

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

14th EDITION



THOMSON REUTERS

REDFERN LEGAL CENTRE PUBLISHING

Published in Sydney
by Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

19 Harris Street, Pyrmont NSW 2009
First edition published by Redfern Legal Centre as *The Legal Resources Book (NSW)* in 1978.
First published as *The Law Handbook* in 1983
Second edition 1986
Third edition 1988
Fourth edition 1991
Fifth edition 1995
Sixth edition 1997
Seventh edition 1999
Eighth edition 2002
Ninth edition 2004
Tenth edition 2007
Eleventh edition 2009
Twelfth edition 2012
Thirteenth edition 2014
Fourteenth edition 2016

Note to readers: While every effort has been made to ensure the information in this book is as up to date and as accurate as possible, the law is complex and constantly changing and readers are advised to seek expert advice when faced with specific problems. *The Law Handbook* is intended as a guide to the law and should not be used as a substitute for legal advice.

National Library of Australia
Cataloguing-in-Publication entry

The Law Handbook : Your practical guide to the law in NSW / Redfern Legal Centre.
14th edition.

Includes index

ISBN: 9780455238180

Law – New South Wales – Handbooks, manuals, etc

Legislation – New South Wales

Jurisprudence – New South Wales – Handbooks, manuals, etc

Civil rights – New South Wales – Handbooks, manuals, etc

© 2017 Thomson Reuters (Professional) Australia Limited

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the *Copyright Act 1968*, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.

This edition is up to date as of 1 October 2016.

The Law Handbook is part of a family of legal resource books published in other states:

Vic: *The Law Handbook* by Fitzroy Legal Service, ph: (03) 9419 3744

SA: *The Law Handbook* by the Legal Services Commission of SA, ph: (08) 8111 5555

Qld: *The Law Handbook* by Caxton Legal Centre, ph: (07) 3214 6333

Tas: *The Tasmanian Law Handbook* by Hobart Community Legal Service, ph: (03) 6223 2500

NT: *The Law Handbook* by Northern Territory Legal Aid Commission and Darwin Community Legal Services, ph: (08) 8982 1111

Editor: Ben Brocherie

Product Developer: Karen Knowles

Publisher: Robert Wilson

Indexed by: Puddingburn Publishing Services

Printed by: Ligare Pty Ltd, Riverwood, NSW

This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.

About the Legal System

Catherine Bryant Legal Information Access Centre, State Library of
New South Wales
Andrew Haesler Judge, District Court NSW
Georgia Millar Office of the Legal Services Commissioner
Lynda Muston Assistant Commissioner (Legal), Office of the Legal
Services Commissioner
Simon Rice ANU College of Law, Australian National University, Canberra

Contents

[1.20]	Fundamental concepts	[1.430]	Legal documents
[1.30]	Common law and statute law	[1.440]	Agreements and deeds
[1.70]	Criminal law and civil law	[1.460]	Birth, death and marriage certificates
[1.90]	State and territory law and federal law	[1.490]	Changing a name
[1.110]	Courts	[1.560]	Statutory declarations
[1.120]	State courts	[1.620]	Affidavits
[1.160]	Federal courts	[1.670]	Notices to attend court
[1.210]	Juries	[1.700]	Passports
[1.240]	Tribunals and commissions	[1.790]	Power of attorney
[1.280]	Time limits	[1.880]	Doing legal research
[1.310]	Appeals	[1.890]	Finding the law
[1.350]	Enforcing the law	[1.910]	Material about the law
[1.380]	Representing yourself in court		

[1.10] Australia inherited its legal system from England at the time of colonisation. Since then laws have been interpreted, applied and developed by Australian judges, and new laws have been made by Australian parliaments.

This chapter explains the basics of how our legal system works, including:

- how laws are made
- how courts and tribunals operate
- how laws are enforced.

It goes on to look at some of the documents used in the day-to-day operation of the law, including:

- deeds and agreements
- birth, death and marriage certificates
- documents issued by courts
- statements made under oath
- passports
- powers of attorney.

Fundamental concepts

[1.20] Every law in Australia is:

- either common law or statute law, and
- either criminal law or civil law, and
- either federal law or state/territory law.

Every law also has a particular *jurisdiction*.

The jurisdiction of a law includes:

- the geographical area it covers (for example, NSW or the whole of Australia)
- its subject matter (for example, family law).

Common law and statute law

[1.30] Australian law comes from either:

- the common law (judge-made law or case law), or
- an Act of parliament (statute law).

Aboriginal and Torres Strait Islander customary law also has some limited application (see Aboriginal and Torres Strait Islander law at [1.60]).

[1.40] Common law

The centuries-old tradition of English law is that judges decide each dispute (a “case”) as it comes to court, and give reasons for their decision. These reasons, or *judgments*, are published in books called law reports (and now also on the internet). The accumulation of judges’ decisions over many years is what is called the *common law* – law made by judges in deciding common disputes.

NSW inherited the English common law, and from early in the 19th century judges in NSW have been developing the common law in Australia.

The doctrine of precedent

Judges are bound by a strong tradition to decide cases consistently with earlier decisions based on similar facts. This approach to decision-making is called the *doctrine of precedent*, and the principles and rules generated by the earlier decisions form, collectively, the principles and rules of the common law. If the facts of a case are completely new, without precedent, a judge will develop a new principle as consistently as possible with similar cases. In this way, judges develop common law rules in areas not covered by legislation.

Interpreting the law

Judges also have an important role in interpreting legislation (see How statute and common law affect each other at [1.60]). The decisions they make in interpreting Acts of parliament are precedents that courts can later use.

The doctrine of precedent in Australia

Some of the rules that make up the doctrine of precedent in Australia are:

- in the hierarchy of the court system, a decision of a higher court is binding on lower courts
 - most courts are not bound to follow their own previous decisions, although they are expected to do so
 - the highest court in Australia, the High Court, is not bound to follow its own decisions
 - the decisions of courts outside Australia are not binding on Australian courts. However, Australian courts can refer to them, often from the United Kingdom, for guidance or comparison if, for example, a case is unusual or difficult
 - when a court makes a decision, it gives reasons for its decision. Another case with similar but not identical facts can be decided differently (ie, it can be *distinguished*). It is often said that “each case will be decided on its own facts”.
-

[1.50] Statute law

Acts of parliament

There was no parliament in NSW until 1823. Before then the NSW Governor had very wide powers to run the colony. English Acts of parliament applied in NSW from 1828, and thereafter the British government gradually increased the role of the NSW parliament while reducing the power of the Governor.

In 1855 the British government gave NSW clear powers to make its own laws, and Australia’s parliament-made laws (statutes or Acts) date from that time.

Each Australian state has power to make its own laws. Since 1901 the federal government has had power to make laws for the whole of Australia within its powers under the Constitution (see What state, territory and federal laws cover at [1.100]).

Bills

While a state or federal parliament is considering whether or not to pass an Act, the draft Act is called a *Bill*. A Bill must be agreed to by (“passed by”) parliament and receive royal assent (approval by the Governor-general or the relevant State Governor) before it becomes an Act.

When does an Act come into effect?

After a Bill becomes an Act, it does not necessarily become operational or “commence” immediately. It may commence on a date specified in the Act itself, or by proclamation (publication in the *Government Gazette*). Different parts of an Act may commence at different times. If no time is specified, an Act commences 28 days after receiving the royal assent.

In practice, some Acts or parts of an Act never actually come into operation because, for a range of practical or political reasons, they are never proclaimed to commence.

Once an Act, or part of it, commences, it becomes law.

Names of Acts

An Act is identified by name, date, and jurisdiction; for example, the *Fair Work Act 2009* (Cth), or the *Bail Act 2013* (NSW). The name usually indicates its content, the date is the year it passed through parliament (which is not necessarily the date it commenced), and the jurisdiction is the parliament that passed it.

Definition of the terms used in an Act

Most Acts have a “definitions” section at the beginning (around section 4), or a Schedule at the end called the Dictionary, to explain what is meant by words and phrases used in the Act. These definitions are crucial to understanding the Act.

Repeals and amendments

From time to time, a parliament repeals (cancels) or amends (changes) an Act, usually by passing an Act with a similar name indicating the nature of the amendment. For example, the *Real Property Act 1900* (NSW) was amended by the *Real Property Amendment (Electronic Conveyancing) Act 2015* (NSW).

It is important always to check the currency of an Act you are reading to make sure that it has not been amended.

Delegated legislation

There are also laws associated with Acts that go into more detail than the more general terms of an Act. These are often called

Regulations, but can have other names, including rules, ordinances and by-laws. They are collectively known as *delegated legislation*, and they always relate to the Act under which they are made.

Delegated legislation such as Regulations needs to be considered, along with the Act, when researching the law.

How is delegated legislation made?

An Act often empowers some authority (a local council, parliamentary minister, public authority or public servant) to make delegated legislation from time to time, although it must be submitted to parliament before it becomes law. In NSW, the minister with the relevant responsibility usually has to give public notice of proposed delegated legislation and call for comments. Most delegated legislation automatically expires five years after it is made.

Publication of Acts and Regulations

The most up-to-date versions of Acts and Regulations are most easily available on the internet: see Doing legal research at [1.88o]. As well, they are printed in statute books for each year, available in the State Library of New South Wales.

[1.60] How statute and common law affect each other

Interpretation of Acts

Acts are sometimes drafted in very broad terms. Courts must often decide their meaning, and the court's interpretation becomes part of the common law in that area. For example, the law on families is found not only in the Commonwealth *Family Law Act*, but also in the decisions courts have made on matters controlled by the Act.

Interpretation Acts

An Act is interpreted according to rules and definitions set out in an "interpretation" statute in each jurisdiction, such as the *Acts Interpretation Act 1901* (Cth) and the *Interpretation Act 1987* (NSW).

The purpose rule of interpretation

A very important rule made to assist in the interpretation of Acts is the "purpose" rule of interpretation, which says that Acts are to be interpreted in a way that promotes the underlying purpose or object of the Act.

Can a judge overrule an Act?

An Act is binding on all courts and judges. Judges can overrule or challenge the validity of an Act only in rare circumstances (see Unconstitutional Acts below).

Which takes priority?

If an Act and a common law rule apply to the same subject matter, and they are inconsistent, the Act overrides the common law to the extent of the inconsistency. If, for example, the courts create a new common law principle, parliament can overrule it or vary it with an Act. The common law principle of native title which was recognised by the High Court in the *Mabo* case was varied by the subsequent *Native Title Act 1993* (Cth).

Where the law is unclear

Occasionally, the courts are uncertain about the meaning of an Act, or make unclear or unhelpful decisions about it. Only a later court decision, or an Act of parliament, can authoritatively clarify the uncertainty.

It is particularly important to seek advice from a lawyer when the law is unclear.

Unconstitutional Acts

The High Court of Australia or a state Supreme Court can declare an Act invalid and of no effect if (and only if) the Act is found to be unconstitutional (ie, the parliament did not actually have the power to make it – see [1.90]). The ACT and NT Supreme Courts can do the same under the federal self-government laws. Under human rights legislation in Victoria and the ACT, but nowhere else in Australia, a state or territory Supreme Court can declare that an Act is in breach of human rights, but that declaration does not invalidate the Act.

For information on how to find statute and common law using a range of legal tools and resources, see Doing legal research at [1.880].

Aboriginal and Torres Strait Islander law

The customary laws of Aboriginal and Torres Strait Islander peoples were given little recognition by the legal system until recently.

When the English colonised Australia, they ignored Indigenous ownership of land. This continued until quite recently, assisted by the legal fiction that Australia was *terra nullius* (land belonging to no-one) at the time of colonisation. The legal argument, now discredited, was that Australia was “settled” (because it was, effectively, vacant) rather than conquered.

As a result of the High Court decision in *Mabo* in 1992 there is now limited recognition of Aboriginal ownership and use of land (native title). As well, there is now limited recognition of indigenous customary law, which has some influence in the sentencing of Aboriginal offenders and in areas such as family relationships and the protection of sacred sites.

