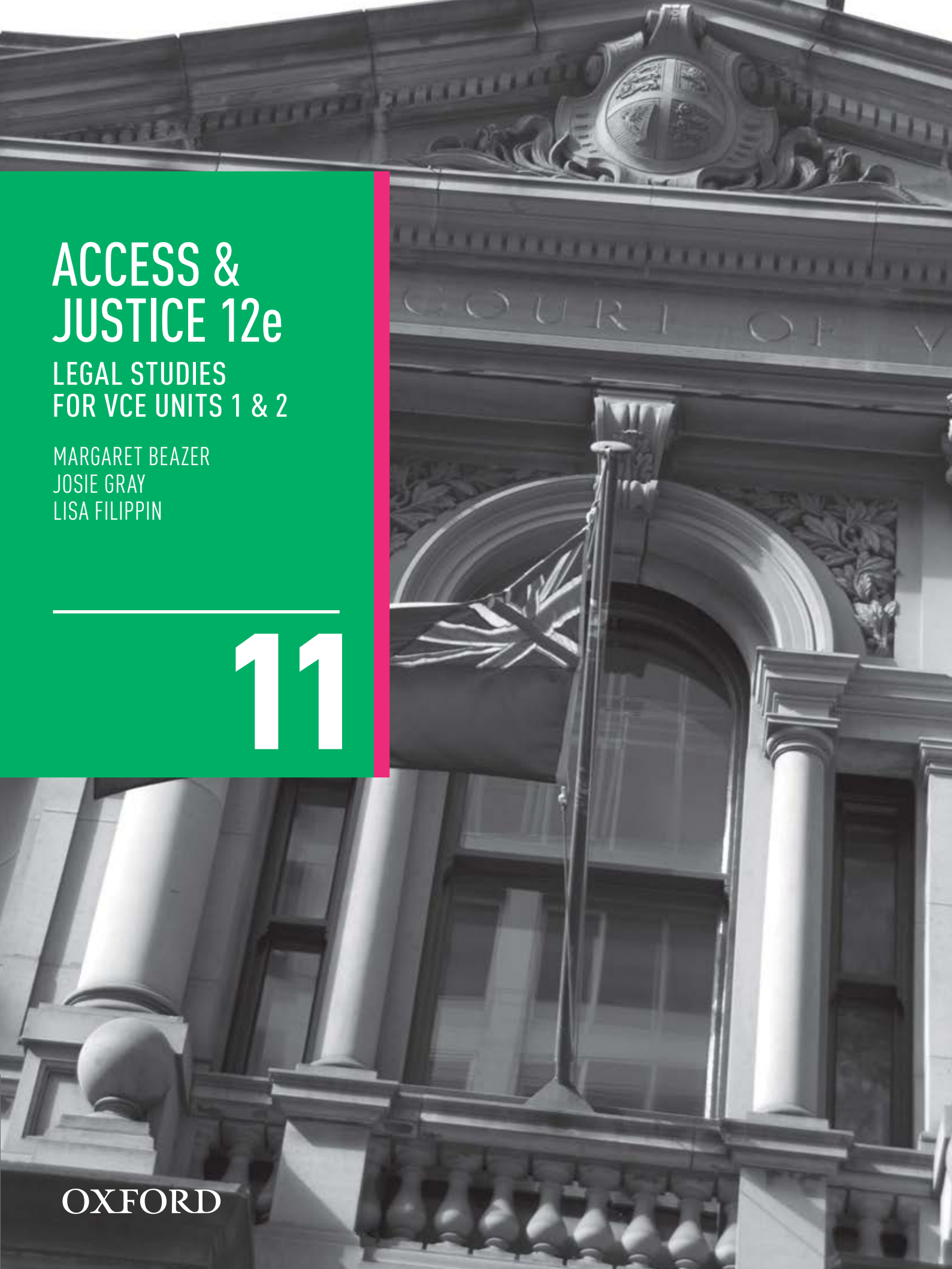




ACCESS & JUSTICE 12e

LEGAL STUDIES
FOR VCE UNITS 1 & 2

MARGARET BEAZER
JOSIE GRAY
LISA FILIPPIN

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ADVICE FOR TEACHERS

This Legal Studies book, *Access and Justice, Legal Studies for Units 1 and 2*, is directed towards the requirements of the Victorian Curriculum and Assessment Authority (VCAA) for Units 1 and 2 Legal Studies. The text covers the key knowledge and skills required to meet the Learning Outcomes specified in the Study Design, which operates from 2011 to the end of 2016.

