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The purpose of the civil justice system in Australia is to prevent and resolve problems between individuals, businesses and companies about their private and commercial matters. It is the body of law that deals with everything that is not a crime. That means the range of things that the civil justice system must deal with is enormous. This includes everything from dividing fences to divorces; from setting up companies to selling second-hand cars; and from compensation for injuries to copyright in music. The states, territories and Commonwealth all share responsibility for different aspects of these problems. This can sometimes make it a little confusing to figure out where the best place to resolve an issue might be.

In this article, we will look at where our Australian civil justice system started, what it looks like today and what it might look like in the future. We will also look at how the civil justice system sorts problems according to a concept called jurisdiction so that they end up in the court or tribunal that is the best one to help solve them.

A brief history of the Australian civil justice system

The Australian civil justice system began in 1788. One of the very first recorded trials in the new colony was a civil one.

Among the convicts on the first fleet were Henry and Susannah Cable and their newborn son. Henry had almost been separated from his new family when, after having their son, Susannah’s death sentence had been commuted to transport to New South Wales while Henry was to stay imprisoned in England. After a public appeal, Henry was allowed to accompany his family, and the family received a large donation of money and goods. During the voyage, the donation went missing. Henry demanded compensation from the ship’s captain.

However, Cables had a problem. English law applied in the new colony. As convicts, the English law of ‘felony attaint’ prohibited the Cables from owning any property. How could they be compensated for something that never legally belonged to them? Judge Advocate David Collins, sitting as the Court of Civil Jurisdiction, decided to ignore the English law and ordered that the Cables should be compensated. This ruling is sometimes identified as the beginnings of an Australian civil justice system.

As settlement in Australia expanded, and England established new colonies, each colony was authorised to set up a system of courts to deal with civil disputes. The colonies adapted English civil law to local conditions and began to create their own civil laws. After Federation in 1901 (when each colony/state joined together to create the country of Australia), the new Australian states and territories kept their civil justice systems, adapting and changing them over time.

The civil justice system today

State courts now deal with most civil disputes including contracts, personal injuries, land and wills.

Most states have three levels of courts to deal with disputes, depending on what the dispute is about, how complex it is, or how much money the dispute involves. The superior court in all states is called the Supreme Court. It usually deals with the most difficult and most valuable disputes. The inferior court deals with less complex and less valuable disputes, and are called the Magistrates’ Court (called the Local Court in New South Wales). All States, except Tasmania, have an intermediate court that deals with more complex matters than the Magistrates’ Court but less complex matters than the Supreme Court. In Victoria, this intermediate court is called the County Court. In all other States, it is called the District Court.

Some states have established specialist courts to deal with particular types of disputes. For example, New South Wales has a Land and Environment Court, while Queensland has a Land Court and a Planning and Environment Court.

Some states have also established tribunals to deal with small disputes quickly, inexpensively and often without needing a lawyer like disputes involving landlords and their tenants. Tribunals are like courts but might be
presided over by a lawyer or a subject matter expert rather than a judge.

Since the Northern Territory and the Australian Capital Territory were given self-government, they have each established a Supreme Court and a Magistrates’ Court, but do not have a District Court.

The Commonwealth has also established a system of courts and tribunals to deal with disputes over which it has constitutional responsibility including issues involving employers and employees, copyright, corporations, bankruptcy and native title.

Which court or tribunal?

With all six states, the territories and the Commonwealth having a system of courts to resolve civil disputes, it could be difficult to figure out which court can hear which matter. However, courts’ and tribunals’ powers are limited by their jurisdiction.

We sometimes find people talk about jurisdiction as being a place or an area over which someone or something has control or authority. That also applies to courts. However, whether a court has the authority to resolve a civil dispute is not just about where the dispute happened. It is also affected by who is involved, what the dispute is about, and when it happened.

Where

State and territory courts have the authority to resolve and make orders about disputes in their own state or territory. This is usually an easy thing to sort out. For example, if two people who live in Sydney have a car accident in Sydney, it is evident that courts in New South Wales will have the authority to deal with a dispute over who was to blame.

However, sometimes, it can be challenging to figure out which court is the right one to deal with the dispute.

When

Usually, when something goes wrong, we are aware of it straight away. If your toaster starts a fire in the kitchen, you are likely to want to be compensated very quickly. Civil disputes tend to start not too long after the reason for the dispute happens.