The law as it particularly concerns Aboriginal people is discussed in detail in Chapter 2, Aboriginal People and the Law.

Criminal law and civil law

[1.70] Criminal law

A crime, or *offence*, is conduct that is contrary to the criminal laws that reflect society’s expectations of personal conduct, such as stealing, assault, fraud, failing to lodge tax returns, and polluting.

The government has the role of *prosecuting* or enforcing the criminal law against a person or company, usually through the police, the Director of Public Prosecutions or some other government body, such as WorkCover NSW.

A person who is being prosecuted in criminal law is called the *defendant* or the *accused*.

The burden of proof

In criminal law, the burden (or *onus*) of proof is on the prosecution. The accused is presumed to be innocent until and unless the prosecution can prove them guilty.

The standard of proof

In criminal law, the standard to which a prosecutor must prove an alleged offence is “beyond reasonable doubt”.

Penalties

A penalty, such as a fine, a bond or imprisonment, can be imposed on a person or company found to have committed a criminal offence.

It is possible to be found guilty but to have no conviction recorded or penalty imposed.

Criminal law is discussed in detail in Chapter 14, Criminal Law.

[1.80] Civil law

Broadly speaking, civil law is all law that is not criminal law. Examples of matters that come under the heading “civil law” are the law of negligence, family law, employment, debt, discrimination and contract law. (The term “civil law” also refers to the type of legal system that is found in many European, Asian, African and South American countries, in contrast with the “common law” system of England, the United States and the British Commonwealth.)

Civil law cases usually involve individuals, companies or government bodies taking legal action against other individuals, companies or government bodies, often for doing something that is alleged to be unfair, harmful, or contrary to an agreement.

A person bringing a civil case is called a *plaintiff* or, sometimes, an *applicant* or *complainant*. A person against whom a civil action is taken is called a *defendant* or *respondent*.

Administrative law

Administrative law is a form of civil law that usually involves legal action between a person or company and a government agency, something that has become much more common in the last 40 years. Some administrative law actions seek review of a

government decision, and others try to compel or prevent action by the government.

The standard of proof

In civil law, the standard to which a person must prove their allegation is “on the balance of probabilities”, meaning it must be proved that something is more likely than not to have happened.

Court orders

In a civil case the plaintiff or applicant can seek an order for compensation (*damages*) from the defendant, and/or an order that some conduct of the defendant be required or stopped (for example, an injunction). In administrative law, the court can order that a government decision under review is affirmed, varied or set aside, or that a government agency must act or cease from acting in a certain way.

State and territory law and federal law

[1.90] State and federal constitutions

Australia and its states all have constitutions. These are the source of the various parliaments’ power to make legislation. If an Act goes beyond the power given in the constitution, then the Act, or part of it, can be declared by the relevant Supreme Court to be invalid.

The Australian Capital Territory and the Northern Territory are in a different position. They are created by the Commonwealth government and, although they make their own laws under self-governing powers, those powers are given and can be limited by Commonwealth legislation.

[1.100] What state, territory and federal laws cover

The laws of the federal parliament apply to all Australians, while NSW law applies to people and things in NSW or having a

connection with NSW. Generally, federal and state legislation deal with different matters.

Federal legislation

The federal parliament can only make laws about matters listed in s 51 of the Australian Constitution. If a matter is not listed, the power to make laws about it lies with the states.

Matters about which the federal parliament can legislate include:

- defence
- taxation
- customs
- migration
- social security
- marriage.

These powers reflect the world as the drafters of the Constitution saw it in the 1890s. For example, the “marriage” power does not cover the families of de facto couples, which means it is a state concern. But under s 51 the states can agree to hand over powers to the federal parliament, and they have done so for de facto couples to avoid confusion and duplication.

The external affairs power

Section 51 of the Constitution also gives the federal parliament the power to make laws in relation to “external affairs”. It is this power that enables federal parliament to make laws giving effect to international treaties signed by the federal government.

For example, the *Racial Discrimination Act 1975* (Cth) gives effect to Australia’s obligations under the United Nations’ *Convention for the Elimination of all Forms of Racial Discrimination*.

State and territory legislation

Under their own constitutions, state parliaments have the general power to make a law on any matter as long as it is for “the peace, welfare and good government” of the state – a very wide power. This means that states can make a law on any matter, including matters listed in s 51 of the Constitution, as long as the law is not inconsistent with a Commonwealth law.

Matters dealt with by the states commonly include:

- health
- education
- roads and traffic
- building
- local government
- the environment.

The Australian Capital Territory and the Northern Territory make laws on similar matters under their self-governing powers.

Inconsistent legislation

A state Act and a Commonwealth Act can cover the same matter as long as they are not inconsistent (for example, as well as the Commonwealth *Racial Discrimination Act*, all states have laws prohibiting racial discrimination). If the laws are inconsistent, the federal law prevails to the extent of the inconsistency (*Australian Constitution*, s 109). The same is true of territory legislation, not because of s 109 but because of the terms of self-governing powers given to the territories.

Inequities in the law

The law works differently for different people. Some groups are consistently disadvantaged in our system; for example:

- the legal system operates in English, which is not the first language of many Australians
- most judges are not familiar with the day-to-day circumstances of, for example, people with disabilities and indigenous peoples, and they may use processes and make decisions that are insensitive to those people
- legal advice and resources are not readily available

to people who do not have the means to pay for them.

To a large extent these inequities have occurred because people from these groups are not usually included among the law-makers.

Measures to improve access to the legal system include law reform, the ongoing education of judges, the availability of interpreters, the work of community legal centres, plain language publications, promoting *pro bono* work among lawyers, and providing legal aid.

Courts

[1.110] Many courts – state and federal – operate in NSW.

A court’s decision is binding on the people involved in to a case (known as the “parties” to a case), and must be complied

with. Further court proceedings can be taken to force compliance.

Court process is considered in detail in Chapter 14, Criminal Law.

Summary offences, indictable offences and committal hearings

Summary offences

Summary offences are common offences such as stealing, assault and possession of drugs, and are dealt with in the Local Court.

Indictable offences

Indictable offences are more serious offences, such as assault occasioning actual bodily harm, and drug dealing, and are dealt with in the District or Supreme Courts after a committal hearing in a Local Court (see below).

Indictable offences dealt with summarily

Some specified indictable offences can be dealt with as

if they were summary offences (ie, in the Local Court) unless the prosecution (or in some cases the accused) objects. Doing this reduces the length and expense of the hearing and limits the jail term that can be imposed if there is a conviction.

Committal hearings

Indictable offences that are not dealt with summarily are dealt with in the District Court or Supreme Court, after a committal (preliminary) hearing in the Local Court. At a committal hearing the magistrate decides whether there is enough evidence to send the accused for a trial.

The law relating to committal for trial and the classification of crimes as summary and indictable are in the *Criminal Procedure Act 1986* (NSW).

State courts

[1.120] The three main courts in NSW are:

- the Local Court (which used to be called the Court of Petty Sessions, and is called a Magistrates Court in some other states)
- the District Court (which is called a County Court in some other states)
- the Supreme Court.

[1.130] The Local Court

The Local Court has jurisdiction to deal with:

- small civil claims where the amount claimed is up to \$10,000
- civil claims where the amount claimed for personal injury or death is up to \$60,000
- all other civil claims such as contracts or motor vehicle damage where the amount claimed is up to \$100,000 or, if the parties agree, up to \$120,000
- bail applications
- summary offences
- some indictable offences
- committal hearings for other indictable offences.

All cases in the Local Court are decided by a magistrate (not a judge), without a jury. The maximum jail sentence a magistrate can impose is usually two years – less for some offences.

Other courts at the Local Court level

Other NSW courts at the same level of the hierarchy as the Local Court include the Coroner's Court, the Children's Court and the Chief Industrial Magistrate's Court.

[1.140] The District Court

The District Court has jurisdiction to deal with:

- most indictable criminal cases (see The Supreme Court at [1.150])
- appeals from decisions of magistrates in most criminal matters
- motor accident personal injury claims for any amount
- civil cases where the amount claimed is up to \$750,000, or more if the parties agree.

Civil matters

Civil cases in the District Court are decided by a judge alone except in defamation trials and special circumstances (see Juries at [1.210]).

Criminal matters

Criminal cases in the District Court are usually heard by a judge and jury, with the judge deciding the law and the jury deciding questions of fact.

In some circumstances a case can be heard by a judge alone, without a jury, but only if the accused requests it after getting legal advice, and the prosecution agrees.

The maximum jail sentence a judge can impose is usually more than the maximum that can be imposed by a magistrate.

Appeals

A single judge of the District Court decides appeals from the Local Court and both criminal and care matters in the Children's Court.

[1.150] The Supreme Court

The Supreme Court decides civil and criminal matters under state laws that are outside the jurisdiction of the Local and District Courts or specialist tribunals (see [1.240]). The Land and Environment Court is a specialist court with the same status as the Supreme Court.

Civil matters

In civil law, the Supreme Court hears civil claims over \$750,000, commercial disputes, and matters relating to *probate*, judicial review of administrative decisions, and *admiralty*. Civil cases in the Supreme Court are decided by a judge alone except in defamation trials and special circumstances (see Juries at [1.210]).

Criminal matters

The Supreme Court hears bail applications, and some serious indictable offences such as murder and manslaughter, complex drug cases, and serious breaches of the Corporations Law. Criminal cases in the Supreme Court are decided by a judge and a jury (unless it is a non-jury trial, in the same way as for District Court criminal matters – see [1.140]).

Appeals

A single judge of the Supreme Court decides appeals from the District Court and some tribunals.

Sitting as the Court of Appeal (with a panel of three judges), the Supreme Court decides appeals from single judge decisions in the Supreme Court.

Sitting as the Court of Criminal Appeal (with a panel of three or five judges), the Supreme Court decides criminal appeals from single judge decisions in the Supreme Court and from decisions in the District Court.

Federal courts

[1.160] Federal courts in NSW deal with federal laws when the circumstances arise in NSW or involve NSW people or companies. Areas of federal law include:

- family law
- discrimination
- bankruptcy
- consumer protection
- privacy
- actions under the federal *Competition and Consumer Act 2010*
- taxation

- review of decisions made by federal government officers.

The main federal courts are:

- the Federal Circuit Court (formerly the Federal Magistrates Court)
- the Federal Court of Australia
- the Family Court of Australia
- the High Court of Australia.

[1.170] The Federal Circuit Court

The Federal Circuit Court was established (initially as the Federal Magistrates Court) to offer a lower level, simpler federal court and ease the workload of the Federal Court and the Family Court. It shares the jurisdiction of both those courts, but is independent of them. It deals with a wide range of matters, including:

- family law (a large part of its work – but see The Family Court of Australia at [1.190])
- consumer protection
- discrimination
- bankruptcy
- copyright
- migration
- privacy.

[1.180] The Federal Court of Australia

The Federal Court's business includes:

- actions under the *Australian Consumer Law*
- bankruptcy
- taxation
- judicial review of government decisions
- appeals from federal tribunals and the Federal Circuit Court.

An appeal from a single judge of the Federal Court is decided by a "full bench" of the Federal Court, which comprises three judges.

[1.190] The Family Court of Australia

The Family Court is like a specialist arm of the Federal Court. It deals with:

- cases concerning property and children of a marriage (see Chapter 24, Family Law)
- cases concerning property and children of opposite-sex and same-sex de facto couples.

An appeal from a single judge of the Family Court is decided by a "full bench" of the Family Court, which comprises three judges.

[1.200] The High Court of Australia

The High Court sits permanently in Canberra but from time to time in other capital cities. It was established by the Constitution as the highest court in Australia.

Some matters (for example, constitutional matters) start in the High Court. The High Court also hears appeals from:

- state Supreme Courts
- the federal courts.

The High Court is the final court of appeal for Australia, and its decisions are binding on all courts and tribunals. It is possible to appeal to the High Court only if the High Court gives permission ("special leave").

Juries

[1.210] Juries are most commonly used in indictable criminal matters. Occasionally they are used in civil matters, usually defamation.

