



## Changing Your Name

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## Introduction

Australian law comes from two primary sources that are judges and courts, and Australian state and federal parliaments.

Law made by judges and courts is often called judge-made law, common law, case law or precedent. For the purposes of this chapter, the phrase ‘common law’ will be used in discussing laws made through courts.

The body of law made by parliament is often called statute law, parliament-made law or more commonly legislation.

## Common Law

Common law is a collection of court decisions developed over hundreds of years by Australian superior courts, English courts and the courts of other countries that have similar legal systems to those of Australia and England. Of course, in Australia, decisions of superior Australian courts will be of more importance to our law than other countries’ decisions, but other countries’ decisions can be considered where relevant. Whenever courts have to consider cases involving either the interpretation of laws made by parliaments or cases where no laws exist, the effect is that by making a decision (and providing reasons for that decision), those courts are creating new laws. This adds to the body of law known as common law.

Particularly interesting or significant court judgments are reported case by case and collected into a variety of books known as law reports. Not all cases heard by courts in Australia will be reported—decisions of minor courts (like the Magistrates Courts in Queensland) are not recorded in law reports. In addition, cases in some superior courts are usually only recorded in law reports when they involve significant decisions that either create new common law or develop the common law previously made by judges.

Nowadays most decisions or cases, including unreported cases, are available online.

Judges deciding cases refer to the common law to guide them in making decisions about the particular case they are dealing with. This ensures that cases of a similar nature (e.g. with similar facts or similar questions of law) are decided using the same principles as previous similar cases.

## The doctrine of precedent

Courts have developed a number of rules to guide them in their application of the common law. This body of rules is known as the doctrine of precedent and some are mentioned below:

- A court, when it makes a decision, will usually give a reason or reasons for its decision, which will be based on the particular facts of the case. The principle of a case is sometimes referred to as the ratio decidendi (the reasoning for the decision). Judges are usually bound to decide a particular question in the same way that earlier cases with similar facts have been decided (i.e. judges are usually bound to apply the ratio decidendi of previous cases).

- If the facts and the principles of the earlier cases are not exactly the same as those in a new case, a judge can still compare the situations and apply a common principle or develop a new, reasonably similar principle for the new facts.
- Earlier cases with similar but not identical facts can be distinguished (i.e. the earlier case can be said to have been decided on different facts and, therefore, the judge or magistrate does not have to follow it).
- Generally, a court must follow decisions that have been made by higher courts (e.g. a Magistrates Court must follow the decisions or reasoning of the Queensland District Court). Most courts are not bound to follow their own previous decisions. The High Court, for example, is not bound to follow the principles it has made in its own previous decisions (for the hierarchy of courts see *The Court System* chapter).
- Higher courts do not have to follow the decisions of lower courts (e.g. the Queensland Supreme Court is not bound to follow decisions made by the Queensland District Court).
- Where a court must follow the decision of another court, the decision is said to have binding authority (i.e. the court must follow the principle of the previous decision unless that decision can be distinguished as having been decided on different facts).
- Courts outside Australia, such as the House of Lords in England and the Supreme Court of the United States, are outside the hierarchy of Australian courts. Decisions of foreign courts such as these are not binding on Australian courts, although their decisions may assist or guide Australian courts when they are about to make a decision on a new set of facts.
- Where courts are not bound by previous decisions but still look to those decisions for guidance, the previous decision is said to have persuasive authority (i.e. the court can look at the previous decision to see whether it can be persuaded to follow it).
- A judge's decision on a case is binding on the parties to that case, unless one party successfully appeals against it.
- Once the time for appeal has expired and neither party has appealed, the matter is settled and the case cannot be re-opened, except in extremely rare circumstances. The reason for this is that a case must have some finality, and parties and society need to have certainty about their legal rights and obligations that arise from that decision.
- In very limited circumstances, a party can appeal a decision on special grounds even though the appeal time period has expired.
- If a party appeals to a higher court within the time limit, the higher court can affirm (confirm) or overrule (change) the lower court's decision. They may also remit the matter back to the lower court for retrial.
- The decision of the highest court is final. The highest appeal court in Australia is the High Court of Australia.

