

# AUSTRALIA: ONE CONTINENT. ONE COUNTRY. ONE FAMILY LAW?

## A Guide to family law in Australia

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### Introduction

It may be thought that with the world's newest continent (saving ice caps) being mostly one sovereign country, there would not be the difficulties with different family law regimes and systems, such as confuse within the British Isles.

Alas. The overlay of a country wide system (the commonwealth) on top of federal states with law making powers means that sorting out issues of jurisdiction and relevant law is the crucial first step for the lawyer from abroad.

This guide attempts to summarises some aspects.

### A geography and politics lesson

Australasia is name of the continent consisting of the largest island in the world (excluding the land masses of Americas and Eurasia) together with New Zealand, New Guinea and other nearby South Pacific islands. In this context, it is purely a geographical term but one now rarely used and Oceania is often preferred, at least in New Zealand, to avoid identification with the political country. There is a distinct continental divide with Asia, known as the Wallace Line and east of Borneo and Bali, based on zoological and biological developments.

The country of Australia is the large island itself together with Tasmania (on south east corner, formerly known as Van Dieman's Island) and Torres Straits Islands, an archipelago of islands off the north east corner and home to Torres Strait Islanders, who share many cultural traits with the inhabitants of nearby Papua New Guinea.

Australia is 3 million sq miles, 7.7 m sq km, and is the sixth largest country in the world by size. Yet its population is about 20 million, ranked 53<sup>rd</sup> in the world. Over 40% of land mass consists of sand dunes or similar arid areas and it is one of the most urbanised countries in the world. Only 15 % live in rural areas. Australians live around the coast and only two cities of any size are any distance from the sea, Canberra, the artificially created capital city inland between Sydney and Melbourne, and Alice Springs in the centre near Ayers Rock now called Uluru. Over 5% of Australian citizens live and work long term abroad. About 2% of Australians are indigenous. Non indigenous Australians originally had strong British, then European, roots and nationalities, but there are now an increasing number from the Far Eastern countries living in Australia.

The two biggest cities are Sydney (population 4 Mill) and Melbourne (3.5 Mill), accounting with their neighbouring towns for almost half of the country's populations. Many international family law cases are in these two cities.

The country was formed on 1 January 1901 as the Commonwealth of Australia with a written constitution, and then spent the next hundred years becoming increasingly independent from the United Kingdom, finally doing so in 1986. It is still a constitutional monarchy with Elizabeth II as Head of State as the

Queen of Australia, with a republican referendum vote failing in 1999. She is represented by a Governor General but her powers are almost entirely ceremonial and constitutional.

Australia has a bicameral Parliament, comprising a Senate (or upper house) with 76 Senators, and a House of Representatives (or lower house) with 150 Members. Members of the lower house are elected on a population basis from single-member constituencies. In the Senate, each state regardless of population is represented by twelve Senators, and each mainland territory by two. The government is formed in the lower house, and the leader of the majority party in the House of Representatives is the Prime Minister.

Australia is divided into six States and several Territories. The states are New South Wales (on eastern coast and of which the main city is Sydney), Queensland (on north east coast of which the main city is Brisbane but also known for its Barrier Reef), South Australia (central south and of which the main city is Adelaide), Tasmania (of which the main city is Hobart), Victoria (south east and of which the main city is Melbourne) and Western Australia (covering the western third of Australia and of which the main city is Perth). The two major Territories are the Northern Territory (NT) (the huge area of largely unpopulated land between Queensland and WA and of which the main city is Darwin) and the Australian Capital Territory (ACT) (of which the main city is Canberra).

The significance of the States and Territories for the family lawyer from abroad is in matters of law making and court structure. More is referred to below but, in summary, the Australian Parliament (“the Commonwealth”) can only make laws affecting each state in circumstances explicitly laid down in the constitution or unless agreed to by the States. The Australian Parliament has greater power over the Territories than the States. Most States have their own elected bicameral Parliament. The head of each State is the Premier, normally the leader of the party with the majority in the lower House in each state. The Commonwealth Parliament has legislative powers over, for example, tax, defence, foreign policy, some family matters. The State Parliaments have powers over, for example, issues of criminal law, transport, education etc.

The highest court is the High Court, primarily sitting in Canberra, which is a commonwealth court. Mostly appellate, it has some original jurisdiction, mainly in overview of Ministerial and Executive decisions. Other Commonwealth (Australia wide) courts are the Federal Courts, sitting in each state and being mainly first instance civil courts on cases of Commonwealth legislation with some appeal jurisdiction, and the Family Courts, as referred to below. Each State has a Supreme Court, dealing with State law and from which appeals are to the High Court. As each state has its own cohabitation law, these are dealt with at State Supreme Court level or the state’s lower courts, not the commonwealth Family Courts.