It is considered that the jury system enables the democratic participation of the community in the administration of justice, that jurors, as randomly selected members of the public, can bring the conscience of the community to bear on issues in a trial in a way that a judge cannot do, and that jury

service promotes an understanding of the system and confidence in it.

[1.220] What the jury does

The jury listens to and looks at the evidence, and decides the facts of a case. The judge decides legal issues that arise in the case and gives the jury guidance and directions.

The procedures for a jury are described in the *Jury Act 1977* (NSW).

Criminal juries

In indictable cases, tried in the District or Supreme Courts, a jury consisting of 12 people decides whether criminal guilt has been proved beyond reasonable doubt. If an accused is found to be guilty, the sentence is decided by the judge, not the jury.

If a juror is unable to continue, then the number can be reduced to 10, or even eight if the trial has been going for more than two months or both the prosecution and defence agree. The jury's decision, called a *verdict*, must be unanimous. If, after trying to reach a verdict for at least eight hours, the jury cannot reach a unanimous verdict, then the court can allow a majority verdict of 11 out of 12, or 10 out of 11. A jury of fewer than 11 must always be unanimous.

Non-jury trials

It used to be mandatory to have juries in serious criminal cases. However, it is now possible to have a District or Supreme Court trial with a judge sitting alone (without a jury) when the accused requests it after getting legal advice and the Director of Public Prosecutions agrees.

Civil cases

Juries are never used in the Local Court. They are used in civil cases in the District and Supreme Courts very rarely. They are used in defamation cases if a party requests it and the court agrees. They can be used in other cases when a party requests it, the judge thinks it is necessary "in the interests of justice", and the party pays the cost of it.

A civil jury usually consists of four people, but can be 12 in the Supreme Court.

Coroner's cases

A jury can be used at a coroner's inquest into the cause of a death in certain circumstances, but only if the State Coroner considers that there are sufficient reasons to justify it (*Coroners Act 2009* (NSW), s 48).

A coroner's jury consists of six people.

[1.230] The jury roll

Jury rolls are generated randomly by computer from the electoral rolls, so everyone enrolled as a voter in NSW is available for jury service.

Anyone on the jury roll may be summonsed to court for jury duty. The NSW Sheriff's Office is responsible for arrangements relating to juries.

People on the jury roll are advised by post. The notice advises the period of inclusion on the jury roll (generally 12 months).

Who is not eligible?

The categories of people disqualified or ineligible for jury service under the *Jury Act* (in Schedules 1 and 2) are listed on the Sheriff's notice. They include, among others:

- parliamentarians
- lawyers
- police officers
- people unable to read or understand English.

Who is exempt?

The *Jury Act* (in Schedule 3) exempts people in some categories from jury service. These include:

- pregnant women
- people aged 70 and over
- practising doctors, dentists and pharmacists.

If summonsed to jury duty, a person can complete the appropriate section of the summons and return it with proof of their claim to be exempt.

Who can be excused?

A person who is not in an exempt category can ask to be excused from serving on a jury by completing a form on the back of the summons and returning it to the NSW Sheriff's Office.

If the application is rejected, the person must attend for jury service as required, although they can then apply to the judge or coroner to be excused.

Only very good reasons, such as a medical condition or a threat to the viability of a business, are likely to be accepted. The Sheriff's Office and judges are reluctant to excuse people from carrying out their civic duty of jury service.

Further information on jury service is available from the NSW Sheriff's Office.

Tribunals and commissions

[1.240] Many state and federal tribunals and commissions operate alongside the court system. Whether they are called tribunals or commissions, they are specialist bodies created by Acts of parliament to deal with particular issues.

Tribunals and commissions are usually intended to be easier to use, cheaper and faster than courts. For example, unlike courts, they are usually not bound by the rules of evidence (see Chapter 14, Criminal Law).

To understand the powers and procedures of a specific tribunal, it is necessary to look at the Act that created it, regulations and rules, and practice notes issued by the tribunal.

[1.250] How tribunals operate

Tribunals usually hold hearings to decide cases, where people are obliged to attend to give evidence.

NSW tribunals

Tribunals and commissions established by a NSW law deal with NSW law. Most previously existing NSW tribunals have been consolidated into a single "super" tribunal, the NSW Civil and Administrative Tribunal (NCAT). Federal tribunals located in NSW deal with federal law. Some previously existing federal tribunals (eg, the Migration Review Tribunal, the Refugee Review Tribunal, and the Social Security Appeals Tribunal) have been merged with the Administrative Appeals Tribunal (AAT).

Who conducts tribunal cases?

In some tribunals cases are conducted (heard) by two or three tribunal members, at

least one of whom has legal training. The other members have relevant expertise.

In many tribunals, such as the AAT, it is usual for just one member to conduct the hearing.

Formal and informal hearings

The style of hearing varies between tribunals, but in most tribunals, particularly the large ones such as NCAT and the AAT, hearings resemble those of courts – lawyers represent the parties, witnesses are cross-examined and so on. Differently from courts, tribunals often allow non-lawyers to assist people in hearings.

Appeal from tribunal decisions

In most cases there is a right, set out in the relevant Act, to appeal to a court from a tribunal decision. Usually appeals are restricted to legal questions – it is very rare that the court can come to new conclusions about the facts that have already been decided.

Even if there is no right of appeal in the Act, a person may be able to go to court to seek *judicial review* of a tribunal decision. This is possible if the tribunal has acted outside its jurisdiction, or has not complied with the formal requirements of procedural fairness (see Chapter 9, Complaints).

[1.260] Commissions of inquiry

Occasionally, commissions of inquiry are set up by governments for a limited period to investigate particular issues or areas of

concern. They gather information in various ways, including by holding hearings and calling witnesses.

They differ from courts and tribunals in that they do not make legally binding decisions, but instead produce reports on their findings with recommendations for future action.

Recent commissions of inquiry in NSW include a *Special Commission of Inquiry Concerning the Investigation of Certain Child Sexual Abuse Allegations in the Hunter Region* (2014) and a *Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales* (2014).

Law reform commissions

There is a law reform commission at both state and federal level. They usually investigate questions referred to them by the relevant Attorney-General.

In NSW, individuals and groups can approach the Law Reform Commission and suggest areas where reform is needed. With the Attorney-General's approval, the commission can then investigate these areas and make recommendations. Members of the public can also contribute to the process by making submissions on matters being investigated. The evidence of community groups with direct experience of people's problems with the law is particularly valuable.

Once a commission has investigated a matter, it makes recommendations for reform. It is then up to the government to decide whether to turn those recommendations into law.

Each tribunal and commission operates differently. For information about a particular tribunal contact it directly.

[1.270] Royal commissions

Royal commissions are commissions of inquiry that have particularly strong powers to investigate matters and to call and question witnesses.

Although people often call for a royal commission to inquire into an issue, royal commissions are not commonly held. Recent topics for royal commissions include, at the Commonwealth level, the *Royal Commission into the Home Insulation Program* (2013), the *Royal Commission into Trade Union Govern-*

nance and Corruption (2014), and the *Royal Commission into Institutional Responses to Child Sexual Abuse*. In NSW royal commissions have been held into, for example, corruption in the NSW Police Service (1997) and into deep sleep therapy (the *Chelmsford Inquiry*) in 1990.

Terms of reference

The state or federal government sets a royal commission's agenda (its *terms of reference*).

Royal commission staff

The government appoints a commissioner (or more than one) – usually a senior barrister or judge. The commissioner's staff includes lawyers, investigators and administrative personnel.

Powers of royal commissions

The state and federal Royal Commission Acts confer wide-ranging powers on royal commissions, including the power to summon a person to give evidence and produce documents. It is an offence to fail to comply, and a warrant can be issued for the person's arrest. It is also an offence not to answer questions or to knowingly give false or misleading evidence.

Who can appear

It is up to the commissioner to decide whether to allow a person to appear or be represented before a commission. This will be authorised if:

- the person is "substantially and directly" interested in the subject of the inquiry, or
- their conduct has been challenged to their detriment (NSW *Royal Commissions Act 1923*, s 7).

Legal assistance

Both state and federal governments may provide funding for legal assistance and representation for some people appearing at royal commissions, or as witnesses. This funding is at the discretion of the government and is not part of the legal aid budget.

Royal commission reports

At the end of an inquiry, the royal commission produces a report containing conclusions and recommendations; for example:

- suggesting reform to laws or practices
 - recommending that criminal or other proceedings be taken against individuals.
- A royal commission can also refer evidence to law enforcement agencies.

The ICAC and the PIC

The NSW Independent Commission Against Corruption (ICAC) and the Police Integrity Commission (PIC) have powers of investigation very like those of a royal

commission, but they are permanent bodies. In some respects they are like ongoing royal commissions, investigating one matter after another, but setting their own agenda under the general heading of “corruption”.

The ICAC and the PIC are discussed in Chapter 9, Complaints.

Time limits

[1.280] Usually there are time limits for making a claim in a court or tribunal. For many court actions, these are set out in the *Limitation Act 1969* (NSW); some are set out in the relevant legislation, such as the *Anti-Discrimination Act 1977* (NSW).

It is very important to get legal advice about time limits as soon as something happens that could lead to a claim. The discussion below indicates only the types of limits that may apply and should not be relied on.

[1.290] Criminal cases

Police must commence a prosecution within six months for summary offences, but there is no time limit for indictable offences.

[1.300] Civil actions

Under the *Limitation Act*, a civil claim must usually be commenced within six years after the date on which it could first have been made; that is, after the date the incident happened or the damage became apparent.

There are exceptions to this. For example, claims based on a deed (see Deeds at [1.450]), or to recover money or other property under a court judgment, have a 12-year limit.

For personal injury the limit is usually three years, although it can be longer, or can be extended in certain circumstances, and does not apply to a minor until they turn 18.

Time limits in other Acts

There are also limits set out in other Acts. For example, compensation claims under the *Motor Accidents Act 1988* (NSW) have to be made within six months of the accident unless the person can give a full and satisfactory explanation for the delay, and claims under the NSW *Anti-Discrimination Act* must be made within 12 months. Always check the relevant Act for any time limits.

Extensions of time

Sometimes – not always – the law allows a time limit to be extended if special conditions are satisfied (for example, *Limitation Act*, ss 52–56). However, it is not safe to rely on getting an extension. It is important to find out what the relevant time limit is and to take steps to resolve a legal problem without delay.

Time limits for various matters are discussed throughout the book.

Appeals

[1.310] A person who is dissatisfied with the decision of a court or tribunal can sometimes appeal to a higher court for a review, although there are restrictions on the right of appeal.

The decision of the highest court that makes a decision is final.

[1.320] Appeals in civil matters

Appeals in civil matters must be lodged within a short period, usually 21 or 28 days. Appeals are usually limited to a review of errors of law; a higher court will very rarely reconsider findings of fact that have been made.

The higher court can either affirm or overrule the lower court's decision ("uphold" or "dismiss" an appeal), or send the case back to the lower court ("remit" it) to be decided again.

[1.330] What courts hear appeals?

Appeals from NSW courts and tribunals

- Appeals from the Local Court, the District Court and most tribunals are heard by the Supreme Court.
- An appeal against a decision of a single Supreme Court judge may be made to the Court of Appeal, consisting of three members of the Supreme Court.
- In criminal cases, appeals from the Supreme and District Courts go to the NSW Court of Criminal Appeal.

- Appeals from the NSW Court of Appeal and the NSW Court of Criminal Appeal can, in special circumstances, go to the High Court of Australia.

Appeals from federal courts and tribunals

- Appeals from a judge of the Family Court go first to a full bench of the Family Court (three judges), then, in special circumstances, to the High Court.
- Appeals from federal tribunals go to the Administrative Appeals Tribunal and then to the Federal Court.
- Appeals from the Federal Circuit Court go to a single judge or a full bench of the Federal Court or Family Court.
- Appeals from the Federal Court, where normally one judge decides a case, can be taken first to a full bench of the full Federal Court (three judges), then, in special circumstances, to the High Court.