However, things sometimes happen, which cause loss or injury that you might not be aware of for a long time afterwards. Sometimes people know that something has gone wrong but take a long time to do anything about it.

The reason for having a time limit is to avoid a dispute getting old and evidence about it getting lost or being forgotten. Once time has run out, the courts might not have authority to resolve them. For example, in New South Wales, there is a time limit of six years on disputes about contracts, certain types of injuries and debts, and a time limit of only one year on disputes about defamation. Courts can extend the time limit, but the person applying for the extension must be able to show that there is a good reason.

What

Whether a court has the authority to resolve a dispute will also depend on what the dispute is about – sometimes referred to as a court’s subject matter jurisdiction.

The most common limit on a court’s jurisdiction is the value of the dispute, for example, the number of damages, or the value of a piece of land or an object. All Supreme Courts have authority to resolve civil disputes regardless of their value. However, if every dispute went to the Supreme Court, the court would be overwhelmed, and people would be waiting a very long time to have their dispute resolved. To prevent this from happening, all states and territories have given authority to their Magistrates’ Court or District Court (County Court in Victoria) to resolve civil disputes up to a particular value.

Depending on the state or territory where you live, the Magistrates’ Court can resolve disputes involving up to $100,000 or as much as $250,000 if there is no District Court. In states where there is a District Court (or County Court), those courts may have authority to deal with disputes up to $750,000.

The value of the dispute is not the only limit. What the dispute is about is important as well. For example, the Commonwealth has constitutional responsibility for a range of areas including marriage, copyright, corporations and bankruptcy. It has established the Federal Court, the Family Court and the Federal Circuit Court, which have the authority to resolve issues in these areas.

The civil justice system in the future

The world in which the civil justice system works has come a very long way since Henry and Susannah Cable arrived in New South Wales. Disputes over convicts’ lost property are much less common today. However, the types of disputes the civil justice system deals with are already changing, prompting new ways of resolving them.
Online courts

Traditionally, all the material needed to resolve a civil dispute had to be provided on paper. With the number of disputes increasing all the time, the amount of paper that courts receive and must keep has increased rapidly. Several courts have started to explore ways of receiving the same material electronically meaning that judges and magistrates can have access to all the material without needing files, folders or even trolley-loads of printed documents.

Because materials can be provided electronically, some courts have also started to deal with some parts of disputes entirely online. For example, in a civil trial, materials setting out the details of the dispute need to be exchanged between the parties according to a timetable set by the court. If someone needed an extension, they would have to make an application and appear in court to explain why it was needed – which can be expensive and time-consuming. Some of these applications can now be completed online entirely without the need for anyone to physically attend.

Electronic filing and some types of online court processes have also encouraged people to start to think about whether whole disputes could be dealt with online, or even by automated decision-making programs involving artificial intelligence.

If you have used eBay or Paypal, you might have already had some contact with one of these types of systems. If you have a problem with a seller using one of these systems, you can make a complaint through the website using some simple options. Your complaint triggers a mostly automated process of contacting the seller and encouraging a solution. eBay now claims that its online dispute resolution system resolves more than 60 million disputes every year.

Online portals like eBay’s are not part of our system of courts or tribunals but are one way that businesses are attempting to make the process of solving problems faster and cheaper.

New ways of doing business

A new challenge for the civil justice system is how the law and technology interact and how the law might be applied to new situations. Civil justice is always adapting, but some changes are happening faster than the law can keep up.

For example, the development of blockchain and cryptocurrency like Bitcoin is starting to present challenges for the law to resolve as the business increasingly adopts these new technologies.

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**Student activities**

1. What is a civil dispute?
   
   One way of defining the civil justice system is that it encompasses everything that is not a crime. Alone or in a group, brainstorm a list of the types of problems, disputes or areas you can think of that are not crimes. Compare your list with other groups and combine them.

2. Explain the significance of the Henry and Susannah Cable case.

3. Why is it necessary to have two or three levels of courts?

4. How many courts and tribunals are there where you live?

Visit the website responsible for courts in your state or territory (the list is set out in the table below). Create a table with two columns. In the left-hand column, list the names of each court or tribunal you can find in your state. Keep it handy! We are going to use it again.

