

COURT SYSTEM

OF

WESTERN AUSTRALIA

Ian Macdonald

August 2014

Court System of Western Australia

Contents

1.1 Civil and Criminal Courts

1.2 State and Federal Courts

1.3 State Civil Courts

1.3.1 Supreme Court

1.3.2 District Court

1.3.3 Magistrates Court - Jurisdiction of Magistrates Court

1.3.4 Minor Case procedure

1.3.5 Residential Tenancies

1.3.6 State Administrative Tribunal

1.3.7 Department of Housing Appeals Process

1.4 State Criminal Courts

1.4.1 Supreme Court

1.4.2 District Court

1.4.3 Magistrates Court

1.5 Federal Courts

1.5.1 High Court

1.5.2 Federal Court

1.5.3 Family Court

1.5.4 Administrative Appeals Tribunal

1.5.5 Child Support Change of Assessment

1.5.6 Immigration Review Tribunal

1.5.7 Refugee Review Tribunal

1.5.8 Social Security Appeals Tribunal

1.5.9 Veteran's Review Board

THE COURT SYSTEM OF WESTERN AUSTRALIA

Western Australia has civil and criminal courts, and state and federal courts.

1.1 Civil and Criminal Courts

Civil law relates to proceedings between private persons. Examples are an action by a lender against a borrower, seeking to recover monies lent, or a Family Court action between people who were married to each other.

Criminal law relates to prosecution of a person by the State for an offence committed by that person.

If a person is prosecuted for an offence against the law of a State, for example murder, the case is referred to as 'The State of Western Australia v Smith'. 'v' stand for versus, which is Latin for against. If a person is prosecuted for an offence against a law of the Commonwealth, for example an immigration offence, the case is referred to as 'The Queen v Brown'.

Most courts, such as the Supreme Court, District Court and Magistrates Court deal with both civil and criminal matters.

1.2 State and Federal Courts

Australia is a Federation. The six States in Australia gave some of their powers to a central government, the Commonwealth, and kept the remainder for themselves. The distribution of powers between the States and the Commonwealth is set out in the Australian Constitution. The Commonwealth has powers in areas of the law in which a nationwide approach was seen as desirable, such as immigration, foreign affairs, defence, customs, taxation, centrelink, family law, bankruptcy and corporations. The states have retained power in areas of law more related to local conditions, such as sale and leasing of land, building, road traffic law, debt recovery, and most criminal law. The powers of the states are residual – that is, unless a particular power is given to the Commonwealth by the Constitution it remains with the States. If there is an inconsistency between a law of the Commonwealth and the State, if the Commonwealth law is a valid exercise of a power given to it by the Constitution, it prevails over the State law to the degree of the inconsistency: s. 109 Australian Constitution 1901 (Commonwealth).

This is very important in debt recovery, where the State law which may lead to seizure and sale of the debtor's property, or appropriation of the debtor's income gives way to the Commonwealth law of bankruptcy, under which debtors are treated more liberally: Bankruptcy Act 1966.

Each State and Territory has its own system of Courts, to administer its own laws. Generally, these are three- tiered systems.

Each State has a Supreme Court to deal with the most serious matters, a middle level of Courts called District or County Courts, and Magistrates Courts which deal with minor civil and criminal matters.

There is also a system of Courts to deal with matters arising under laws of the Commonwealth, the Family Court and the Federal Court. Some Courts exercise both State and Federal jurisdiction, for example the Family Court of Western Australia.

1.3 State Civil Courts

1.3.1 Supreme Court

The Supreme Court deals with the most serious civil matters, involving more than \$750,000 with the exception of major personal injury matters arising from the use of a motor vehicle, which are dealt with by the District Court. The Supreme Court deals with appeals from lower Courts, and all matters relating to probate and land title irrespective of the amount involved. For example, a dispute about a caveat on land can only be dealt with by the Supreme Court, even if the amount of money involved is very small. Probate of a will or Letters of Administration to a deceased estate can only be granted by the Supreme Court, again even in the case of a very small estate.