Appeals to the High Court

Appeals to the High Court are possible only if the High Court gives permission. This is called *special leave*, and is given after a preliminary hearing when two or three judges of the High Court consider whether the issues are sufficiently important in the development of the common law in Australia to justify the appeal.

[1.340] Appeals in criminal cases

See Chapter 14, Criminal Law, for information on appeals in criminal cases.

Enforcing the law

[1.350] Criminal law

The police and the Director of Public Prosecutions (DPP) prosecute criminal charges on behalf of the state.

Prosecutions by individuals

Private individuals may prosecute criminal offences. However, this is rare; crimes must be proved beyond reasonable doubt – very difficult without the resources and powers of law enforcement agencies – and there is the risk of having to pay the legal costs of an unsuccessful prosecution.

A person should get legal advice before beginning private criminal proceedings.

Government regulatory bodies

A number of bodies created by parliament enforce the legislation they administer; for example:

- SafeWork NSW is responsible for work health and safety laws
- the Australian Competition and Consumer Commission enforces the federal *Australian Consumer Law*.

How government bodies enforce laws

Regulatory bodies use a range of strategies to enforce the law, including:

- pointing out to someone that they are in breach of the law and requiring something to be done
- issuing an infringement notice
- requiring someone to answer questions and produce documents for examination
- prosecuting the person in court.

Some regulatory bodies do their own prosecutions, while others ask the Director of Public Prosecutions to carry them out.

Infringement notices

Infringement notices are on-the-spot fines. They give the person the option of paying the fine or defending the matter in court. Examples of matters for which an infringement notice might be issued are parking and driving offences, littering, and failing to file a company's annual return.

The notice usually sets a time limit, for example of 28 days, to pay a fine or to choose to defend the matter in court.

Anyone who receives such a notice and is not sure what to do should seek legal advice.

[1.360] Civil law

Civil law is enforced by people and companies who claim they have been harmed, misled, or treated unfairly. If one person's negligence injures another person, for example, it is up to the injured person to sue to obtain compensation.

Generally, only the wronged or injured person ("plaintiff" or "applicant") is allowed to enforce the law against the other side ("defendant" or "respondent"). If a person is unable to participate in a case because, for example, they are under 18 or lacking the intellectual ability to handle their own affairs, the court can agree to someone else acting on their behalf.

How civil cases are commenced

Civil cases are commenced in a number of different ways, depending on the type of case and the particular court or tribunal that will deal with it. Each has its own forms, rules and procedures. The usual procedure is for a plaintiff to fill out an application or a "statement of claim" and to deliver it to ("serve") the defendant. The two sides – plaintiff and defendant (or applicant and respondent) – are called the "parties".

Court and tribunal staff can usually provide information about what a person needs to do.

Paying the other party's costs

A common rule in enforcing a civil claim is that the losing party pays the winning party's legal costs. This is intended to discourage people making claims that lack merit. The rule usually applies only to legal costs and witnesses' expenses, not to compensating the person for their own time and effort.

The rule is usually enforced in courts, but often does not apply in tribunals.

Administrative law

Administrative law governs the processes, powers and decisions of government bodies.

Whether and how government obligations under an Act can be enforced is generally discussed in that Act. If review of government decisions is available, it is usually

through an administrative tribunal, such as the NSW Civil and Administrative Tribunal (NCAT) for NSW law and the Administrative Appeals Tribunal (AAT) for federal law.

Usually a person who is adversely affected by a government decision can take action to have that decision reviewed. There are rules about *standing* that say who can enforce the law by taking government authorities to court; these are discussed in Chapter 9, Complaints.

[1.370] Legal assistance

Anyone who has to defend themselves in criminal proceedings, or make or defend a civil claim, or apply for administrative review, should get advice from a qualified lawyer in legal practice. Legal aid may be available.

For information about people and services who can give legal advice and assistance, see Chapter 4, Assistance with Legal Problems.

Finding out about the law

There are many resources for finding out the law, and getting explanations of the law (see Doing legal research at [1.880]). These may provide all the information required and are likely to be easier to read than statutes and law reports. You will find many of them in your local public library.

The Legal Tool Kit

All central public libraries in NSW have a collection of plain language law books called *The Legal Tool Kit*. The kit is kept up-to-date by the State Library in Sydney since the defunding in 2014, after 26 years, of the Legal

Information Access Centre (LIAC). There are usually about 20 books in the kit, covering subjects such as family law, tenancy, buying a house, and defending yourself in court. It always includes the latest edition of *The Law Handbook*.

Other resources

Useful internet sites are listed in Contact points at [1.960] and the Contact points for Chapter 4, Assistance with Legal Problems. See also Doing legal research at [1.880], for how to locate statutes, case law and other legal materials and use them effectively.

For more information, visit the NSW State Library's legal information site at www.legalanswers.sl.nsw.gov.au and the NSW Government's free service at www.lawaccess.nsw.gov.au.

Representing yourself in court

[1.380] You do not always need a lawyer when you have a legal problem. Most legal problems do not end up in court, and often people can sort issues out for themselves.

However, keep in mind that the law on any particular issue can be complex, and you should always get *advice* from a lawyer about the action you propose to take.

Where to go for advice

Free advice is available from the Legal Aid Commission, community legal centres, chamber registrars at Local Courts and the LawAccess phone line (see Contact points for Chapter 4, Assistance with Legal Problems, for a comprehensive list).

A lawyer at a community legal centre or Legal Aid Commission office can give you advice on what action is needed and may be able to help negotiate with the other side, draft letters and fill in forms. They can advise you in person or by phone.

[1.390] Do you need a solicitor?

If your matter goes to court, you must decide whether you need to be represented by a lawyer.

Matters to consider

In making a decision, you should consider the questions discussed below.

How much time do you have?

Court proceedings often involve a good deal of preparation and hours of waiting around in courts for a case to be heard.

What are the consequences of losing?

If they could be serious – for instance you could go to jail, be evicted from your house or have to pay large sums of money – you should definitely use an experienced lawyer. If you can't afford one, find out whether legal aid is available (see Chapter 4, Assistance with Legal Problems). If you are not eligible for legal aid, see a lawyer at a community legal centre who may be able to represent you or help you find a lawyer willing to take the case pro bono (ie, for free or for a reduced fee).

How confident will you be speaking in court?

If you do not speak English well or are nervous about speaking in public, you should probably get a lawyer to represent you.

Will the other side in the case have a lawyer?

It can put you at a disadvantage if you represent yourself and the other side has a lawyer.

Where will your case be heard?

It is much more difficult to represent yourself in higher courts such as the District or Supreme Courts where procedures are very formal and matters are more serious.

Self-representation is more common in the Local Court and various tribunals, where the proceedings are usually less formal.

Going ahead

Having considered all these points, you may decide that you can represent yourself. Every day in NSW, people successfully represent themselves in Local Courts and tribunals. If you are properly advised and well prepared, you may do just as well as if you had a lawyer acting for you, or better.

[1.400] Preparing for court

There are some basic preparations you should make if you have a case coming up in court. These are discussed below.

Find out when your case will be heard

There is often a first date in court for the magistrate or judge to decide whether a case is ready to go to a hearing. If you are notified that your case is on in court on a particular day, check with the court that it will actually go to a hearing on that day.

If the case is not listed for a hearing, ask the court office what the initial appearance will involve so you have any necessary information ready. If the case is listed for a hearing, you will need to be prepared to present your evidence and call any witnesses.

Do you need more time?

If you have received a notice saying you have to go to court and have not been given enough time to prepare for the hearing, seek an *adjournment* – that is, ask the court to set another date for the hearing so you have more time.

Ask a community legal centre or Local Court duty solicitor for advice about this before the date.

Prepare your case

Work out exactly what you want the court to know about your case. It is a good idea to write this down so that you don't forget anything.

Check your information with a lawyer at a community legal centre or Legal Aid office before your case is on.

Prepare your witnesses

Once you have a confirmed date for the hearing, make sure that all your witnesses can come to court on that day and bring any relevant documents with them.

If a witness important to your case does not want to come you may be able to get a *subpoena* – that is, a court order requiring witnesses to appear in court or produce documents.

Ask at the court office for advice about this as soon as possible, as a subpoena needs to be issued a certain time before a hearing.

Get information about the law

Find out as much as you can about the law and your legal position.

One way to get this information is from a lawyer at one of the free legal services described in Chapter 4, Assistance with Legal Problems.

You can also find information in libraries, in particular the Legal Information Access Centre in the State Library of NSW, which was set up specifically to provide access to plain language legal information for non-lawyers. Local public libraries can also help with this information.

Many government departments have pamphlets and booklets on various regulations and legal requirements. The Legal Information Access Centre has a list of these on their website.

Just remember that the law can be complex, and it is always a good idea to check your opinion of what the law is with a lawyer.

Prepare details of your income and expenses

If your case is about a debt matter or the magistrate is considering giving you a fine in a criminal matter, the court will find it

very useful to have full details of your income and any debts.

Prepare a list showing how much money you get every week, what you pay out, for example on rent, electricity, travel, food and so on, and how much you have available to pay a debt or fine.

You should also consider how long it would take you to pay back any fine or debt – the court will generally give you time to pay. You could pay a set amount every fortnight, for instance.

Arranging for an interpreter

If you are not confident about speaking English, you should think carefully before deciding to represent yourself. If you decide to go ahead, you can arrange an interpreter through the court.

For criminal cases, this should be free.

For a civil case you may have to pay, although sometimes assistance is given on the grounds of hardship. Ask the court staff for details. (See also the section on interpreters in Chapter 4, Assistance with legal problems.)

Consider possible costs

If you are representing yourself you will not have to pay a lawyer, but often in civil cases if you lose you have to pay the other side's costs. If the other side is represented by a lawyer, the costs may be very high.

In some cases you may also have to pay court costs – for example, part of the court's costs associated with conducting a hearing. Check with the court to see if this applies in your case.

You may also have to pay your witnesses to come to court – for example, if you are using expert witnesses to give an opinion on something.

[1.410] The hearing

The following points might help you present your case on the day of the hearing:

- pay careful attention to what is being said by everyone in court so that you can respond accurately
- take notes during the hearing to help you remember not only what was said, but when

- be polite and courteous, especially if you are under stress. If you get angry or are rude to the magistrate or other people, this may affect your case badly
- only one person can speak at a time. If you are not sure whether it is your turn to speak, simply ask “May I say something please?” This will ensure that you have your say at the appropriate time
- address people as “madam” or “sir” if you do not know how else to refer to them. Generally magistrates and judges should be addressed as “your honour”
- it may not seem important, but you will make a better impression on the court if you wear clean, neat clothes on the day of the hearing.
- be prepared to give the magistrate full details of:
 - your age, financial circumstances and occupation
 - how you came to commit the offence and any explanations you have
 - medical information relevant to your circumstances (supported by a letter from your doctor)
 - why you need your driver’s licence, if you are in danger of losing it.
- have character references ready.

Character references

If you are charged with a criminal offence and you are pleading guilty, your references will give the magistrate some knowledge of your character. (You also need references if you are pleading not guilty – the magistrate will take these into account before deciding on a sentence if you are found guilty.)

Get references from people the magistrate will regard as “respectable” members of the community, such as teachers, ministers of religion, sports coaches and community workers.

References should be addressed to the court.

What the reference should say

In the reference, the referee should say:

- how long they have known you
- how they know you (for example, as a family friend or teacher)
- that they know you have been charged with the offence
- their opinion of your character
- what the court should take into account when considering your penalty.

Get references especially for the case – don’t use references you have been given for other purposes such as job applications.

[1.420] Pleading guilty on a criminal charge

Before deciding to plead guilty to a criminal charge, you should get advice from a lawyer on whether you are in fact guilty according to law, and what the penalty is likely to be. If the matter is serious, you should get a lawyer to represent you.