<table>
<thead>
<tr>
<th>State</th>
<th>Department</th>
<th>Website</th>
</tr>
</thead>
<tbody>
<tr>
<td>Queensland</td>
<td>Department of Justice and the Attorney-General</td>
<td><a href="https://www.courts.qld.gov.au/">https://www.courts.qld.gov.au/</a></td>
</tr>
<tr>
<td>Tasmania</td>
<td>Department of Justice</td>
<td><a href="https://www.courts.tas.gov.au/">https://www.courts.tas.gov.au/</a></td>
</tr>
<tr>
<td>Western Australia</td>
<td>Department of Justice</td>
<td><a href="https://courts.justice.wa.gov.au/">https://courts.justice.wa.gov.au/</a></td>
</tr>
</tbody>
</table>
5. What is the meaning of jurisdiction?

6. Read this case study and answer the questions below (it is based on a real case):

   **Mr Zhang’s accident**

   Mr Zhang has been living in Australia as a student and has applied to live in Australia permanently. The Australian Government tells Mr Zhang that he needs to make his application while he is living outside Australia. Mr Zhang moves to New Caledonia. While he is there, he makes his application for permanent residency in Australia. During his stay in New Caledonia he hires a Renault car from a local car hire company. He has a serious car accident (Mr Zhang is the only person involved in the accident), and he is unable to walk. He is flown back to Sydney for treatment and eventually is allowed to live permanently in Australia. My Zhang believes Renault is to blame for the accident because of mechanical faults, so he sues Renault in the Supreme Court of New South Wales for compensation. Renault’s office is in France, and it objects to being sued in Australia.

   Some of the witnesses in Mr Zhang’s case live in Australia (including Mr Zhang), others live in New Caledonia, and others live in France. There are at least three different places (or jurisdictions) where the dispute could be heard and two separate bodies of law (Australian and French) that might apply.

   a. Where do you think the trial should take place?

   b. Which country’s law do you think should be applied to figure out who is responsible for Mr Zhang’s accident?

7. Explain what factors you must consider when deciding what court to take a civil matter to.

8. Which court does what?

1. Eventually, the High Court decided that Mr Zhang’s matter could be heard in New South Wales because it was a convenient location for Mr Zhang. However, the law of France would have to be applied by the Supreme Court to figure out who was to blame for the accident.

9. Take your list from Question 1 and your table from Question 4. Add a column to your table headed ‘What does it do’. Using the websites from question 4 add details about what each of the courts and tribunals you have listed does. Check those details against the brainstorming list you have from Question 1.

10. Discuss the ways that technology is being used to settle disputes at the moment. Do you think this creates a fairer and more efficient system? Discuss.

11. How do you think the development of cryptocurrency and other modern ways of doing business such as Afterpay, may change how the legal system deals with disputes?

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**References**


The original record and report of *Cable v Sinclair [1788]* NSWKR 7 is available online at [https://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1788/cable_v_sinclair/](https://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1788/cable_v_sinclair/).
PROTECTING HUMAN RIGHTS

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The importance of human rights
The term ‘human rights’ describes a set of principles about treatment and conditions that all humans are entitled to expect, regardless of race, sex, where you are from or the language you speak, religion, or any other status. It is often said that with every right, comes a responsibility. Individuals have responsibilities to respect each other’s rights, but governments are also responsible for protecting rights and creating the necessary circumstances to attain the rights.

Human rights create guaranteed minimum standards or basic needs that people can expect to have so they have the freedom to make decisions about their own lives and advance themselves. Many individuals lack power, especially in comparison to governments that make laws about their lives. So if governments must meet minimum human rights’ standards, people are protected from governments using their power to take advantage of those without power. For example, if we did not have a right to fair working conditions, people could make more money by neglecting to offer workers safe conditions or employers could make the employees work too many hours, thereby affecting their health.

Human rights in Australia
Australia is the only western democracy without a charter or bill of rights. Some rights are protected by the Constitution of Australia, which is a document that creates the basic rules and principles for the country, including how laws can be made. The rights protected by our Constitution are: the right to vote (section 41); protection against acquisition of property on unjust terms (section 51); the right to trial by jury (section 80); freedom of religion (section 116) and prohibition of discrimination on the basis of state of residence (section 117).

Freedom of speech is not included in the Constitution. However, the High Court, whose job it is to interpret the Constitution when there are disagreements, has said that sections 7 and 24 of the Constitution guarantee a right of freedom of speech on political matters and public affairs (Australian Capital Television v Commonwealth, 1992). This is because, in a democracy, people need to be able to debate and be informed so that they can vote for a representative in parliament.