Although it is theoretically possible to bring a claim for a small amount, for example \$5,000, in the Supreme Court for other types of matters, this is discouraged by the costs rules in the Supreme Court. The general position is that if an action is brought in the Supreme Court which could have been brought in the Magistrates Court, the plaintiff (if successful) cannot recover any more for legal costs than would have been the case if the action had been brought in the Magistrates Court: Rules of the Supreme Court Order 66 Rule 17.

An action in the Supreme Court by a lender under a mortgage to take possession of the land and sell it is started by a Writ of Summons: rules of the Supreme Court Order 4. The Writ is addressed to the defendant, and requires the defendant to **cause an appearance** to be entered for them in the Supreme Court, and in default of that the plaintiff can proceed and obtain judgment in the absence of the defendant.

This does not mean the defendant needs to appear anywhere in person. It is an invitation to enter a defence, and a warning that if the defendant does not enter a defence, the plaintiff can go ahead and get judgment in the absence of the defendant.

A defendant can file a Memorandum of Appearance, which is equivalent to lodging a response in an action in the Magistrates Court, by filing two copies of a Memorandum of Appearance in the Supreme Court Registry, and serving a copy on the defendants: Rules of the Supreme Court Order 12.

In considering whether or not to defend a Supreme Court action, a defendant should think carefully about the cost implications before doing so. A defendant who feels aggrieved, but who does not have any sound legal basis for defending should be warned of the substantial costs they may incur by doing that. If the defendant admits owing the money to the plaintiff, but wants to pursue a hardship claim, the better course of action is to lodge a dispute with FOS or COSL. This must be done **before** the plaintiff enters judgment in the matter: Financial Ombudsman Service Terms of Reference 5.1 (L); Credit Ombudsman Service Rules 10.1 (n).

1.3.2 District Court

The District Court was set up in 1972 to deal with the middle range of matters. It deals with civil matters up to \$750,000 with the exception of personal injury matters in which there is no limit to its jurisdiction. Personal injury claims arising from motor accidents can only be heard in the District Court, irrespective of the amount claimed. It also deals with appeals from the decisions of lower Courts and Tribunals.

1.3.3 Magistrates Court Jurisdiction of the Magistrates Court

The Magistrates Court is a State-wide Court with both criminal and civil jurisdiction. The criminal jurisdiction of the Magistrates Court allows it to deal with the less serious criminal matters, and the preliminary stages of more serious matters: Magistrates Court Act 2004 (s. 11 (2)). In this paper, this Act is referred to as the 'MCA'.

The civil jurisdiction of the Magistrates Court is set out in the Magistrates Court (Civil Proceedings) Act 2004. In this paper this Act is referred to as the 'MCCPA'.

The jurisdictional limit of the Magistrates Court in civil proceedings is \$75,000. MCCPA s. 4.

The jurisdiction of the Magistrates Court relates largely to claims for money – debt or damages – arising under state law. It can deal with consumer – trader claims, claims to recover personal property that has been unlawfully detained, and proceedings under the Residential Tenancies Act. It cannot deal with any civil matters arising under Commonwealth law – for example bankruptcy, maritime law, or intellectual property. These are dealt with by the Federal Court and the Federal Circuit Court.

There are two streams of civil matters in the Magistrates Court. There is the general procedure stream, dealing with matters up to \$75,000, and the minor cases procedure, deal with matters where the sum claimed is up to \$10,000: MCCPA s. 3.