If you decide to represent yourself on a guilty plea, take the following steps:

- ask the police to show you their statement of facts or *brief*, so that you can check that you agree with the facts as the police have described them. If you do not agree, tell the magistrate which matters are not correct
- check the police details of your criminal record, if you have one. Again, tell the magistrate if the details are incorrect

Legal documents

[1.430] This section explains some commonly used legal documents. There are many others not covered here. Some are

discussed in more detail elsewhere in the book; for example, Chapter 40, Wills, Estates and Funerals.

Agreements and deeds

[1.440] Oral and written agreements

Legal agreements such as contracts (see Chapter 11, Contracts) may be oral or in writing.

Agreements that must be in writing

Some agreements, such as agreements for sale of land and leases for a fixed period of more than three years, must be in writing (*Conveyancing Act 1919*, s 23C).

[1.450] Deeds

A deed, also called an agreement under seal, is a document that has been witnessed and signed, sealed and delivered, which means that the parties have:

- signed the document (executed it), and
- written the words “signed, sealed and delivered” on it (s 38).

Deeds can be enforced by the courts.

Why a written agreement is better

If there is a dispute, an oral agreement has to be proved in court by evidence from the parties about what they recall and understood was said. A written agreement is itself evidence of what the parties intended to happen.

What deeds are used for

Deeds are used to make something legally binding; for example, to transfer property from one person to another, or to set up a trust. Unlike a contract, a deed is legally binding even though there is no consideration (this is explained in Chapter 11, Contracts) between the parties.

Executing a deed

A deed must be signed or marked in the presence of a witness who must then also sign it. Deeds for some purposes (for example, for certain powers of attorney – see Power of attorney at [1.790]) have additional witnessing requirements.

Execution by a company

A company executes a deed by affixing the company seal on the document in the presence of both a permanent officer of the company and a member of the governing body (for example, a director), who then sign the deed as witnesses (s 51A).

The Australian Securities and Investments Commission (ASIC) requires company seals to display the company’s Australian company number.

Stamp duty

When stamp duty must be paid

Stamp duty must be paid on:

- deeds executed before 1 July 1998, which are not valid and cannot be enforced in a court unless they have been stamped, and
- deeds that convey or transfer property, regardless of when they were executed (see also Chapter 27, Housing).

The Office of State Revenue can advise whether duty is payable on a document.

How is stamp duty assessed?

The duty on a deed that conveys or transfers any property of value is assessed according to the value of the transaction.

When must a deed be stamped?

A deed must be stamped within two months of the date of execution.

If a person does not pay stamp duty within two months, they may face a fine (up to 100% of the stamp duty) as well as a criminal charge.

How to get a deed stamped

A deed may be stamped by lodging it at the Office of State Revenue.

Title deeds

The term *deed* is often used to describe documents relating to ownership of land, houses and units. This is because deeds are used for transactions involving the sale of land.

The formal names of these documents are:

- certificate of title (for Torrens title land)
- abstract and chain of title (for old system land) (see Chapter 27, Housing).

Who holds title deeds?

The original title deeds are usually held by the property owner. However, if there is a loan with the property as security (such as a

mortgage), the deed is held by the lender (the mortgagee) and the mortgagee is named on the deed.

When the loan is repaid, the mortgagee's name is removed from the deed and the deed returned to the owner.

A copy of the title deed is always held by Land and Property Information NSW (formerly the Land Titles Office).

Birth, death and marriage certificates

[1.460] Registration

All births, deaths and marriages in NSW must be registered by the NSW Registrar of Births, Deaths and Marriages.

A birth, death or marriage certificate is completed from information supplied to the registrar, or to another authorised person such as a marriage celebrant.

It is an offence to supply false or misleading information to the registrar.

[1.470] Obtaining copies of certificates

Certified copies of a birth, death or marriage certificate can be obtained from the registrar by:

- lodging an application, and
- paying a fee, and
- proving your identity.

Either an extract or a full copy of the certificate can be obtained. If an application does not ask specifically for an extract of the certificate, a full copy will be provided.

What identification is accepted?

A person can prove their identity for the purpose of obtaining a birth, marriage or death certificate by producing three forms of identification:

- one document from each of category 1, 2 and 3 below, or
- if no document from category 1 or 2 is available, two documents from category 3 and one document from category 4.

Category 1

- Australian birth certificate
- Australian citizenship certificate
- New Zealand birth certificate
- New Zealand citizenship certificate together with passport

Category 2

- an Australian driver's licence
- an Australian passport
- a firearms licence
- a foreign passport
- proof of age card

Category 3

- a Medicare card
- a credit or debit card
- a Centrelink or Department of Veterans' Affairs card
- a security guard/crowd control licence
- a tertiary education institution ID card

Category 4

- a recent utility account (such as gas or electricity) with current residential address
-

Children born outside NSW

In some circumstances, the birth of children outside NSW may be registered in NSW; this may be appropriate, for example, if the birth is not registered elsewhere and the parents usually live in NSW.

Lodging the application

Applications can be made by lodging a standard application form (available from the registry and all Local Courts, NSW Government Service Centres and the registry's internet site), or applications can be lodged at the Registry of Births, Deaths and Marriages, any NSW country Local Court, Service NSW centres or online.

Proof of identity

A person must provide proof of their identity (see *What identification is accepted?* above) when applying for a copy of:

- their own or their child's birth certificate
- their own marriage certificate
- the death certificate of a next of kin.

A person applying for a copy of a certificate other than those listed above must also provide identification and authorisation relating to the person whose certificate they are seeking or, in the case of a death certificate, their next of kin.

Anyone who cannot produce the required documents should contact the registry for advice.

Photocopies of suitable documents may be delivered, posted or faxed with the application.

Fees

Current fees (August 2016) are:

- \$53 for a standard certificate
- \$78 for an urgent certificate.

[1.480] Changing birth certificate details

Change of name

The registrar may change the name recorded on a birth certificate when:

- a person registered at birth in NSW lawfully changes their given name or surname (except where the change is the result of marriage)
- parents change the given name or surname of a child whose birth is registered in NSW.

How to apply

A person can apply by registering an application for change of name (available from the registry) and paying the required fee (currently \$179, which includes the issue of a new certificate).

A person under 18 should have the consent of both parents. If both parents cannot make a joint application, you can contact the registry to discuss your circumstances.

Effect of the change on the certificate

Once the change is recorded, the new name is the only name to appear on an extract of the birth certificate. A copy of the full certificate shows the history of name changes and previous names.

Change of sex

A person born in NSW may have the record of their sex altered if the person:

- is over 18, and
- has undergone a sex affirmation procedure, and
- is not married.

The current fee (August 2016) is \$122.

Effect of the change on the certificate

The new certificate will not show that the person has changed their sex.

Changing a name

[1.490] By usage

A person may change their name simply by use, without taking any formal steps. Except for the purpose of opening and operating bank accounts, a person may use any name they wish, provided the name is not used to deceive or defraud.

[1.500] By registration

If, as well as changing their name by usage, a person wants to formally record the change, a document showing the change of name can be registered at the Registry of Births, Deaths and Marriages. This may be necessary when proof of the change of name is required (for example, to obtain a passport).

Procedure

A statutory declaration called an application for change of name must be completed. The name is changed as soon as the document is registered.

Fee

The fee for registering a change of name is \$179. The applicant is issued with a birth certificate (if they were born in NSW) or a change of name certificate. Extra certificates cost \$53 each.

Children

Children over 12 must give their consent to any registered changes of their name.

[1.510] Bank and other accounts

Under the *Cash Transaction Reports Act 1988* (Cth) it is an offence, punishable by a fine and/or imprisonment, for someone to open or operate "an account for cash purposes" in a name other than that by which they are commonly known.

What is an "account for cash purposes"?

An "account for cash purposes" is very broadly defined in the legislation, ranging from bank and building society accounts to accounts with bookmakers.

The effect of the Act is to restrict the previous law whereby a person could operate a bank account in any name if there was no fraudulent intention.

If a person changes their name, presumably the banks with which they deal would need to be satisfied that the change was for all purposes, not just banking purposes, and that the person is commonly known by the new name. Banks have introduced their own procedures for determining identity when accounts are opened.

[1.520] Changing a child's name

A child under 18 cannot change their name without consent.

Who must consent?

If the names of both parents are recorded on the birth certificate, both parents must consent to a change in the child's surname.

If the father's details are not shown on the birth certificate, only the mother's consent is required.

If a child uses the mother's surname, the mother can easily change the child's surname. However, where the child uses the father's surname, the mother needs the father's consent to change the name. Similar considerations in relation to the mother's consent apply if it is the father who wishes to change the name.

If consent cannot be obtained

If consent cannot be obtained, the mother, father or child can apply for a court order.

What the court takes into account

The court regards the child's welfare as the paramount consideration when deciding by what name they should be known. Factors the court will consider are:

- the need to retain a connection with the parent the child does not live with
- the likelihood of the child experiencing confusion of identity
- any embarrassment to the child caused by having a different surname from the parent they live with.

When a child's father dies

When a father dies, a child who used the father's surname may retain it, adopt whatever surname is used by the mother, or use any other name.

[1.530] Change of name on marriage

There is no law requiring a woman to change her surname on marriage. If a woman does adopt her husband's name all that is required is that she should inform certain institutions of the change (see Bodies to notify at [1.550]).

In some situations, such as applying for a passport, the marriage certificate must be presented to allow use of the different name.

Using more than one name

A woman may use her previous family name for some purposes (for example, professional or financial) and her husband's name for others, as long as there is no intention to deceive.

After a divorce, a woman may use her former husband's name, her original name or a different name. If she remarries, she may use her new husband's surname, her first husband's surname, her original name or any other name, as long as there is no intention to deceive.

[1.540] Change of name on a driver's licence

To change the name on a driver's licence it is necessary to take the old licence and some documentary evidence of the change of name to a motor registry. A licence will then be issued in the new name.

[1.550] Bodies to notify

A change of name becomes effective through use. Certain agencies (such as banks, credit card providers, medical funds and employers) should be notified immediately of a name change.

Other agencies can be notified of the change when the occasion arises (for example, when an election is imminent, or a tax return is due).

Property owners

Property owners do not need to do anything until their land is dealt with in some way (such as through a sale or mortgage).

Old system title

If the property is held under old system title, the new name is used but the old name is referred to on the relevant documents.

Torrens title

If the property is held under Torrens title (see Chapter 27, Housing), the documents are signed in the new name, and evidence of the change (such as the registered name change or a statutory declaration) must be provided.

With Torrens title land, the change of name may be noted on the certificate of title, though this is not essential.

For information about changing a birth certificate, see Changing birth certificate details at [1.480].

Statutory declarations

[1.560] A statutory declaration is a written statement of fact declared by a person (the declarant) to be true, in the presence of a person authorised to be a witness (see Who can be a witness? at [1.600]).

Usually an affidavit, not a statutory declaration, is used in court (see Affidavits at [1.620]). When an affidavit is not required, a statutory declaration may give a statement weight; for example, in support of a plea in mitigation.

False statements

A person who knowingly makes a false statement in a statutory declaration can be fined, imprisoned, or both.

[1.570] Legislation

The relevant laws are:

- the *Oaths Act 1900* (NSW)
- the *Statutory Declarations Act 1959* (Cth).

An Act may require a statutory declaration for certain procedures, such as some applications under the *Migration Act 1958* (Cth).

In some cases statements are considered true simply because they are in the form of a statutory declaration; for example, under the *Oaths Act*, s 22 and the *Conveyancing Act 1919*, s 53(2).

[1.580] What should be in the declaration

Statements of fact

The declaration should contain only statements of fact. This can include the fact of holding a belief; for example: "To the best of my knowledge and belief the will was made in 1958".

Each fact should be stated in a separate numbered paragraph, and it is advisable to list them in chronological order.

Statements of opinion

Statements of opinion such as: "I think the will may have been made in 1958" should not be used.

The jurat

The place (that is, the name of the town, suburb or locality) and date of the declaration, and the name of the witness before whom it is made, must be stated at the end of the statutory declaration. This is called a *jurat*.

[1.590] Is a form necessary?

