

AUSTRALIA

Australia has a **federal** system of government and there are federal and State courts.

The State courts deal with virtually all criminal cases, even those involving offences created by Acts of the Commonwealth Parliament. They also deal with most civil claims.

The **structure** of the Australian Court system can be outlined as follows¹:

High Court of Australia

<i>Federal Courts</i>	<i>State Courts</i>
Full Court of Federal Court Appellate Division, Family Court	Court of Appeal Court of Criminal Appeal
Federal Court (Single Judge) Family Court (Single Judge)	Supreme Court
	District (County) Court
Federal Magistrates Service	Local Court

The **High Court of Australia** is the ultimate court of appeal from all the Australian courts. Except for the High Court of Australia, the decision of each State court is, in theory, subject to appeal or some kind of review by a higher court in the system.

New South Wales is the most appropriate State to compare with the South African situation, due to the complexity of its serious cases, the volume of the work and the problems experienced by court delays.

¹ This diagram does not include specialist courts and tribunals. There are minor variations within the States.

The law in Australia operates as an **adversarial system** and there is a **jury** system in respect of the more serious criminal and civil trials.

NEW SOUTH WALES

There are 3 levels in the general court hierarchy in New South Wales²:

- Supreme Courts
- District Courts
- Local Courts

The Supreme Court of New South Wales serves as the superior court of general jurisdiction in the State and hears criminal trials of the most serious nature and has unlimited jurisdiction in civil disputes. In addition, this court has appellate jurisdiction in criminal and civil matters.

The Court of Appeal and the Court of Criminal Appeal and the administration of these courts are centralized within the Supreme Court.

The Supreme Court has two divisions – the Common Law Division and the Equity Division.

Judges are assigned to the divisions by the Chief Justice. The Judges of the Common Law Division hear the Supreme Courts criminal trials as well as civil trials. The Court of Appeal hears civil appeals and the Court of Criminal Appeals hears criminal appeals. Acting Judges do not normally sit for an entire year and the courts' policy is that only either former

² The other courts, namely the Land and Environment Court, the Industrial Relations Commission, the Compensation Court, the Dust Diseases Tribunal and the Administrative Tribunal are not relevant for our present purposes.

Judges or those running a current commission in another jurisdiction will be appointed as Acting Judges of the Supreme Court of New South Wales.

The permanent judicial resource is composed of 47 judges, including the Chief Justice, the President and 4 Masters. At any one stage, there are 12 acting judges.

The District Court serves as the largest trial court in Australia and the intermediate court in the State court system. The court also deals with all indictable criminal offences (except murder, treason and piracy) in its criminal jurisdiction, and has unlimited civil jurisdiction in relation to motor vehicle accidents and has \$750 000 limit on general actions. The court also hears appeals from the local court and also presides over a range of administrative and disciplinary tribunals.

There are 160 **Local Courts** in New South Wales which deal with criminal matters which can be decided without a jury, and committal hearings and civil actions to recover amounts up to \$40 000.

Appeals from the Court of Appeal or Criminal Appeal go to the **High Court of Australia**. Thus, the Court of Appeal and Court of Criminal Appeal hear appeals from decisions made by most of the courts of New South Wales and from decisions made by a single judge of the Supreme Court.

Delays in the criminal justice system have been a matter of concern to the New South Wales Government since the **middle of the 90's**. The Director of the New South Wales Bureau of Crime Statistics and Research

stated in 1998 that the delays in criminal matters had far-reaching social effects that had to be addressed quickly:³

"Firstly, many innocent people who are not guilty are being kept in prison for more than a year and, plainly, that is neither fair nor desirable, he said.

Secondly, the length of time before the matter comes to trial when somebody is guilty means they have a greater chance of getting off because it is harder for people to remember what they saw and evidence becomes less reliable."

One option then under consideration was to *"eliminate the long summer vacation."*

Although comparisons between the States must be treated with caution due to the widely differing complexity of cases, workload and resources, the 1999 Report by the Council of Australian Governments, covering the 1997 – 1998 financial year, indicated that New South Wales had the longest finalization time nationally for processing matters before both the Supreme Court and the District court in the criminal jurisdiction.