Even though Australia doesn’t have a bill of rights and only a few human rights are protected in the Constitution, Australians can call upon internationally established human rights declarations, such as the United Nations’ Universal Declaration of Human Rights and its legally binding supporting ‘covenants’. Countries can voluntarily sign on to promise to do what they can to protect and respect the rights in the covenants. For example, the International Covenant on Civil and Political Rights canvasses rights such as the right to privacy, home and family life, peaceful assembly, equality and non-discrimination. Compare this to the International Covenant on Economic, Social and Cultural rights, which includes the right to work and to fair and just conditions of employment; an adequate standard of living including food, clothing and housing; participate in culture; and health, education and social security. Australia has signed on, or ‘ratified’, both covenants. These covenants empower citizens of a country to complain to the United Nations (UN) when they think their human rights have been breached and they can’t get a resolution in their own country. For example, in Toonen v Australia (1994), a Tasmanian man, Nicholas Toonen complained to the UN Human Rights Committee that the Tasmanian laws outlawing consensual sex between men violated his human rights. The Committee asked the Australian Government to respond, and the Federal Government passed a law that overrode the Tasmanian law.

In Victoria, the Charter of Human Rights and Responsibilities Act (‘The Charter’) was introduced in 2006. Victoria was only the second state or territory in Australia to introduce human rights protections like this. The first was the Australian Capital Territory in 2004 and Queensland became the third, in 2019. The Victorian Charter protects twenty human rights, including, for example, the right to life (s.9), the right to liberty and security (s.21(1)), freedom of movement (s.12), cultural rights (s.19), property rights (s.20), and the right to liberty and security of person (s.21). The Charter requires ‘all public authorities to act in a way that is compatible with human rights’ (s.1(2)(c)). So, if a parliament passes a law that is inconsistent with a human right, the Supreme Court can make a declaration of inconsistent interpretation. The court notifies the Attorney-General (who is a minister in the Victorian Government) and the Victorian Equal Opportunity and Human Rights
Case Study: The Melbourne ban on sleeping rough

In the summer of 2017 record numbers of people were sleeping rough in the Melbourne CBD. The Melbourne City Council proposed a law to stop people from sleeping on the streets. The media and people who disagreed with the law, including many people experiencing homelessness and living on the streets, called this a ‘homeless ban’ because the effect of the law would be that many homeless people would not be able to live in that area of Melbourne.

The council proposed to change an existing law, which makes it an offence for people to camp in the City of Melbourne. The law is found in clause 2.8 of the Activities Local Law 2009. It says:

Unless in accordance with a permit, a person must not camp in or on any public place in a vehicle, tent, caravan or any temporary or provisional form of accommodation (italics added).

Effectively, ‘camping’ is defined by the words in italics. To make sleeping on the streets illegal, the council proposed to delete the words in italics. Without the italics, camping would have a broad definition and even sleeping under the stars without a tent could be ‘camping’. The council proposed to fine people heavily if they were found sleeping on the streets.

Case Study: Canada’s ‘Tent City’

In 2008 in a Canadian city, several homeless people had set up tents side by side. This became known as a ‘tent city’, and the council asked the court to make an order (an ‘injunction’) that the tents be taken down. The first court made that order, but the people living in the tents appealed the decision to the Supreme Court.

The law that the local council was relying on said that it was illegal to ‘loiter or take up a temporary abode overnight on any portion of any park’ (Victoria (City) v Adams, 2008). The Canadian Supreme Court interpreted that to mean that the local law stopped people from ‘erecting any form of overhead protection including, for example, a tent, a tarp strung up to create a shelter or a cardboard box, even on a temporary basis’ (Victoria (City) v Adams 2008, p.4). Compare this to Melbourne where similar laws define camping as ‘a vehicle, tent, caravan or any temporary or provisional form of accommodation’ (Activities Local Law 2009, cl 2.8).

The Canadian Supreme Court said that banning shelters such as tents was a violation of human rights:

[T]he effects of the prohibition is to impose upon those homeless persons, who are among the most vulnerable and marginalised of the City’s residents, significant and potentially severe additional health risks. In addition, sleep and shelter are necessary preconditions to any security, liberty or human flourishing. I have concluded that the prohibition on taking a temporary abode contained in the Bylaws and operational policy constitutes an interference with the life, liberty and security of the person of these homeless people. (Victoria (City) v Adams, 2008, p.5)

The right to ‘life, liberty and security’ is found in section 7 of the Canadian Charter of Rights and Freedoms, which is enshrined in the Canadian Constitution. The Victorian Charter of Human Rights and Responsibilities protects the same rights (at s.9 and s.21(1)). If the Canadian reasoning were applied in Victoria, even the existing laws disallowing the use of a tent would be incompatible with the right to life, liberty and security of homeless people. To date, a Victorian court has not been asked to decide on this.