Printed statutory declaration forms are available for around a dollar from law stationers and newsagents, but there is no legal requirement to use them as long as the correct form of words is used (see Standard form of a statutory declaration at [1.610]). The declaration need not be typed, as long as the writing is legible.

Form of words

Under the Oaths Act

Statutory declarations under the *Oaths Act* may be in the form of either Sch 8 or Sch 9 to the Act. This is set out in Standard form of a statutory declaration at [1.610].

Under the Statutory Declarations Act

A statutory declaration made under the *Statutory Declarations Act* should be in accordance with the form set out in the Schedule to the *Statutory Declarations Regulations 1993* (Cth). This is set out in Standard form of a statutory declaration at [1.610].

[1.600] Who can be a witness?

A statutory declaration must be declared before a person referred to as the witness.

Under the Oaths Act

Statutory declarations made under the *Oaths Act* can be declared before:

- a justice of the peace
- a solicitor or barrister admitted to practice in NSW
- a notary public
- a commissioner for affidavits
- the Registrar-General or a deputy registrar-general
- the Principal Registrar or a deputy principal registrar of Births, Deaths and Marriages
- anyone else authorised by law to administer an oath.

Under the Statutory Declarations Act

A statutory declaration under the federal *Statutory Declarations Act* may be made before:

- a clerk of court
- a person before whom a declaration may be made under the law of the state in which it is made
- an Australian consular officer or diplomatic officer (defined by s 2 of the *Consular Fees Act 1955* (Cth)).
- any judicial officer
- a member of the professions.

Finding a witness

A justice of the peace is usually available at a Local Court or a bank, among many other places. Lawyers are available at legal aid offices, private firms and community legal centres. The NSW Attorney General's Department has an online list of justices of the peace.

[1.610] The role of the witness

The witness must be satisfied, through questioning or observation:

- that the declaration is in the form prescribed by the Act under which it is made, and
- of the identity of the person making the statutory declaration and certifies that fact, and
- that the declaration is signed and witnessed properly, and
- that the signature is that of the declarant.

Under changes to the NSW legislation in 2012, witnesses to a statutory declaration

under the *Oaths Act* are required, under s 34 of that Act, to have seen the face of the declarant (unless there is a special justification, eg a medical reason), and either have known the declarant for at least 12 months, or confirmed their identity based on an identification document (such as a drivers licence or passport). The authorised witness must then certify on the statutory declaration that the requirements of the *Oaths Act* have been complied with. See the standard form of a statutory declaration below for an example of this.

The witness should not read the declaration (unless the person making the declaration cannot read it – see below).

Signing

The witness should say to the declarant words such as: "Is this your name and signature, and do you declare the contents of this declaration to be true and correct to the best of your knowledge and belief?"

The declarant should then say "yes", and sign the declaration in the presence of the witness.

If there is more than one page

If there is more than one page, both declarant and witness sign at the bottom of each page.

Alterations

The witness must initial any alterations in the margin. The declarant need not do this.

People who cannot read the declaration

If the declarant is blind or illiterate, the person taking the declaration should:

- read the document to them or have someone else read it aloud in their presence, and
- be satisfied that the declarant fully understands and agrees with the contents.

The following statement, signed by the witness, should be included in the jurat (see The jurat at [1.580]):

It appearing to me that the declarant is blind [or illiterate], I certify that this declaration was read to her/him in my presence and that s/he seemed to understand it.

If the declarant cannot sign their name

If the declarant cannot sign their name, the witness should write it next to the jurat, and ask the declarant to make a cross or mark like this:

X His mark
Arthur Brown

Children

Children between six and ten are not considered competent to swear in court that what they say is true. They are, however, considered old enough to make a statutory declaration, as long as the witness is satisfied that the child understands:

- what they are saying
- that they should tell the truth, and
- what the truth of the situation is.

A statement to this effect should be added to the jurat (see The jurat at [1.580] for what this is).

Interpreters

If the declarant is hearing or speech impaired, does not know English or has difficulty understanding English, the decla-

ration must be translated by an interpreter. The witness administers an oath as follows:

You shall truly and faithfully interpret the contents of the statutory declaration and all other matters and things relating to the declaration, and render the English language into the [other] language, and the [other] language into the English language, according to the best of your skill and ability.

Annexures

Any annexures (attachments to the declaration) must each be certified by the witness as follows:

I hereby certify that this [and the following [number] page[s]] is/are the annexure marked (A), referred to in the statutory declaration of [name] declared before me at [place] on [date].

If the annexure has more than one page

If the annexure is more than one page, that fact should be referred to in the text of the declaration (but not necessarily in the witness's certification). The witness may sign each additional page. The declarant need not sign annexures.

Standard form of a statutory declaration

Under the Oaths Act

I, [full name] of [address], [occupation], do solemnly and sincerely declare: [set out the statements in point form, i.e.

- 1
- 2 etc.]

and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act.

OR

and I make this solemn declaration, as to the matter aforesaid, according to the law in this behalf made, and subject to the punishment by law provided for any wilfully false statement in any such declaration.

..... [signature of declarant]

Declared at [place] this [day] of [month], [year]

before me [signature of witness]

..... [title of witness]

Standard form of certification of Identity

Certificate under section 34(1)(c) of Oaths Act

**Please cross out any text that does not apply*

I [insert name of authorised witness], a [insert qualification to be authorised witness], certify the following matters concerning the making of this *statutory declaration/affidavit by the person who made it:

- 1 *I saw the face of the person or *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.
- 2 *I have known the person for at least 12 months or *I have confirmed the person's identity using an identification document and the document I relied on was [describe identification document relied on].

[insert signature of authorised witness]

Date:

Under the Statutory Declarations Act

I, [full name] of [address], [occupation], do solemnly and sincerely declare: [set out the statements in point form, ie

- 1
- 2 etc.]

And I make this solemn declaration by virtue of the Statutory Declarations Act, and subject to the penalties provided by that Act for the making of false statements in Statutory Declarations, conscientiously believing the

statements contained in this declaration to be true in every particular.

..... [signature of declarant]

Declared at [place] this [day] of [month], [year]

before me [signature of witness]

..... [title of witness]

Affidavits

[1.620] Affidavits are written statements of fact sworn or affirmed by a person (the deponent) to be true, in the presence of a person authorised to be a witness. Affidavits are used in court proceedings in place of spoken evidence. A statutory declaration is usually enough in other situations.

An affidavit used in court proceedings must be served on all other parties involved in the proceedings. The person who made the affidavit may still be required to attend court to be questioned on its contents.

[1.630] Who can make an affidavit?

Like a statutory declaration, an affidavit may only be made by someone who understands:

- what they are doing, and
- the nature of the oath or affirmation.

Children

A child aged between six and ten cannot legally swear an oath, and therefore cannot make an affidavit. If necessary, a child's statement may (usually) be put in a statutory declaration.

[1.640] What should be in the affidavit

Affidavits are used like spoken evidence, and the rules of evidence apply:

- the text of the affidavit should be divided into numbered paragraphs. Each paragraph should relate to a distinct matter
- the facts in the affidavit should be relevant
- the affidavit should be in the first person

(for example, "I met the defendant")

- conversations must be reported in direct speech (for example, "I said ' ', then she said ' '?")
- the text should contain only facts of which the deponent has first-hand knowledge (that is, not known only by hearsay)
- statements of opinion, unless it is expert opinion, should be avoided.

Annexures

Documents referred to in the affidavit, or copies of them, should be attached and marked as "Annexure A", "Annexure B" and so on.

[1.650] Who can be a witness?

Affidavits may be sworn in the presence of:

- a commissioner for affidavits
- a justice of the peace
- a solicitor or barrister.

Standard form of an affidavit

The usual form of an affidavit is:

On [date], I, [full name] of [address], [occupation] affirm/say on oath that:

[set out the statements in point form, i.e.

1
2 etc.]

SWORN at [place]

Before me [signature of witness]

Justice of the Peace/Solicitor

..... [signature of deponent]

I [insert name of authorised witness], a [insert qualification to be authorised witness], certify the following matters concerning the person who made this affidavit:

1 *I saw the face of the person or *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.

2 *I have known the person for at least 12 months or *I have confirmed the person's identity using an identification document and the document I relied on was [describe identification document relied on].

[insert signature of authorised witness]

[1.660] The role of the witness

The witness should make sure that the affidavit is legible and certify the identity of the deponent (see [1.610] Standard form of certification of identity).

Administering the oath

The witness administers the oath or affirmation by asking the deponent to swear or affirm that the contents of the affidavit are true. The deponent must either:

- swear that the facts are true by taking an oath, or
- make a statement affirming that the facts are true.

The witness should not allow an affidavit to be sworn if the person does not understand either its contents or the nature of the oath or affirmation.

Signing

The witness should see the deponent signing:

- the end of the document, in the jurat (see The jurat at [1.580]), and
- the bottom of each page.

The witness then also signs the jurat, adding their title, and signs the bottom of each page.

As with statutory declarations under NSW legislation, witnesses to an affidavit in NSW are required to certify on the affidavit that the requirements of the *Oaths Act* have been complied with. See the standard form of an affidavit above.

People who cannot read the declaration

If the deponent is blind or illiterate, the witness should add, and sign, the following statement:

It appearing to me that the deponent is blind [or illiterate], I certify that this affidavit was read to him/her in my presence and that he/she seemed to understand it.

Interpreters

If the deponent is hearing and/or speech impaired or does not know English, the affidavit must first be interpreted (see Interpreters at [1.610]).

Alterations

Alterations must be initialled by the witness. In some jurisdictions the deponent must also do this.

Annexures

Any annexures (attachments to the affidavit) must each be certified by the witness as follows:

This [and the following [number] page[s]] is the Annexure marked (A) referred to in the Affidavit of [name] sworn on [date]

Before me [signature of witness]

Justice of the Peace/Solicitor.

Use a lawyer

Affidavits are best prepared with the help of a lawyer. The rules about their form and content vary between courts (for example, the District and Family Courts), and an affidavit must be in a form acceptable to the court concerned. If it does not comply with the relevant rules, it may be struck out by the judge or magistrate.

Justices of the peace

A justice of the peace traditionally had both judicial and ministerial (administrative) functions in the legal system. The judicial function (that is, to decide on guilt or liability) exists to various extents in the federal jurisdictions.

In NSW

A justice of the peace in NSW can act judicially only if formally called on to do so by the government in a time of real need. In practice, justices of the peace perform only administrative functions.

In NSW, the functions and duties of the office are set out in the *Justices of the Peace Act 2002*. They have duties under the *Oaths Act* to administer oaths and witness documents such as statutory declarations and affidavits.

Justices of the peace are nominated by a member of the NSW parliament and appointed by the Attorney General for five years. They may be re-appointed.

The Attorney General's Department maintains a list of all NSW justices of the peace and their contact details.

Notices to attend court

[1.670] Court attendance notices

A court attendance notice is a document that tells a person to attend court to answer a charge or in response to:

- a claim against them, or
- an application for an order against them.

Some court attendance notices used to be called summonses.

What is in the notice?

Both court attendance notices:

- state the charges or claims made against the person (the defendant)
- state what court to go to, and when
- advise the person to seek legal advice (which should be done as soon as possible).

Getting legal advice

Anyone unable to afford a private solicitor should contact:

- Legal Aid NSW (through LawAccess)
- a community legal centre, or
- the LawAccess website.

See Contact points in Chapter 4, Assistance with Legal Problems for contact details.

The document should not be ignored. If anything in it is unclear, legal advice should be sought.

Is there time to respond?

The notice must allow enough time for the defendant to prepare and file a response. If enough notice is not given, the defendant or their lawyer can (and should) attend the court on the day named and ask for the hearing to be postponed to another date.

If the person does not attend court

If a person does not attend court after receiving a court attendance notice the matter may proceed without them, and the other side may obtain the orders they seek in the defendant's absence (this is called an *ex parte* order).

If the notice was not received

A person who receives notice of an *ex parte* order against them who can prove that they did not at any stage receive a court attendance notice can apply to have the order set aside and the matter heard again.