## Legislation

An individual law of either a state parliament or the Commonwealth Parliament is called an Act. Acts usually take effect when they have received Royal Assent (approval) from the Queen through her representative, who is either the Governor-General (Commonwealth) or Governor (state). Often, parliaments will make an Act become law on a date to be proclaimed (published) in the Government Gazette. A Government Gazette is a periodical publication of a parliament. It contains details of decisions of the parliament, government and governmental agencies.

While an Act is in draft form, and until it has been passed by a parliament and given Royal Assent, it is called a Bill.

Acts are passed to complement or replace the common law or judge-made law, or to create laws in areas where none existed previously. Sometimes, a parliament will pass an Act that incorporates a whole section of the common law and even other existing Acts. This is called codification. For example, the Queensland Parliament codified the criminal law in Queensland in 1899 when it passed the *Criminal Code Act 1899* (Qld).

From time to time, parliament will repeal (do away with) or amend (change) an Act.

## Delegated legislation

An Act is not the only type of legislation. Other types of laws are made to regulate administrative procedures and other matters not dealt with by an Act of parliament. Rules, by-laws and public ordinances are made by public authorities, local councils, government ministers and public servants to complement specific Acts. The power to make these laws is delegated (given) by parliament and conferred by the Act (often called a parent Act), so that rules, by-laws and public ordinances are often collectively known as delegated legislation.

Rules, by-laws and public ordinances must be worded so they do not go beyond the boundaries laid down by the Act under which they are made.

A regulation that attempts to regulate matters outside the scope of its parent Act can be declared by a court to be of no effect.

## The power of parliaments to legislate

The power of the Commonwealth Parliament to make laws is contained in what is commonly known as the Commonwealth Constitution. The Commonwealth Constitution is contained in the *Commonwealth of Australia Constitution Act 1900* (Imp) (Commonwealth Constitution Act), which sets out the terms of agreement reached between the Australian colonies for a federation.

The Commonwealth Constitution contains a number of extensive powers on which the parliament can rely to make laws. The list of powers is contained in s 51 of the Commonwealth Constitution Act. Laws made by the Commonwealth Parliament apply to all Australian states and territories.

Unlike the Commonwealth Parliament, the law-making ability of state parliaments is not restricted by a list of powers. The Queensland Constitution (contained in the *Constitution Act 1867* (Qld)) gives the Queensland Parliament general power to legislate for the State of Queensland. The only exceptions to

absolute state legislative power reflect certain powers given exclusively to the Commonwealth by the Commonwealth Constitution. For example, the Commonwealth has exclusive power to impose duties of customs and excise. Laws made by the state parliaments apply only within the jurisdictional limits of that state (e.g. Queensland cannot make law that applies in New South Wales and vice versa).

The Commonwealth Constitution Act prohibits both the Commonwealth Parliament and state parliaments from making certain types of laws. Most importantly, s 92 of the Commonwealth Constitution Act prohibits laws and government action restricting the freedom of interstate trade and commerce.

The Commonwealth and a state may make laws regulating the same things. When this happens, the Commonwealth and state laws may conflict. If so, s 109 of the Commonwealth Constitution Act provides that the Commonwealth law will prevail over the state law. The part of the state law that is inconsistent with the Commonwealth law will have no effect.

Despite the apparently sharp differences in their powers, state governments and the Commonwealth Government are often involved in the same projects. The extent of each government's involvement will vary according to its constitutional power. Even in areas beyond its strict legislative power, the Commonwealth may become involved through the provision of financial assistance. For example, although the Commonwealth Government does not have the constitutional power to legislate on education, it is involved by funding each state's educational services. In that way, the Commonwealth may indirectly affect the way a state exercises its legislative powers by providing that state with 'strings-attached' financial assistance.

## The interpretation of legislation

It is the role of judges and magistrates to interpret legislation. Judges have developed a set of rules to help them interpret Acts. The basic rule for the interpretation of Queensland legislation is that the words of the statute must be given their ordinary literal meaning. If words are ambiguous and capable of more than one meaning, secondary rules require that words be interpreted so as to avoid absurdity and best achieve what appears to have been the purpose of the Act. These rules are contained in the *Acts Interpretation Act 1954* (Qld).