The Magistrates Court **cannot** deal with:

- a) a claim relating to title to land
- b) a claim relating to a will or settlement
- c) a claim for damages for libel or slander
- d) A claim for damages for personal injury arising from use of a motor vehicle
- e) a claim within the jurisdiction of the Building Commissioner or the State Administrative Tribunal under the Building Services (Complaint Resolution and Administration) Act 2011 – MCCPA s. 6 (5)

1.3.4 Minor Cases Procedure

Claims within the minor cases jurisdictional limit described above can be dealt with under the minor case procedure. This has some special rules. In a minor case:

- * proceedings are to be conducted in private unless the Court orders otherwise: MCCPA s. 29
- * proceedings are to be as informal as the Court thinks reasonable. For example, the Court is not bound by rules of evidence or procedure: MCCPA s. 29
- * parties are not entitled to be represented by a lawyer unless the Court permits MCCPA s. 30
- * legal costs are not awarded to a successful party unless there are exceptional circumstances, or the unsuccessful party's claim or defence was wholly without merit. A successful party may recover the Court filing fees, costs of a process server, and costs of enforcing a judgment. MCCPA s. 31.

1.3.5 Residential Tenancies

Residential tenancies matters in which the sum in dispute is up to \$10,000 are to be dealt with under the minor cases procedure in the Magistrates Court: Residential Tenancies Act s. 12 and 12A.

1.3.6 State Administrative Tribunal

This was established by the State Administrative Tribunal Act 2004, which is referred to in this paper as the 'SATA'. It has the jurisdiction previously exercised by the Commercial Tribunal, the Retirement Villages Disputes Tribunal, the Strata Titles Referee, and the Equal Opportunity Tribunal. It deals with a wide range of matters, ranging from guardianship, town planning, vocational regulation, to retirement village disputes. It aims to resolve disputes fairly and according to the substantial merits of the case, and acts as speedily and with as little formality and technicality as is practicable. It seeks to minimize the costs to parties, and to make appropriate use of the knowledge and experience of Tribunal members: SATA s. 9. Parties can be legally represented: SATA s. 39. The usual rule is that parties pay their own costs in a proceeding, though the Tribunal can order the payment of legal costs, and also compensation for any losses resulting from the circumstances which led to the claim: SATA s. 87. The Tribunal has a very helpful website, which can be found by googling State Administrative Tribunal.

1.3.7 Department of Housing Appeals Process

There is an appeals process concerning decisions made by the Department of Housing relating to:

- * applications for rental housing
- * bond assistance
- * requests for priority housing assistance
- * assessment of tenant liability charges,
- * requests to transfer to another rental home
- * continued tenant eligibility for public housing

There is a twelve-month time limit from the date of receipt of a decision

Some decisions cannot be appealed. These are:

- * decisions in regard to which the Department has taken legal action
- * decisions considered by the Minister or the State Ombudsman
- * decisions on the purchase and sale of Department assets

There is a two-tier process. The first is a review by a Departmental officer, a senior person who has not been involved in the matter previously. The second is the Regional Appeals Committee. This meets in a Department office. The person appealing can attend, and be accompanied by a support person, who may be someone who has been helping the applicant with their housing problem. If the applicant cannot attend in person, a telephone conference may be able to be arranged.

A booklet called Department of Housing Appeals Mechanism can be obtained from the Department website, which is www.housing.wa.gov.au. Put **appeals** into the search field.

If this does not produce a satisfactory outcome, an aggrieved person can pursue the matter in a number of fora depending on the nature of their grievance. Some possibilities are:

- * The Minor Disputes Division of the Magistrates Court
- * the State Ombudsman
- * The Equal Opportunity Commission or
- * The Human Rights Commission

1.4 State Criminal Courts

1.4.1 Supreme Court

The Supreme Court deals only with the most serious criminal offences, generally those punishable by life imprisonment, such as murder. The Supreme Court also hears appeals in criminal matters from lower Courts.

1.4.2 District Court

The District Court deals with the mid-range of criminal matters. Most indictable matters, that is, matters in which trial by jury may occur, are heard in the District court. It also hears appeals from the Magistrates Court.

1.4.3 Magistrates Court

The Magistrates Court deals with the less serious criminal matters, which are dealt with summarily – that is, by a Magistrate rather than by a Judge and Jury. It also deals with the first stages of the criminal process covering more serious offences.