It is usually up to the plaintiff or applicant (the person who started the proceedings) to prove that the notice was served. The defendant may also produce evidence that they were, for example, overseas or interstate at the time and could not have received the notice.

[1.680] Statements of claim

Civil cases are commenced by the issue of a statement of claim. These documents do not have a date to attend court.

A person wishing to dispute or defend a civil claim must lodge a defence with the court within 28 days of receiving the statement of claim.

Legal advice should be obtained as soon as possible.

[1.690] Subpoenas

A subpoena is a document from a court that tells someone that they must attend at a particular time and date to be a witness in a hearing and give evidence. It might also tell the person to produce documents to be used in the case.

Get legal advice!

Anyone receiving a subpoena should seek legal advice immediately. It is an offence to ignore a subpoena, and failure to attend court can result in arrest. It is also possible to be charged with contempt of court for ignoring a subpoena.

If there is not enough time to get legal advice, it is possible to ask the court if the matter can be delayed for a short while so that advice can be sought.

Passports

[1.700] Australian passports are issued to Australian citizens by the Minister for Foreign Affairs under the *Australian Passports Act 2005* (Cth).

[1.710] Eligibility

The minister must issue a passport to an Australian citizen (s 7) unless:

- the person is an unmarried minor (that is, a person under 18) who does not have their guardian's consent, a court order or other special circumstances (s 11)
- there are reasons for not issuing a passport relating to:
 - Australian law enforcement matters (s 12)
 - international law enforcement co-operation (s 13)
 - potential for harmful conduct (s 14)
- there have been two or more passports issued to the person in the past five years (s 15)
- money is owed to the Commonwealth (s 16)
- the person already holds a valid Australian passport (s 17).

Children

Since 1986, people under 18 have received their own passport.

Permanent residents

Permanent residents are not entitled to an Australian passport.

[1.720] Applications

An application for a passport can be made at either a passport office or a post office.

Documents required

The application must be accompanied by:

- evidence of citizenship; for example:
 - an Australian passport issued after 1 July 1983
 - an original or certified full copy of a birth certificate
 - for people born overseas, a citizenship certificate
- two passport-sized colour photographs
- evidence of identity, for example:
 - a driver's licence
 - a credit card
 - a rates notice
 - an academic record
- evidence of a change of name, if applicable, for example:
 - a marriage certificate
 - a statutory declaration
 - a registered name change or deed poll
- evidence of sexual and gender diverse identity, if applicable, being a letter from a medical practitioner certifying:
 - appropriate clinical treatment for change of sex and gender identity, or
 - intersex identity
- consent documents, for applicants who are under 18 and unmarried.

A full list of the type and number of documents required for identification is on the application form and on the Australian Passport Office website.

Timeframe

Passports are usually issued within ten working days.

Urgent applications

If the application is urgent, the person must explain the circumstances to the passport

officer at a post office, showing documents indicating the cause of the urgency, and their airline tickets.

Cost

The current cost of a standard passport (32 pages) is \$254 for an adult and \$127 for a child under 16.

Larger passports (64 pages) are available for frequent travellers at a cost of \$382.

[1.730] Appeals

In accordance with the *Australian Passports Act 2005*, certain decisions of the Department of Foreign Affairs about issuing a passport may be reviewed. A written request should be sent to the legal adviser at the department within 28 days.

[1.740] Renewals

Passports issued to adults are valid for ten years, while passports issued to people under 16 are valid for five years. When a person's passport expires, they must apply for a new one.

Expiry overseas

If a passport is due to expire while the holder is overseas, it is possible to apply for a new one before leaving Australia and have the current one cancelled. Otherwise, the passport will have to be renewed at an Australian consulate overseas.

Passports issued after 1 July 1983

If the expired passport was issued after 1 July 1983, presentation of that passport and the required photographs and fee will be sufficient for an adult to obtain a new passport.

A person under 18 must apply as though for the first time.

[1.750] Lost and stolen passports

A lost or stolen passport must, as soon as possible, be reported:

- in Australia, to the police
- in a foreign country, to the Australian consular representative.

The passport will be cancelled, and a new passport issued. In a foreign country, a new passport is likely to be restricted and valid only for the remainder of the trip. It can be extended on return to Australia.

It is an offence not to report a lost or stolen passport.

[1.760] Cancellation

Passports may be cancelled in certain circumstances (s 22).

[1.770] Surrendering a passport

Anyone holding a cancelled passport, or one suspected of being wrongfully obtained, can be asked to hand it over. Failure to surrender a passport on demand is an offence.

Court orders

A court may order a person to surrender their passport.

The Family Court may do this if there is concern that a person may remove a child from the country. Criminal courts may do it in relation to a person who is granted bail.

Entering or leaving Australia

When a person enters or leaves Australia, they must show their passport to the relevant official.

Usually the passport is inspected and returned, but the official can retain the passport if they have reasonable grounds for suspicion.

Dual nationality

A citizen of another country may lose that citizenship when they take up Australian citizenship, along with their right to a passport from that country.

Inquiries should be made at the consulate of the other country to see if there is an agreement with the Australian government about dual nationality.

[1.780] Offences

Offences under the *Australian Passports Act* include:

- making, giving or producing false or

misleading statements:

- in an application for a passport
- in support of someone else's application
- making alterations or additions to a passport (only an authorised passport officer may make alterations or additions)
- intentionally damaging or destroying a passport
- using someone else's passport
- possessing a false passport

- using a cancelled, forged or altered passport
- failing to report a lost or stolen passport as soon as possible
- selling a passport
- dishonestly obtaining a passport
- bringing or taking a false passport across international borders.

A passport is, and remains, the property of the federal government and thus cannot be given away or sold.

Power of attorney

[1.790] A power of attorney is a document that appoints a person, the *attorney*, to act on behalf of the person or company who gives the power, the *donor* or *principal*.

The power can be:

- to act generally on the principal's behalf
- to act in a manner specified in the power of attorney (ie, in a particular area, for a particular time or for specific purposes).

A power of attorney is proof of the attorney's authority to act on behalf of someone else.

[1.800] When to use a power of attorney

A power of attorney is advisable when, for example, someone is planning a long overseas trip and needs a trusted person to run their affairs at home.

A power of attorney might also be appropriate for someone who is bedridden or physically incapacitated.

When a power of attorney is not necessary

Pensions

It is not necessary to make a power of attorney to deal with a social security pension. A person may apply to Centrelink to become a warrantee for a person's pension, setting out the reasons (usually supported by a medical certificate, stating, for example, that the pensioner cannot sign documents because of an injury to their hand).

Bank authorities

A person can also sign a bank authority giving a trusted person permission to operate their account. A bank authority can be revoked at any time by the person giving it.

[1.810] Who can give a power of attorney?

Individuals

Anyone who is capable of understanding its nature and effect, even a child, may give a power of attorney.

Companies

A company can also give a power of attorney, unless it is restricted by its memorandum and articles of association, rules or constitution.

[1.820] Who can act as an attorney?

A person, or a company, capable of making a power of attorney can also act as an attorney.

[1.830] Formal requirements

A power of attorney is generally in the form of a deed that must be signed before a witness, and end with the words "signed, sealed and delivered". The document is deemed to have been sealed and delivered when it is signed.

If the principal is expected to lose mental capacity

For a power of attorney to be effective after the principal loses mental capacity (an enduring power of attorney), the witness to the principal's signature must be:

- a barrister
- a registrar of a Local Court
- a solicitor who is not, and does not work with, the attorney being appointed, or a licensed conveyancer.

Standard forms

The standard forms for a general and for an enduring power of attorney can be accessed on the LPI website.

Drafting a specific power of attorney

Care should be taken when a power of attorney is to be limited to specific powers. The wording should be broad enough to allow the intention of the principal to take effect, but not so broad as to give the attorney more power than the principal intended.

Using a solicitor

Most solicitors have standard documents for giving a power of attorney that they can adapt for use in most circumstances.

Costs

A solicitor's fee for preparing a power of attorney is generally between \$150 and \$250, and the money is well spent if the document has been properly prepared. Lawyers can also advise on the interpretation of powers.

The only other cost associated with a power of attorney in NSW is, where applicable, the registration fee.

[1.840] Registering a power of attorney

If a power of attorney is to be used for any dealing in land (including sales and leases of more than three years), it must generally be registered with the Registrar-General (*Powers of Attorney Act 2003*, s 52). (This may not be necessary if the attorney is acting for the buyer – see below.)

Acting for a person selling land

If a person selling land appoints an attorney to act for them, the sale will not be valid unless the power of attorney has been registered.

Acting for a person buying land

Where the attorney is acting on behalf of a buyer, it is not necessary to have the power of attorney registered if a solicitor acts for the attorney and signs the transfer.

If the attorney intends signing the transfer, the power of attorney must be registered.

How to register a power of attorney

The original stamped power of attorney must be lodged with Land and Property Information NSW.

There is a fee of \$136.30.

Duties of an attorney

An attorney must:

- act in good faith
- tell the principal about any conflict of interest.

Delegation of a power of attorney

An attorney may not delegate their powers and duties to another person unless the power of attorney authorises them to do so. If there is doubt, a solicitor should be consulted. If the power is delegated, the new attorney has the same duties.

Exceeding a power of attorney

An attorney who exceeds the authority granted in the power of attorney may be liable for any damage suffered by the principal or others and will, in any event, be guilty of an offence (s 49).

[1.850] Signing documents

A document that is to be executed by the attorney on behalf of the principal should be prepared in the usual way without any reference to the attorney. However, when the document is signed, the attorney should sign on behalf of the principal and the following words should be inserted:

I, [the principal's name], by his/her attorney [the attorney's name] pursuant to power of attorney (Registered Book ... No ...) and I declare that I have no notice of revocation or suspension of the said power of attorney.

[1.860] Dealing with an attorney

People dealing with an attorney can rely on the power of attorney as binding on the principal if:

- the power is expressed to be irrevocable, or
- they have no notice of its termination (s 48).

The power of attorney should be read carefully to ensure that it is current and relevant to the dealing. If there is any doubt about its effect, a solicitor should be consulted.

[1.870] Ending a power of attorney

A power of attorney can be ended by either the principal or the attorney. Anything done by the attorney on behalf of the principal before they receive notice of the revocation will be valid.

Unregistered power of attorney

No specific form of words is needed to end an unregistered power of attorney, as long as the intention is made clear to the other party.

Registered power of attorney

If the power of attorney has been registered, a written revocation of that power should also be registered. This must also be done if the power of attorney requires it.

Registration fees must be paid to register a revocation.

Where the power cannot be ended

Certain grants of a power of attorney cannot be revoked or ended (for example, where the power is given in the form of a deed and is expressed to be irrevocable).

However, the Supreme Court may end the power if the purpose for which it was given is achieved or becomes incapable of achievement.

Doing legal research

[1.880] You will need to prepare before any court appearance whether you have a lawyer representing you or not. Preparation involves finding the law that applies to your circumstances, as well as any other materials that may help explain the law.

Any legal right or obligation can be found in either legislation or the common law:

- *Legislation.* Acts of parliament (also called statutes) and any regulations, rules, by-laws or environmental planning instruments (EPIs) made under the authority of an Act are all forms of legislation.
- *Common law.* If no legislation on a particular legal issue exists, the courts can make decisions. These decisions become law. If any conflict exists between the two types of law, legislation prevails over common law.

All legislation and many court judgments are now freely available on the internet.

Your local library can provide material such as plain language resources, books on legal topics and internet access. Look for the *Find Legal Answers Tool Kit*, available in all public libraries. This contains plain language, up-to-date books on specific legal subjects. For more in-depth research such as legal commentaries, searching for court judgments and information on court processes and procedures, visit the State Library of New South Wales, to access law resources in the library's large law collection. Use the *Researching the Law* research guide at guides.sl.nsw.gov.au/research_law for a useful introduction to the Australian legal system, help doing legal research, and finding cases, legislation and commentary about the law on a subject or topic.