³ Statistics released by the Australian Bureau of Statistics [ABS] show that, in 1996, the mean time for matters going to trial before the New South Wales [NSW] district Court stood at 62,7 weeks for a guilty verdict and 55,8 weeks for an acquittal. Guilty verdicts in Victoria took 55,2 weeks, in Western Australia [WA] 42,4 weeks, in Queensland 38,3 weeks and in Tasmania 18.5 weeks. The 29.7 weeks' median duration it took until NSW defences and prosecutions prepared their cases, and courts listed, and heard, the cases, was also the longest in the country, the ABS figures showed. Victoria came next with 23,2 weeks; Tasmania and WA had the shortest median duration of just over 12 weeks. The ABS figures show NSW took longer to put cases through the District Court in 1996, even though the number of defendants dropped by 14 percent to 3,835 from 4,458 the previous year.

NSW also failed to register much of an impact in reducing the waiting time for defended cases. At the start of 1996, NSW defendants were waiting 24,4 weeks for a verdict after their case had been initiated, but by the end of that year the pending time had blown out to 28,9 weeks.

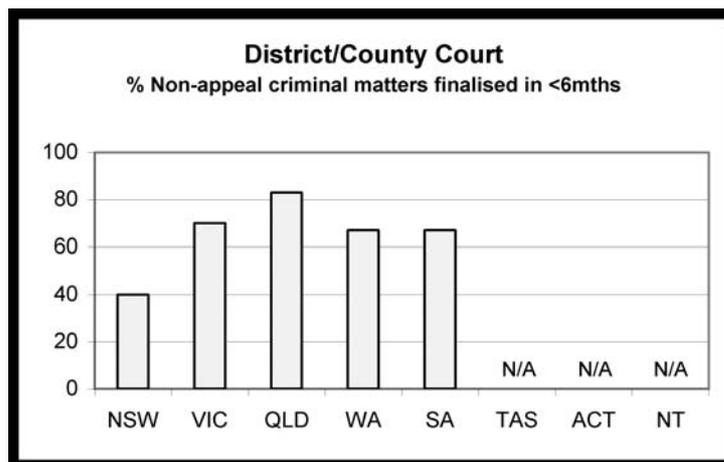
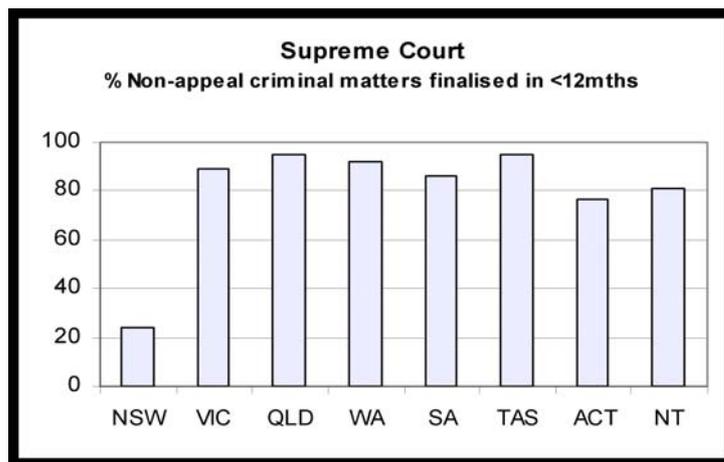
Sydney Morning Herald, 28 August '98

50% of the awaiting trial prisoners in the NSW district court have been waiting for 6 months in custody and close to 30% spend between 6 and 12 months in custody.

