie)

- The Family Court of Australia is a **specialist court** dealing with **divorce, family property, child custody** and occasionally **child support** disputes.
- This Court is a Federal Court, funded almost entirely by the Commonwealth Government.

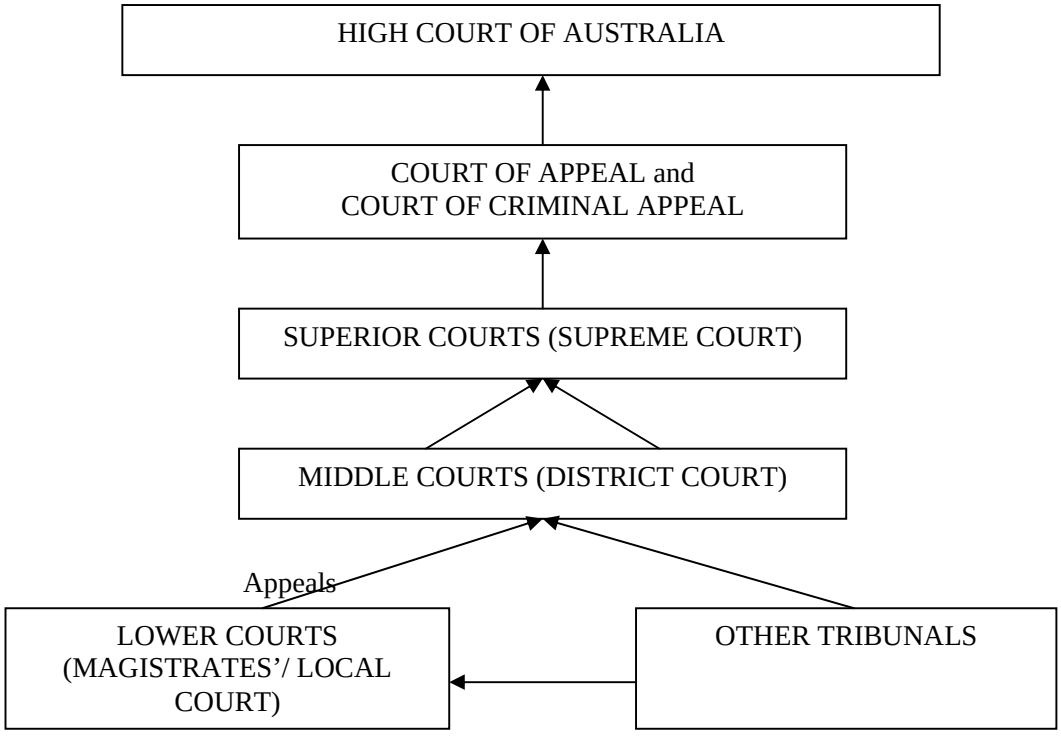
- It seems that Australia has an appetite for courts and dispute resolution agencies? Why?

***Family Court of Australia in Sydney***

# STATE COURT SYSTEM
## (LE SYSTEME DE LA COUR D'ETAT)

1. **Superior Courts (Supreme Courts)**
2. **Middle Courts (District courts)**
3. **Lower Courts (Magistrates/Local Court)**

**STATE COURT STRUCTURE:**




## (1) "Superior Courts" (Supreme Courts): (La Cour Suprème ou Supérieure)

***Jurisdiction of Superior Courts:***

– Superior Courts have almost **unlimited jurisdiction** within their geographic regions.
– Superior Courts are responsible for:
  - State law;
  - State legal institutions; and
  - State legal profession.

– Superior Courts have both **original** and **appellate jurisdiction**, taking appeals from:
  - Lower courts
  - Single judges of the Supreme Court itself.

***Cases heard by Superior Courts:***

– Superior Courts hear **serious crimes** and cases important in terms of **legal issues** or **monetary amounts ($)** involved.

## (2) "Middle Courts" (District Courts): (La Cour Intermédiaire ou Cour de District ou Régional)

– Middle Courts have different names in individual States. For example:
    - In New South Wales, Queensland and Western Australia they are **District Courts**;
    - In Victoria and South Australia they are **County or Local Courts**; and
    - In Tasmania and the Territories (regions with smaller populations) there are no middle courts.

***Jurisdiction of Middle Courts:***

– Middle Courts have both **civil** and **criminal jurisdiction**. However, their jurisdiction is restricted by statute to include **less important matters**. For example:
    - **Civil jurisdiction** - defined by **monetary amounts ($)** in civil disputes. Traditionally the middle courts had only a *limited* equitable jurisdiction; however the modern trend is to give them *full* equitable jurisdiction.
    - **Criminal matters** – defined by the **seriousness** of the **criminal offence.** The middle courts share jurisdiction with the Superior Courts to try most criminal offences (except murder and rape).

***Appeals heard by the Middle Courts:***

– Middle Courts can hear appeals either by:
    - Re-hearing cases of the lower courts; or
    - Hearing disputes regarding statutes, such as the *Local Government Act.*

## (3) "Lower Courts" (Magistrates/Local Courts): (La Cour Locale / Magistrats)

– Lower Courts have different names in individual States. For example:
    - In New South Wales, Western Australia and the Northern Territory they are **Local Courts**;
    - Whilst in Victoria, Queensland, South Australia, Tasmania and the Australian Capital Territory they are **Magistrate's Courts**.

***Jurisdiction of Lower Courts:***

– **Criminal jurisdiction** of lower courts includes:
    - "Summary" offences (small offences heard quickly without a jury); and
    - Committal hearings for more serious offences (cases which are later transferred to the middle or superior courts).

– **Civil jurisdiction** of lower courts includes **minor claims** for:
    - Debt
    - Accidents; and
    - Contract disputes.

  Note: Civil jurisdiction only includes cases involving **small amounts of money ($).**

– **Jurisdiction over certain family matters:** For example, occasional jurisdiction over the custody and access of children; and a very busy caseload in relation to domestic violence.

## Further Reading (Lecture Supplémentaire)

**Australia:**

R Conway, *The Great Australian Stupor* (1971)

D Horne, *The Lucky Country* (1964)

S Graubard, *Australia: The Daedalus Symposium* (1985)

R White, *Inventing Australia – Images and Identity 1688-1980* (1981)

**Australian Courts, Tribunals and Dispute Resolution Bodies:**

R Chisholm, G Nettheim, *Understanding Law* (7th edition, 2007)

R Hughes, G Leane, A Clarke, *Australian Legal Institutions – Principles, Structure and Organisation* (2003)

P Vines, *Law and Justice in Australia – Foundations of the Legal System* (2005)

Australian Law Reform Commission, *Managing Justice* (2000)