Finding the law

[1.890] Legislation

You first need to find out what legislation is applicable to your situation, and if it is a NSW or a Commonwealth law. The Australian Constitution gives power to our parliaments to make laws. Section 51 of the Constitution sets out what the Commonwealth parliament can make laws about. These areas include defence, external affairs, trade, social security, family law, taxation, immigration, corporations and bankruptcy.

State law covers any matters that are not mentioned in s 51 of the Constitution. Most criminal law is state law, unless it deals with something covered by Commonwealth law such as tax fraud. Many crimes are covered by the *NSW Crimes Act 1900*. (This Act has been amended many times since 1900 but it still keeps its original name and year.) Other matters covered by state laws include tenancy, driving offences, neighbourhood problems, strata living, environmental and planning issues, and local government.

If you don't know whether your legal matter is covered by Commonwealth or state law, check the relevant chapter in this book or other books on the law. Law books are available in the State Library of New South Wales.

Current NSW law

To find the most up-to-date law, use the official NSW Legislation website at www.legislation.nsw.gov.au:

1. Select the *Browse* tab.
2. Under *Browse in Force* choose the first letter of the Act (or regulation or EPI).

In Force means that the Act or regulation is current and includes all amendments.

Repealed legislation is no longer in force, so it does not apply as law.

For a printed historical version of an Act, contact the State Library of NSW.

Regulations, rules and by-laws

While Acts are the principal legislation, a lot of detail such as procedures, forms and specific applications are contained in regula-

tions or rules, ordinances and by-laws. These are made by government departments under authority stated in the Act and are called *subordinate* or *delegated* legislation.

If you cannot find what you are looking for in an Act it may be in the delegated legislation.

On the NSW legislation website there is a link from the principal Act to all regulations made under it. Alternatively, if you know the name of the specific regulation you can find it under *Browse in Force – Regulations*.

Environmental Planning Instruments (EPIs)

These are a form of delegated legislation, similar to regulations and are made under the *Environmental Planning and Assessment Act 1979* (NSW). They are found on the NSW legislation website under the heading *Browse in Force – EPIs*. EPIs include State Environmental Planning Policies (SEPPs) which are planning instruments dealing with NSW policies for issues such as development standards, aged and disabled persons' housing and coastal development, and Local Environmental Plans (LEPs) which regulate planning and development in each local government area.

Current Commonwealth legislation

Use the AustLII website www.austlii.edu.au:

1. Select *Commonwealth* from the left hand menu under the heading "Cases & Legislation".
2. Scroll down to the heading *Cth Legislation*.
3. Click on *Commonwealth Consolidated Acts* (or Regulations).

A consolidated version means that all amendments or changes to an Act (or Regulation) have been added, making it the current version of the law.

The Federal Register of Legislation www.legislation.gov.au is the authorised website for Commonwealth legislation. To find current legislation, click on *Acts in Force*, and use the alphabet to locate the Act.

Other states' legislation

To access legislation for other states use the State Library of New South Wales law research guides at guides.sl.nsw.gov.au.

For printed historical versions of Australian states' and territories' legislation, contact the State Library of New South Wales.

[1.900] Case law

You may want to find cases dealing with a particular point of law to see how the courts have dealt with it. Cases, also called law reports, judgments, decisions or determinations are important sources of legal information because they contain judges' reasons for making a particular decision in a case.

Textbooks, legal reference books and looseleaf services are a good place to start as they identify the most significant cases in a legal area.

Subscription-based electronic citators, for example, Westlaw AU's *FirstPoint* identify cases by legal issue or legislation. *FirstPoint* is available for use in the State Library of NSW.

This resource will give you a citation for each relevant case which you will need in order to find the full text of the case.

Once you have the name of a case, or the case citation, you can search for it in the following places:

- the AustLII website at www.austlii.edu.au using the homepage search box. AustLII is freely available and provides full text of an extensive collection of cases, including High Court cases from 1903
- the NSW Caselaw website at www.caselaw.nsw.gov.au. NSW Caselaw is freely available and provides cases from NSW courts and tribunals, including NSW Supreme Court cases from 1999
- printed law reports available at the State Library of NSW
- online subscription databases such as Westlaw AU, LexisNexis AU and CCH contain published law reports and unreported judgments. The State Library of

NSW provides access to the full text of some cases on selected databases.

How to read a citation

A citation is the standard way to refer to published court decisions. For example:

Waters v Public Transport Corporation (1992) 173 CLR 349:

- Waters and Public Transport Corporation are the names of the parties in the case
- v stands for versus, meaning "against"
- 1992 is the year of the decision
- 173 is the volume in the report series
- CLR is the abbreviated name of the report series, Commonwealth Law Reports
- 349 is the page where the decision starts in volume 173.

Most cases are now cited with the medium neutral citation, and often only with that citation. For example, *Liu v The Age Company Ltd* [2012] NSWSC 12:

- 2012 is the year of the decision
- NSWSC is the abbreviation for NSW Supreme Court
- 12 is the chronological number of the case decided in that year.

Criminal cases will always include the Crown as one of the parties. For example, in the case *R v Smith*, R or *Regina* (Latin for "Queen") refers to the Crown. This means the state is prosecuting a case against Smith.

To identify the full name of a law report series you can use:

- a printed legal citation guide
- the online guide to legal abbreviations on the Monash University Library website at guides.lib.monash.edu/legal-abbreviations, or
- the State Library of NSW *Researching the law?* research guide at guides.sl.nsw.gov.au/research_law?

Not all cases are available. Courts select and provide decisions for publication, usually on the grounds of legal significance. Just because a case is well known does not mean that it has been published in print or on the internet, although increasing numbers of cases are being made available online.

Material about the law

[1.910] You can find plain language legal information on the Find Legal Answers website at www.legalanswers.sl.nsw.gov.au. The Find Legal Answers Tool Kit is available in NSW public libraries. The Tool Kit is a collection of plain language books about the law, covering a variety of topics including renting, family law, fines, wills and estates, going to court, and *The Law Handbook*. Most of the Tool Kit books are also available online.

The Law Handbook and the other Tool Kit books provide overviews of many legal topics, but you may need more detailed information if you are going to court. Textbooks, practice books, legal encyclopaedias and legal commentaries all help explain the law and give examples of significant cases. To access these resources you can use the extensive law collections at the State Library of NSW, as they are not freely available on the internet.

Specific titles to start your research with are:

Anderson, Tim (2014) *Defend Yourself: Facing a Charge in Court*, 3rd ed, The Federation Press, Sydney. This is an excellent guide to the whole process of appearing in court, from arrest right through to sentencing and appealing. Available in all public libraries in NSW and online at www.legalanswers.sl.nsw.gov.au.

Behan, Nadine (2009) *How to Run Your Own Court Case*, Redfern Legal Centre Publishing, Sydney. This book deals with civil (non-criminal) cases in a court and tribunal, and is available in all public libraries in NSW and online at www.legalanswers.sl.nsw.gov.au

College of Law Practice Papers (LexisNexis). These are written for lawyers and contain practical information. They are available at the State Library of NSW.

The online guides *Representing Yourself – LawAssist*, published by LawAccess and available at www.lawaccess.nsw.gov.au/Pages/representing/Representing-yourself.aspx, provide procedural information, sample letters, flow charts and FAQs. The guides cover a wide range of legal topics including debt, AVOs, fences, fines, employment rights, driving offences, after someone dies, and legal skills.

[1.920] Legal texts

These give an overview of the subject, provide commentary on the law and often discuss key cases and refer to relevant legislation. If you are using textbooks, check the date of publication as the law can change from year to year. The State Library of NSW has a comprehensive collection. Also check with your public library as it may have some legal texts.

[1.930] Dictionaries and legal encyclopaedias

- *LexisNexis Concise Australian Legal Dictionary* (5th ed, 2014) (LexisNexis)
- *Encyclopaedic Australian Legal Dictionary* (LexisNexis)
- *Laws of Australia* (Thomson Reuters)
- *Halsbury's Laws of Australia* (LexisNexis)

These explain the law and are a good starting point if you do not know much about the topic. They are divided into broad subject areas arranged alphabetically, and give a comprehensive overview of the subject, including relevant legislation and cases.

[1.940] Legal commentaries

These are produced by legal publishers such as Thomson Reuters, CCH and LexisNexis and are available electronically and in print. The printed versions, also known as loose-leaf services, are regularly updated. They

cover most legal subjects such as employment, contracts, torts, family law, intellectual property, social security and civil liability, to name just a few. These are the tools that lawyers use as they provide commentary, practical information, key cases and interpretation of the law. The State Library of NSW has an extensive collection of loose-leaf services.

[1.950] Court procedure

The easiest way to find out about court procedure is to go to the individual court website. Each court has court forms, fees and information about procedure.

The Justice website is an online government portal for all law and justice agencies and services in New South Wales:

- go to www.justice.nsw.gov.au.
- then go to the *Courts and Tribunals* pages and select the relevant court.

For more detail on court procedure you can use court practice books. Each court has a practice book providing legislation governing the court, court procedures and fees, and practice notes. They are available at the State Library of NSW. Some examples of these are given here.

High Court, Federal Court, Federal Circuit Court, Family Court

- *High Court Practice* (Thomson Reuters)
- *Practice and Procedure: High Court and Federal Court of Australia* (LexisNexis)
- *Australian High Court & Federal Court Practice* (CCH)
- *Australian Family Law* (LexisNexis).

Supreme, District and Local Courts

- *NSW Civil Practice and Procedure: Local Court Practice* (Thomson Reuters)
- *Ritchie's Uniform Civil Procedure NSW* (LexisNexis)

For criminal matters:

- *Criminal Law NSW* (Thomson Reuters)
- *Local Court Criminal Practice NSW* (LexisNexis)
- *Criminal Practice and Procedure NSW* (LexisNexis)
- *Federal Criminal Law* (LexisNexis).

Contact points

[1.960] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.relayservice.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online see www.tisnational.gov.au.

Attorney-General's Department (Cth)

www.ag.gov.au

Australasian Legal Information Institute (AustLII) – Commonwealth and state legislation and case law, subject databases and links to government departments and agencies – www.austlii.edu.au.

Australian government
www.australia.gov.au

Australian Law Reform Commission
www.alrc.gov.au

Community Justice Centres NSW
www.cjc.justice.nsw.gov.au

Community Justice Centres help people resolve disputes quickly and for free using mediation.

Community Legal Centres NSW
www.clcnsw.org.au

Community Legal Centres provide free legal information and advice.

Department of Justice
The online gateway to law and justice information in NSW.
www.justice.nsw.gov.au

Federal Register of Legislation
www.legislation.gov.au
The authorised website for Commonwealth legislation.

Find Legal Answers, Legal Information Access Centre, State Library, NSW

A free legal information service for the community of NSW. The service is available online and in public libraries across NSW.

www.legalanswers.sl.nsw.gov.au

Jury duty

www.courts.justice.nsw.gov.au/cats/jury_service.aspx

Justices of the Peace

www.jp.nsw.gov.au

Lands & Property Information

www.lpi.nsw.gov.au

ph: 1300 052 637 or 9228 6666

LawAccess NSW

www.lawaccess.nsw.gov.au

ph: 1300 888 529

Law Society of NSW

Find a lawyer and legal information

www.lawsociety.com.au

NSW Law Reform Commission

www.lawreform.justice.nsw.gov.au

NSW government

www.nsw.gov.au

NSW legislation

www.legislation.nsw.gov.au

Passport Information Service

www.passports.gov.au

ph: 131 232

Redfern Legal Centre

www.rlc.org.au/publications/fact-sheets

Registry of Births, Deaths and Marriages

www.bdm.nsw.gov.au

ph: 1300 655 236

Sheriff of NSW, Office of

www.courts.justice.nsw.gov.au/cats/catscorporate_officeofsheriff.html

ph: 9287 7300

Taxes & duties

Office of State Revenue

www.osr.nsw.gov.au

ph: 1300 139 814

Dispute resolution

A list of contacts for dispute resolution, including community justice centres, is in the Contact points for Chapter 18, Dispute Resolution.

Courts and tribunals

A complete list of courts is in the Contact points for Chapter 14, Criminal Law.