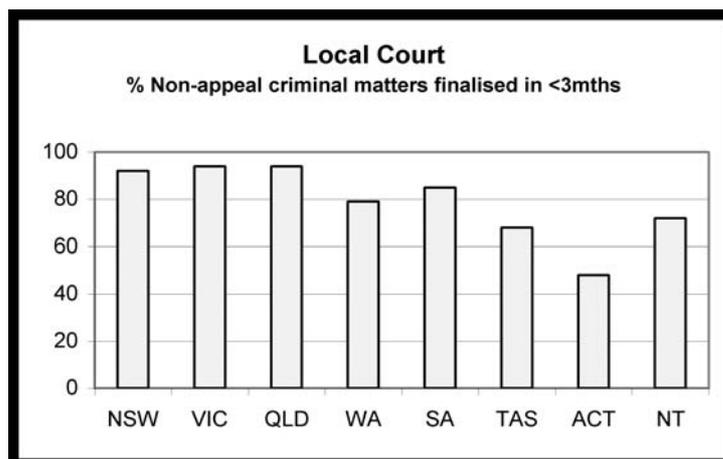
The NSW Bureau of Crime Statistics and Research, *Higher Courts Quarterly Report Series*, December Quarter, 1998

The comparative tables are set out hereunder:

The following figures show the comparison, based on the percentage of non-appeal criminal matters finalised⁴.



⁴Source: Report on Government Services 1999, vol 1 Table 7A.9



Supreme Court Cases Finalised 1997-1998⁵

	Civil	Criminal	Civil Appeal	Criminal Appeal
NSW	8,436 ⁶	92	926	538
VIC	3,085	103	315	374

During the late 1990's, there was a major move to deal with the backlogs that had accumulated in the higher courts.

- In the **Supreme Court**, several **acting judges** were appointed for varying periods to assist in the hearing of the backlog of cases.
- Following legislative changes in July 1997, many Supreme Court

⁵ Source: Report on Government Services 1999. Tables 7A.8 7A.10

⁶ After deducting 2,174 cases transferred to the District Court

Common Law Division cases became appropriate for hearing in the District Court (which was given increased jurisdiction), where waiting times were generally shorter. The entire Supreme Court Common Law Division caseload was screened for suitability for transfer to the District Court and a total of **3 199** cases were **transferred** to the District Court. This reduced estimated waiting times, from completing case management to hearing, by 6 – 13 months for remaining Common Law Division cases.

- The Supreme Court in 1998/99 **increased its rostered sittings** in the Criminal jurisdiction by about 64%, to 315 sitting weeks.
- In the **District court**, the Government provided special funding for the implementation of an **Acting Judge Scheme**. The scheme was run in conjunction with the initiative of **abandoning the fixed term judicial vacations**, so that the court could sit for more weeks of the year. In 1996/97, the court's judicial sitting capacity was increased by **310 weeks** and, in 1997/98, by about **490 weeks**. This was equivalent to the workload of around 12 extra judges.
- The District court in 1998/99 increased its rostered sittings in the criminal jurisdiction by 12%, most markedly in country areas where an additional 61 weeks were scheduled (being an increase of 22% over 1997).

Although New South Wales implemented other measures to combat the delays in the criminal justice system, **appointing more acting judges** and **staggering judicial vacations** was regarded as fundamental for

this exercise.⁷

THE POSITION AT PRESENT:

The **local courts** sit from around 15 January to 15 December each year and do not close at any other time during the year.

The **District Court** has a variable timetable for both civil and criminal courts and both civil and criminal courts sit from 30 June to 25 June each year. Vacations are thus staggered. Country and region courts have different sittings according to the local needs.

Supreme Court:

The rules concerning vacations in the Supreme Court are set out in Part 1A, Rule 2(2) of the Supreme Court Rules:

"2 Vacations

- (1) *There shall be a fixed vacation and a variable vacation in each year.*
- (2) *The fixed vacation shall be a period of six weeks from the beginning of the Monday before the 24th of December.*
- (3) *The variable vacation shall be a period not exceeding four weeks regulated by the Chief Justice.*
- (4) *A hearing or trial shall not be held in the fixed vacation, unless the Court otherwise orders."*

The Court's judges each have an entitlement to, in total, **10 weeks** of leave per year.