1.5 Federal Courts

1.5.1 High Court of Australia

The High Court is the final Court of Appeal in the Australian judicial system: Australian Constitution 1901 (Commonwealth) s. 73. The High Court has original jurisdiction (that is, matters start in the High Court) relating to treaties, consular and diplomatic matters, matters in which a State or Commonwealth is a party: s. 75 and matters involving the interpretation of the Constitution: s.76 and Judiciary Act 1903 (Commonwealth) s. 30 (a). The High Court has original jurisdiction in trials of indictable offences against the law of the Commonwealth: Judiciary Act s. 30. The High Court does not have original jurisdiction in matters arising under State law.

1.5.2 Federal Court of Australia

The Federal Court deals with matters arising under Commonwealth acts of parliament. Examples are bankruptcy, corporations, maritime, native title, intellectual property, taxation, and review of administrative decisions. The Federal Court also hears appeals from the Federal Circuit Court.

The Federal Circuit Court of Australia is intended to deal with shorter and simpler matters arising under Commonwealth Law. It deals with matters relating to bankruptcy, migration, human rights and industrial law. In the other states it deals with some family law matters, but in Western Australia all family law matters are dealt with by the Family Court of Western Australia.

1.5.3 Family Court

The Family Court of Australia was created by a Commonwealth Act of Parliament, the Family Law Act 1975 (Commonwealth), to deal with matters arising under that Act. Accordingly, it deals with divorce, property settlements between separated spouses, and matters relating to children. All States except Western Australia have given their powers relating to children of parents who were not married to each other (ex nuptial children) to the Family Court. This means that in all other States and Territories all children are within the jurisdiction of the Family Court. In Western Australia, ex nuptial children are dealt with by a State Act, The Family Court Act 1997 (WA) which controls the Family Court of Western Australia.

The Family Court of Western Australia was established at the same time as the Family Court of Australia (1976). It is a state court, which exercises both state and federal jurisdiction. The federal jurisdiction relates to people who are, or were, married to each other. The state jurisdiction deal with disputes between people who have never been married to each other: for example, de facto property matters, and matters relating to ex nuptial children. The court has both judges and magistrates, who both exercise state and federal jurisdiction in matters coming before them. The Court is based in Perth, but has circuit sittings in five regional centres – Albany, Broome, Bunbury, Kalgoorlie and Geraldton.

Family Court and Bankruptcy

With effect from 18 September 2005 family law and bankruptcy legislation was amended to allow the Family Court to deal with both family law and bankruptcy proceedings at the same time, when they are both relevant to parties before the Court. The legislation also allows bankruptcy trustees and third party creditors to be involved in the proceedings. Orders can be made that are binding on them, as well as on the husband and wife. The Family Court of Western Australia does not have bankruptcy jurisdiction in relation to de facto property proceedings.

Family Court and Third Parties

With effect from 17 December 2004 the Family Court has the power to make orders and injunctions binding third parties, as well as the husband and wife. These third parties may be creditors, other family members, or trusts and companies. The Family Court of Western Australia has power to make orders binding third parties in de facto property proceedings: Family Court Act 1997 (WA) s. 205 ZLF.

1.5.4 Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) was established by the Commonwealth to deal with reviews of administrative decisions of a number of Commonwealth departments. The pattern with many review systems is that the first external review is by a body specific to the department, such as the Veterans' Review Board or the Migration Review Tribunal, and applicants unhappy with the decisions of these bodies can appeal to the AAT for further review.

The AAT has a President, who is a Judge, and members who are either lawyers or persons with special expertise or experience in relevant fields. The proceedings are like those in a Court, with parties able to be represented by lawyers, evidence is given on oath, and each side is able to cross-examine the other's witnesses.

Fees may be paid to witnesses by the party who calls them. An applicant can apply to the Attorney-General for legal assistance to deal with an AAT matter: Administrative Appeals Tribunal Act 1975 (Commonwealth) s. 69. The Tribunal itself can ask questions of witnesses. The Tribunal is not bound by the rules of evidence. Hearings are usually public. A dissatisfied applicant can appeal an AAT decision to the Federal Court, but only on a question of law. (see - Administrative Appeals Tribunal Act 1975 (Commonwealth)).