Lobbying to protect human rights

Returning to the Melbourne case study, you might be wondering whether they ever changed the law to broaden the definition of camping, and therefore ban sleeping on the streets. After nine months of consistent lobbying by people who are or have experienced homelessness, homeless support and charity groups, lawyers and other residents of Melbourne, the council withdrew the proposal.

A month after announcing the law, the Melbourne City Council accepted comments from the public. This was done through ‘submissions’, including an online survey, emails, letters and verbal submissions. The council received a very large response. Two thousand five hundred and fifty-six people or organisations made a submission, and 84% of them opposed the proposal. Many of the submissions argued that the laws would impinge on the rights laid out in the Human Rights Charter. A United Nations representative also commented on the laws and sought a response from Australia, saying “[i]f passed the law would legitimise discriminatory stereotypes of an already marginalised population” (Farha 2017). During the time for submissions, large protests were held, including at the
White Night festival when the words ‘Melbourne is for all, #nohomelessban’ was displayed on the State Library in lights.

Despite the overwhelming response against the proposal, the Melbourne City Council did not immediately withdraw it. The law was proposed in February 2017, submissions were accepted during March, and the final withdrawal was not until September. After submissions closed, lawyers and support groups as well as homeless people themselves, continued to discuss the proposal in public forums and through news outlets. Shortly after submissions closed, 54 homeless and housing support agencies, legal services and church organisations jointly formed an alternative plan called ‘Ten things the Melbourne Council could do instead of homeless bans’. They presented the proposal online through videos and images for social media and developed a hashtag, #keepyourheart that mobilised the public into outrage so that Melbournians themselves would continue to demand that the proposal be withdrawn.

Humanising homeless people through storytelling was also important in the campaign to convince the council to not proceed with the law. Members of a small group called the Homeless Persons Union of Victoria made up of people who are or have been homeless, spoke at several forums and on the radio, to provide a voice for people directly affected by the proposed law. They highlighted how the proposed law was an uncompassionate response to a problem faced by people in poverty and disadvantage. For example, there was a story about a deaf person experiencing homelessness and a pregnant woman who was sleeping rough (Lambert, 2017).

Conclusion

In the end, it was not one single event or method of raising awareness that can be said to have contributed to the council withdrawing the proposed law in Melbourne. When the council withdrew the proposal, the Lord Mayor ultimately cited possible incompatibility with the Charter of Human Rights and Responsibilities as the reason (Mills and Dow, 2017). The persistent advocacy from people affected by the proposal and their supporters should not be minimised though. In this case study, the law was only in a proposal stage, but at other times, people seek to reform unjust laws that are already in place. It takes people working in all different professions, not only lawyers, to bring about changes and protect our human rights.

Student activities

1. Why do you think, we need our human rights protected? Discuss.
2. Why is it necessary for governments to protect human rights?
3. List some things that you think are human rights that should be protected. Remember to think about the specifics of the rights too – for example, if you have the ‘right to free education’, what level of education would that include?
4. List two rights protected by the Australian Constitution (other than the one referred to in question 5).
5. What is meant by the right to protection against acquisition of property on unjust terms?
8. Read through the twenty rights that are protected by the Charter of Human Rights and Responsibilities in Victoria. Which of the rights do you think might be violated by the Melbourne Council’s proposed change in the ‘The Melbourne ban on sleeping rough’ case study?
9. Explain the similarities between the Canadian case (Canada’s ‘Tent City’) and the Melbourne case (The Melbourne ban on sleeping rough)?
10. What did the people involve in responding to the Melbourne Council’s proposed law do? Discuss your opinion about the proposed law.
11. Look back at the human rights you listed in Question 3 and 7. Discuss examples that you can think of where people do not have those rights met.
12. Think of people working in jobs other than law, how can they work to ensure human rights are protected?
References

Australian Capital Television v Commonwealth (1992) 177 CLR 106


Tammy Mills and Aisha Dow, ‘Robert Doyle Dumps Homeless Camping Ban amid Legal Concerns over Human Rights’ The Age (online), 26 September 2017