Six of those weeks should fall within the period of the **fixed vacation**

⁷ The NSW Government Audit Report 1999/2000 Chapter 3 Point 3.2 and 3.3 - <http://www.audit.nsw.gov.au/perfaud-rep/Year-1999-2000/courtswait99/3measuresadopt.html>;
NSW Court Services: Annual Report 1997/98 Supporting the Administration of Justice – http://www.lawlink.nsw.gov.au/lawlink.nsf/pages/ar_court

unless the judge was rostered to sit during the fixed vacation as either a Vacation Judge or a Bail Judge, or unless the judge has been required to sit for some other reason during the fixed vacation. That time lost from the fixed vacation is given as compensatory leave later in the year.

The balance of **4 weeks** is the **variable vacation** and is taken outside the fixed vacation period.

Judicial officers also have an entitlement to **extended leave**.

Fixed vacation⁸

During the fixed vacation there are Vacation Judges rostered who are available to deal with urgent applications. Generally, at most times during the fixed vacation there are at least three Vacation Judges: one each from each of the Common Law Division, the Equity Division and the Court of Appeal.

Any Vacation Judge may be designated by the Chief Justice to handle any of the work concerning the Court of Criminal Appeal that arises during the fixed vacation. Criminal work can be handled by the Common Law Division Vacation Judge.

Generally, a judge rostered as a Vacation Judge will be rostered for a two-week period. A judge who has been rostered as a Vacation Judge will have that rostered time “reimbursed” as compensatory leave during the following year.

Bail applications lists continue as normal throughout the entire year, regardless of the fixed vacation period. The exception to the routine is usually confined to public holidays that fall during the fixed vacation, such

⁸ Subrules 2 and 4 describe the fixed vacation.

as Christmas Day, Boxing Day and New Year's Day. Bail applications are heard from a judge of the Common Law Division. Any judge who is rostered during the fixed vacation as the Bails Judge would also be "reimbursed" with compensatory leave during the following year.

Also note that the Court has a policy that once started, a trial should run to conclusion.⁹ In accordance with subrule 4, unless otherwise ordered, trials will generally not be listed at a time that might reasonably cause that trial to proceed during the fixed vacation period. However, if for example a trial listed in ordinary circumstances is not concluded by the start of the fixed vacation, the trial will proceed during the fixed vacation period until the accused is acquitted or found guilty.

Variable vacation¹⁰

The variable vacation is a separate vacation to the fixed vacation. It totals four weeks and can be taken at any time in the year, subject to the approval of the Chief Justice. It need not be taken as one block. The Chief Justice regulates the timing of this leave.

The variable vacation of the judges is staggered so that, as much as possible, a sufficient number of judges will be available during the law term for:

- one, or sometimes two, benches in the Court of Criminal Appeal each week
- two, or sometimes three, benches in Court of Appeal each week, criminal trials and civil hearings
- a Bail Judge

⁹ Judges from the Common Law Division are rostered to hear criminal trial work during nominated periods of the year. They do not hear any other case during the hearing of a criminal trial until the accused is acquitted or found guilty, even if the trial exceeds its estimated hearing time. After this the judge may be assigned to hear other cases until such time as the sentence can be prepared. The criminal trial work of the Supreme Court generally means that, for an accused found guilty, several weeks will elapse before pre-sentence reports and other necessary sentencing materials are available.

¹⁰ Subrule 3 refers to variable vacation.

- a Common Law Duty Judge
- an Equity Division duty Judge
- hearing listed criminal trials
- hearing listed civil cases

If sufficient permanent judges will not be available to meet these needs, the Chief Justice will consider assigning one or more Acting Judges. This situation can arise when, for example, cases over-run their estimated hearing time, there are fewer settlements than expected, or when permanent judges require judgment writing time or are ill.

One of the advantages of the New South Wales Supreme Court system is its flexibility which makes it beneficial for Judges, practitioners and the public alike.¹¹

Extended leave

Six months of extended leave is available to judges after 5 years of service. Thereafter, extended leave accrues at a rate of 1 month and 6 days for every completed year of service. For the purpose of calculating leave, periods of leave already taken are regarded as periods of service.