Lawyers qualify in each state and are described as “solicitors and barristers”, but in practice a conventional split profession exists. Family law solicitors exercise their rights of audience quite extensively. Lawyers can qualify for the High Court (Commonwealth) by a paper application and can then appear in courts in other states.

### Family law

For the family lawyer from outside Australia, some basic knowledge of the relationship between commonwealth and the federal states is needed.

The primary legislation is the Family Law Act 1975 which greatly changed family law in the country. It was very innovative, caused much controversy and has been copied abroad. This is commonwealth legislation and covers marital and children issues. It set up the Family Court of Australia. This court has first instance and appellate jurisdiction, the latter being from its own decisions and often heard by a court of three judges known as a Full Court. The Full Court also deals with complex first instance cases.

Below the level of Judge are registrars, deputy registrars and judicial registrars. Appeals from the Family Court are to the High Court. It is headed up by a Chief Justice. Its website is one of the best of its kind in the world and at [www.familycourt.gov.au](http://www.familycourt.gov.au)

An increasing number of cases are being given to the Federal Magistrates Courts, including divorce and some children and finance cases. They sit in all main population centres, often in Family Court buildings.

States were given power to have their own State Family Courts. In practice, only Western Australia has done so with the result that in some respects, more often in strict law than in practical outcome, Western Australia has some differences to court structure and children law to the other states. As always, local advice should be taken. Less power was given to the Territories and so less an issue with ACT or NT.

Save for WA, children law is Commonwealth. But a couple of states including NSW and Victoria exclude children in care from Commonwealth powers and so are therefore dealt with under local State law.

Whilst divorce law, financial provision law on divorce and children law is now commonwealth and applies to all states, subject to WA above, cohabitation law (known in Australia as de facto law or domestic relations law) is purely State based. There is no countrywide law. Each State has different laws. Whilst most give approximately similar rights to marriage, there are key differences. There are some very different definitions between the States of the relationships covered, different powers to make orders, length of relationship required and factors taken into account. Cases are dealt with in the State's Supreme Court, or lower civil courts, by judges who are primarily not family specialist judges. They have often not followed the principles applied in the Family Court, giving rise sometimes to quite different outcomes in de facto cases compared to marital cases.

The Attorney General's Department in Canberra is the Central Authority for the Hague Convention in respect to child abduction in Australia and can be contacted on [www.ag.gov.au/www/childabduction.nsf](http://www.ag.gov.au/www/childabduction.nsf). Abductee parents are represented by lawyers from the Department of Community Services.

Forum for Australian law is primarily based on citizenship, residence and/or presence. Only divorce has any domicile basis. Australian law allows the financial aspects of the breakdown of a marital relationship to be dealt with separately to a divorce and often well in advance in time, as divorce requires 12 months separation.

Forum law is specifically not based on forum conveniens but a test that a party who has properly/regularly instituted proceedings in Australia has a prima facie right to have the proceedings determined by an Australian court unless Australia is the "clearly inappropriate forum". Although discretionary and reference is made in case law to similar principles as found in forum conveniens cases, this is a more onerous test for the foreign applicant. If a case has been regularly issued in Australia, there is often an expectation that forum will stay with Australia. The leading case is Henry (1996).

The Child Support Agency was set up in the late 1980s and applies across all Australia. They can be contacted on [www.csa.gov.au](http://www.csa.gov.au).

Local advice should always be obtained in any case involving Australian family law matters. The best starting point, apart from personally known contacts, is the International Academy of Matrimonial Lawyers ([www.iaml.org](http://www.iaml.org)) whose self elected members are specialists in international aspects of family law cases. Most specialise in finance and forum cases. I am not aware of any local list of specialist child abduction lawyers. The primary organisation of lawyers is the Law Council ([www.familylawsection.org.au](http://www.familylawsection.org.au)) which covers all of Australia. There is a successful accreditation scheme for solicitors run by State and Territorial Law Societies. Most Australian family lawyers do not specialise in just finance or children

cases, in part as both issues are considered together by the family court. There are a number of us who are specialist family lawyers dual qualified in Australia and other jurisdictions.

Australian government resources on the web are very good in the field of family law and an article on web resources for Australian family law can be found on the information pages at [www.davidhodson.com](http://www.davidhodson.com). A companion article “England expects ...Not to be confused with Scotland! A Guide to family law in the British Isles” is also available there.

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