For Commonwealth legislation, the *Acts Interpretation Act 1901* (Cth) provides that an Act should be interpreted in a way that promotes the purpose of the Act.

A court's decision on the meaning of certain words in an Act affects not just the particular case before the court. The decision changes or confirms the meaning of the Act itself and becomes part of the common law, thus binding or guiding courts in similar future cases.

## Common Law versus Legislation

An Act of parliament will overrule the common law if there is a common law principle and an Act which conflict in relation to the same area of law. This is because the supreme power to make laws is vested in elected representatives of parliament.

The role of the courts is to interpret the laws made by those parliaments and, where appropriate, create new laws (either through the process of interpretation or because no current parliament-made laws exist in the particular area).

Parliament can, of course, override the decisions made at common law by enacting legislation to cover the area of law previously covered by the common law. Increasingly, Acts are replacing or complementing judge-made law, but the common law still applies in many areas, and the doctrine of precedent continues today.

## How to Find and Understand Law

### Finding legislation

Acts and delegated legislation are printed in statute books. Separate statute books contain all the parliament-made laws for each calendar year.

The Acts of particular jurisdictions (e.g. the Commonwealth or Queensland) are often reprinted to include amendments. These Acts are called reprinted or consolidated Acts. This makes finding the law much easier, as a consolidated Act has all the amendments inserted in the right place. Reprinted or consolidated Acts are published alphabetically in loose-leaf volumes. Reprinted Commonwealth Acts and new Commonwealth Acts can be found in a multi-volume, loose-leaf publication called Acts of the Parliament of the Commonwealth of Australia, available in the National Library of Australia collection. Reprints of Queensland Acts are contained in a publication called the Queensland Legislation Reprint.

Nowadays the most common way to find law is on the internet (for a list of useful links see the Legal Resources page).

Copies of particular by-laws can be obtained from the office of the council concerned.

### Understanding legislation

Every Act will have a name and a date, such as the *Family Law Act 1975* (Cth) or the *Criminal Code Act 1899* (Qld). The Act's name indicates its contents, and the date shows the year the Act passed through parliament. Care must be taken to check whether an Act has been repealed or amended in some way.

In Queensland, the most current reprint should contain all amendments. When accessing an Act, it is important to have either the most recent reprint (or consolidated version) or, where referring to the Act in its original version, to have access to all further amendment Acts that have modified the original. An Act that amends a previous Act usually has the same name, but with the word 'amendment' in it, for example the *Succession Amendment Act 1997* (Qld) amended the *Succession Act 1981* (Qld). Sometimes an Act will be passed that amends many different pieces of legislation, for example the *Crime and Misconduct and other Legislation Amendment Act 2006* (Qld) or the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld). When that occurs, it may be cumbersome to track changes to one specific piece of legislation. It is for this reason that use of the most recent reprint is recommended. The first page of an Act will inform the reader of the date of the most recent reprint. For example, on the first page of the *Anti-Discrimination Act 1991* (Qld) it

states ‘Current as at 1 July 2014’, which means that that reprint contains all amendments up until 1 July 2014.

Parts of Acts may be called divisions or parts. Acts are divided into numbered sections, which may be divided into sub-sections, then into paragraphs. When text refers to sections, it can be abbreviated and written as ‘s’ (e.g. s 109 *Commonwealth of Australia Constitution Act 1900* (Imp) means section 109 of the Commonwealth Constitution Act). Multiple sections are abbreviated to ‘ss’. The same abbreviation applies for references to multiple regulations (e.g. reg 4, regs 8–10).

Often an Act will have a table of contents at the front that gives the titles of the sections, parts and divisions, and an index at the back. Sometimes there is also a schedule at the back of an Act. Schedules may contain definitions, tables, forms for court documents and other information.

## Finding common law

Common law (the significant decisions of courts) is often contained in law reports, which are bound books of (usually higher) court decisions.

Several dozen series of law reports are published. Each series of reports has a different name, and each series contains decisions of different courts. Series of law reports are expensive to buy (sometimes costing thousands of dollars), and for this reason most people accessing law reports will do so via a law library or the internet.