If part or all of the fixed vacation falls during a period of extended leave, this time will not be “reimbursed” at a later time but will be counted as part of that period of extended leave. Public holidays that fall within a period of extended leave are similarly not “reimbursed”.

¹¹ During September 1999, the Chief Justice of the NSW Supreme Court announced that 3 weeks of the variable vacation for the year 2000 were to be fixed for the period commencing Monday 11 September 2000 and concluding on Friday 29 September 2000. This vacation was fixed pursuant to Part 1A Rule 2(3) of the Supreme Court Rules 1970 in order to coincide with the Olympic Games. The arrangement also took into account the availability of police for court work during the period, the impact of transport congestion on prisoner transport, court personnel, witnesses, jurors, the legal profession and court reporters and accommodation difficulties for witnesses and litigants. During the vacation, duty judges and registrars were available to deal with urgent applications and registry services were maintained. Arrangements were made to ensure that there was no reduction in the courts’ sitting time.

Judgment-writing time

The Common Law Division judges are each allocated one week during the year that is designated as judgment-writing time. Judgments are written throughout the year, as time out of court arises, and also after hours and on weekends. Judgments are expected to be completed within six months after the conclusion of the hearing. Judgment-writing therefore cannot be routinely deferred until the allocated judgment-writing week although that week does offer some catch-up time. A judge may negotiate with the Chief Judge at Common Law to be relieved of his or her rostered duties for some additional judgment-writing time during the year, if this is necessary.

If a matter that arises during a trial must be dealt with before the trial can continue, the judge might need to take a short time off the bench to research or consider that matter. The judge will give his or her decision so that the trial may proceed but often the reasons for the decision will be reserved and given after the conclusion of the trial.

VICTORIA, QUEENSLAND AND WEST AUSTRALIA

The court structures in **Victoria, Queensland** and **Western Australia** are similar to that of New South Wales except that the district court in Victoria is referred to as a county court and a local court is referred to as a magistrates court in Queensland and Victoria.¹²

¹² The **Supreme Court** is the superior court of Victoria, Queensland and Western Australia divided into the Court of Appeal and the Trial Division. The types of criminal cases heard and determined by the trial division include:

- all cases of treason, murder, attempted murder and other major criminal matters such as armed robbery and serious drug cases
- some appeals and reviews of inferior courts and tribunals
- various other cases such as applications for bail

The **County Court** of Victoria has jurisdiction to hear all indictable offences except treason, murder and certain other murder related offences [s. 36A *County Country Court Act 1958*]. Subject to the power of the Supreme Court to order a transfer of a matter from the Supreme Court to the County court the director of Public Prosecutions does the initial decision where to present a person for trial in a county or supreme court [Section 353 Crimes Act]. In practice the majority of offences are heard in the county court. The South Australia

The **Victoria Supreme Court** has 3 fixed vacations: 6 weeks in summer (starting the week before Christmas), 2 weeks in winter and 4 days at Easter (following Easter Monday).¹³

Queensland has a population of 3.6 million, and growing rapidly. It is overwhelming English-speaking and hence is relatively homogenous. The State is roughly triangular in shape, about 2 500 kms long X 1 300 kms at its widest, with the capital Brisbane illogically placed within 100 kms of the southern border, which greatly increases the problem and cost of servicing non-metropolitan areas. However, some evidence and some appeal hearings are now being taken electronically.

The **Queensland Supreme Court** has 24 Judges [including 5 Court of Appeal Judges]; about 35 District Court Judges and 75 magistrates. The latter have civil jurisdiction up to \$50 000 and a criminal jurisdiction extending up to 2 years imprisonment. District Court civil jurisdiction is presently from \$50 001 to \$250 000. District Courts try all indictable crimes except murder, manslaughter, kidnapping and drug dealing. Both District and Supreme Court judges sit with juries in criminal matters but rarely in civil matters.