It is planned with effect from 1 July 2015 the AAT will be amalgamated with the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal and the Classification Review Board.

1.5.5 Child Support Change of Assessment

The law relating to child support and changes of assessment are set out in two Commonwealth Acts. These are the Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988. In this section these are referred to respectively as the CSA Act and the CSR & C Act.

A liable parent, and a carer entitled to child support, can apply to the Child Support Registrar for departure from the amount of child support which has been set by administrative assessment. This application can only be made concerning assessments in the eighteen months preceding the application, unless the Family Court has granted permission to the person to make application relating to an

earlier period of time. The maximum time the Court can allow retrospective departure is up to seven years prior to the date of the application: CSA Act ss 98B and 112.

If a party is unhappy with the Child Support Registrar's decision, they have twenty-eight days to object to it. The Registrar has sixty days to make a decision on the objection: CSR & C Act ss. 80, 81 and 87.

A party who is unhappy with the Registrar's decision on the objection has twenty-eight days to apply to the Social Security Appeals Tribunal for a review: CSR & C Act s. 90.

The decision of the SSAT is final as a decision on the facts of the matter. A party can appeal to the Family Court on a question of law: CSR & C Act s. 110B.

As mentioned in 1.5.4 above, the SSAT is likely to be amalgamated with the AAT in 2015.

1.5.6 Migration Review Tribunal

The Migration Review Tribunal is set up under the Migration Act 1958 (Commonwealth). It provides a final review of decisions made by the Department of Immigration and Border Protection in regard to general visas. These are visitor, student, partner, family, business and skilled visas. Detailed information relating to how to apply for reviews, and how they are conducted, can most easily be obtained by visiting the Tribunal's website. This can be found by googling Migration Review Tribunal.

As mentioned in 1.5.4 above, this tribunal is likely to be amalgamated with the AAT in 2015.

1.5.7 Refugee Review Tribunal

The Refugee Review Tribunal is also set up under the Migration Act. It provides a final review of decisions made by the Department of Immigration and Border Protection in regard to protection or refugee visas. Again, the easiest way to obtain detailed information is to visit the Tribunal's website by googling Refugee Review Tribunal.

As mentioned in 1.5.4 above, this tribunal is likely to be amalgamated with the AAT in 2015.

1.5.8 Social Security Appeals Tribunal

The Social Security Appeals tribunal (SSAT) is established under the Social Security Act 1991 (Commonwealth). It can review decisions made by Centrelink relating to social security, family assistance, the Health Insurance Act, the Farm Household Support Act, the Student Assistance Act and the Veteran's

Entitlements Act. It also reviews decisions made by the Child Support Agency relating to change of assessment.

SSAT has a website, which sets out detailed information about SSAT, its role, and procedures. This can most readily be accessed by googling Social Security Appeals Tribunal.

As mentioned in 1.5.4 above, this tribunal is likely to be amalgamated with the AAT in 2015.

1.5.9 Veteran's Review Board

This is a tribunal established to review decisions made by the Repatriation Commission, the Military Rehabilitation and Compensation Commission, and service chiefs of the Army, Navy and Air Force. It deals with issue such as claims for acceptance of injury or disease having been related to military or defence service, and claims for pensions by veterans and their dependents.

The Board has a website which can most easily be found by googling Veteran's Review Board.

Legislative changes to modify the alternative disputes resolution processes used by the Board came into operation on 28 July 2014.

Ian Macdonald
August 2014

Writ of Summons In The Supreme Court of Western Australia

Schedule 2 Forms (in Rules of the Supreme Court)

In the Supreme Court of
Western Australia
No.of 2014

AB - Plaintiff
And
CD – Defendant

To – CD of _____ in the State of Western Australia.

Your are commanded that within _____ days after the service of this writ on you, exclusive of the day of such service, you cause an appearance to be entered for you in the Supreme Court in an action at the suit of the abovenamed plaintiff, and take notice that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

Witness Chief Justice of Western Australia.