All law reports arrange the reported cases chronologically, but the arrangement of the cases into volumes varies with the series. For example, some series of reports may arrange volumes by year, having perhaps one or two volumes in each year, while other series of reports may simply number each volume sequentially without reference to the year of the reported decisions contained within. It is important to know how a specific series of reports arranges their volumes in this regard so as to easily find the reported decision you are looking for.

Most law reports contain the names of the parties to the dispute, a summary at the front of the case that lists the facts involved and the court’s decisions (a head note), the judgment of each judge quoted verbatim and the order of the court.

## Understanding common law

When a reported case is referred to, a traditionally accepted shorthand reference is used. These case references are called citations. For example, the same case may be cited as *Commonwealth v Anderson* (1960) 105 CLR 303 or *Commonwealth v Anderson* [1961] ALR 354.

The differing citations show that this case has been reported in two law report series: the Commonwealth Law Reports (CLR) and the Australian Law Reports (ALR).

In the first citation, the 105 before the CLR shows the volume of the series that contains the case. The second citation uses the date to show which volume of that series contains the case report.

Whenever the date of a case is cited in square brackets, it shows that a series adopts a sequence of yearly volumes rather than of numbered volumes. Where volumes are numbered other than by year, the date is placed in round brackets.

In both citations, the numbers 303 and 354 after the series refer to the respective pages of the volume at which the case is reported.

The citation *R v Gassman* [1961] Qd R 381 shows that this case is reported at page 381 in the 1961 volume of the Queensland Law Reports. The R is a shortened version of the Latin words Regina (the Queen) or Rex (the King), collectively meaning the Crown, and indicates a criminal case.

In ordinary language, a ‘v’ between the names of the parties involved in the case would normally indicate the word versus. However, in a legal citation, the ‘v’ stands for ‘and’ in civil cases and ‘against’ in criminal cases.

## Legal Resources

### Law databases

A large amount of public domain (available to all) legal material, including Acts of parliament and law reports can be accessed via the internet. An advantage of using the internet over printed material is that the resource is more likely to be up to date and it makes searching for information on related topics easier.

A selection of useful legal sites on the internet that contain Australian legal information include:

- AustLII—this is the ideal starting point for Australian legal research. It provides access to cases and legislation, and to journals and an index of Australasian materials. Whilst an excellent starting point, AustLII is not an official site for legislation, and thus recent changes may not always be reflected in the legislation accessed on this site
- the Australian Government Home Page—this site offers information from government departments and agencies, state governments and other internet sites
- the National Library of Australia—this website provides links to government servers, legislation and policy documents, including access to Bills before Australian parliaments
- Queensland Legislation—Queensland legislation is available in a portable document format (pdf)
- Commonwealth Register of Legislation—Commonwealth Legislation is available in both pdf and rich text format.

### Other useful internet sites about the law

While the following sites do not necessarily provide access to Acts of parliaments or common law cases, they do offer a range of legal information targeted at the general public:

- Legal Aid Queensland—this website contains information about the law, lawyers and the legal system. It is written in easy-to-understand language and has been created so that anyone can use and understand it. Through this site, a person can also access self-help publications dealing with such issues as unfair dismissal, domestic violence and drink driving
- Family Court and the Federal Circuit Court—these websites contain self-help kits and forms on family law matters, as well as information on these courts’ procedures and practices

- Child Support (part of the Department of Human Services)—this website contains forms and publications for parents with legal issues regarding maintenance
- Residential Tenancies Authority—this website provides services to tenants, lessors and agents in Queensland, and information about the services and access to forms
- Public Trustee—this website contains information including will making, investments, enduring power of attorney, auctions and administration of estates
- Queensland Law Society— this website contains information about finding a solicitor and legal information brochures
- Department of Justice and Attorney-General—this website contains information on the law, mediation, guardianship and the court system
- Caxton Legal Centre—this website provides information about its services and has links to many sources of law on the internet.

# Legal Notices

## Disclaimer

The Queensland Law Handbook is produced by Caxton Legal Centre with the assistance of volunteers with legal experience in Queensland. The Handbook is intended to give general information about the law in Queensland as at July 2016. The content of the Queensland Law Handbook does not constitute legal advice, and if you have a specific legal problem, you should consult a professional legal advisor.

## External links

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