The original scheme of the court calendar was that Supreme and District Court judges sat **throughout the year** except for six weeks, from before Christmas to the end of January, and two weeks at mid-year¹⁴, with four

district court was established in 1969 to take some of the pressure off the supreme court and it was not constituted by its own Act of Parliament until 1991.

¹³ Victoria Legal Almanac for 2003:

First Term	Monday 3 February to Wednesday 16 April
Second Term	Wednesday 23 April to Friday 4 July
Court Vacation	Monday 7 July to Friday 18 July
Third Term	Monday 21 July to Friday 3 October
Fourth Term	Monday 6 October to Friday 19 December

During the terms, judges will sit on circuit which may last for a full four weeks and in the Practice Court. Outside the terms, a number of Judges will sit in order to dispatch business. A Judge will sit daily in the Practice Court from Thursday 2 January 2003.

¹⁴ Supreme Court Trial Division Roster: July 2003 – January 2004
Winter break 30 June 2003 – 11 July 2003

weeks scattered across the year for judgment writing.

Except for about a **fortnight** at Christmas/New Year, most District Court judges now sit throughout the year taking their annual leave at times that suit them personally and the Court calendar. The Supreme Court is moving in the same direction. There is always at least one judge sitting in civil and one judge in crime in Brisbane during the January vacation. For some reason (probably flexibility in holiday-taking time) there is no difficulty in finding Supreme Court judges to sit during what were formerly the vacation times.

The Hon Mr Justice B H McPherson CBE¹⁵ says:

"The secret of success lies in calendaring. The system aims at having a minimum number of judges sitting at all times in criminal, civil, chambers, circuits and on appeals, as well as allowing for judgment writing and vacations at staggered times throughout the year. The old practice by which all judges sat in fixed term times, and none sat in vacations has now almost disappeared except for the month of January. The legal profession has shown some resistance to having that month off, and in that respect can always get their way by applying a form of passive resistance to working when they do not want to.

The ultimate limiting factor on sitting constantly through the year is the annual summer holiday period. All schools, universities and many businesses [including the building industry] close during January when most people go away to other places. In consequence, it is impracticable to try to assemble witnesses, parties, members of the legal profession and jurors for trials in that month of the year.

I can see no reason why courts in South Africa should not sit continuously and make use of court facilities during the whole year, provided there are sufficient numbers of judges and court staff, as well as prosecutors and defence counsel, to serve the system at all times. Trials by jury are probably more time-consuming than trials by judges and assessors, but with juries there is no delay in waiting for reserved judgments in criminal

matters, as I find there sometimes is in Solomon Islands, where I also sit periodically as an appeal judge, and where trial judges sit without juries or assessors.

In terms of use of facilities, you might derive some assistance from Singapore, which has a reputation for making the most of its buildings, etc. For example, school children there attend school either in the morning or in the afternoon session, so that schools are used twice over in the same day."

The **Supreme Court of Western Australia** has 2 fixed vacations namely 4 weeks in the summer and 2 weeks in the winter.¹⁶

The **Australian Capital Territory, the Northern Territory** and **Tasmania** have no intermediary structures between the local/magistrates courts and their supreme courts¹⁷.

Conclusion

In Australia, and especially in the state of New South Wales, it is evident that the courts are becoming increasingly mindful that judicial independence does not remove the need to manage public resources appropriately and to account for their performance.¹⁸

Largely through need, New South Wales has adopted a very progressive and even handed approach in respect of the reduction of court recesses or vacations in order to promote higher productivity.

Such an approach, where possible, should be replicated elsewhere.

¹⁶ Almanac for 2003:

Winter break 30 June – 13 July

Summer break 20 December – 13 January

¹⁷ An analysis of the court structure of these areas would be irrelevant. By way of example, the 2003 Criminal Annual Almanac for the Tasmanian Supreme Court reads as follows:

First Term 3 March 2003 – 20 March 2003

Second Term 26 May 2003 – 5 June 2003

Third Term 18 August 2003 – 28 August 2003

Fourth Term 27 October 2003 – 6 November 2003

¹⁸ *Vide* strategic plan of the district court of NSW.