Learning activities are included in each chapter and are designed to enable students to develop a clear understanding of Legal Studies. The learning activities are provided as a guide and a means of preparing students to meet the designated Learning Outcomes.

Students will achieve the set Learning Outcomes based on their performance in assessment tasks. Sample assessment tasks are provided and should form part of the regular teaching program. While it is only necessary for students to complete one assessment task per Learning Outcome, it is possible for one or more outcomes to be assessed across a number of assessment tasks. It is important that the assessment tasks selected for each Learning Outcome are of comparable scope and demand.

Explanations of the type of assessment tasks as shown in the Study Design for Units 1 and 2 are given below. These explanations reflect the overall requirements of the Study Design but have been developed independently of the VCAA. Teachers are advised to structure their course in accordance with the requirements in the VCE Study Design – Legal Studies Units 1 to 4.

ASSESSMENT

To achieve an award of satisfactory completion for a unit, a student must have demonstrated the achievement of the set of outcomes specified for that unit. This decision will be based on the teacher's assessment of the student's overall performance on a selection of assessment tasks that are designed to cover the relevant key knowledge and skills listed for each outcome. It is important that the tasks selected are of comparable scope and demand.

ASSESSMENT OF LEVELS OF ACHIEVEMENT

Procedures for the assessment of levels of achievement in Units 1 and 2 are a matter for each school to decide.

UNIT 1 SCHOOL-ASSESSED COURSEWORK

OUTCOME 1

On completion of this unit the student should be able to explain the need for effective law and describe the main sources and types of law in society.

OUTCOME 2

On completion of this unit the student should be able to explain the key principles and types of criminal law, apply the key principles to relevant cases, and discuss the impact of criminal activity on the individual and society.

OUTCOME 3

On completion of this unit the student should be able to describe the processes for the resolution of criminal cases and discuss the capacity of these processes to achieve justice.

UNIT 2 SCHOOL-ASSESSED COURSEWORK

OUTCOME 1

On completion of this unit the student should be able to explain the principles of civil law, law-making by courts and elements of torts, and apply these to relevant cases.

OUTCOME 2

On completion of this unit the student should be able to explain and evaluate the processes for the resolution of civil disputes.

OUTCOME 3

On completion of this unit the student should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

OUTCOME 4

On completion of this unit the student should be able to describe an Australian case illustrating rights issues and discuss the impact of the case on the legal system and the rights of individuals.

TYPES OF ASSESSMENT TASKS

The types of assessment tasks shown in the Study Design for Units 1 and 2 are listed below with an explanation of each. These explanations are developed independently of VCAA, but are in line with the overall requirements of the study as a whole.

This text covers the key knowledge and skills listed for each outcome in the Study Design. Learning activities have been developed in accordance with these outcomes. Assessment tasks must be a part of the regular teaching and learning program.

The student's performance on each outcome in Units 1 and 2 should be assessed using one or more of the following assessment tasks.

UNITS 1 AND 2

- structured assignment
- essay
- mock court or role play
- folio and report
- case study
- test
- report (written, visual, oral or multimedia)

DESCRIPTION OF ASSESSMENT TASKS FOR STUDENTS

STRUCTURED ASSIGNMENT

A structured assignment is an extended task requiring responses to a set of structured questions. The questions involve extended responses which cover the relevant key knowledge and key skills for the particular outcome.

ESSAY

An essay is a sustained passage of writing that covers a particular topic and analyses the relevant issues. See the guide to writing an essay below.

GUIDE TO WRITING AN ESSAY

- 1 Read the topic carefully.
- 2 Work out all the separate parts to the question and decide on a logical order for answering them.
- 3 Research your topic using:
 - this Legal Studies textbook
 - other books or texts from the local library or school library
 - newspapers, journals and magazine articles
 - reports of investigations from law reform bodies or parliamentary committees
 - the Internet.
- 4 Draw up a basic plan of your essay.
- 5 Write your essay paying attention to:
 - the topic of the essay (ensuring not to miss any parts of the topic)
 - your constructed plan
 - the qualities required in your essay such as analysis and assessment
 - the word limits that may have been set for the essay.
- 6 If discussion or analysis is required, for each paragraph you should:
 - make a point
 - refer the point to the question
 - explain the point
 - discuss the positive and negative aspects of the point made
 - use an example if appropriate.
- 7 Write a conclusion to the essay.
- 8 Make sure any quotes or statistics are footnoted.
- 9 If required, write a bibliography of all references used in researching and writing the essay.

MOCK COURT OR ROLE PLAY

A mock court involves the class undertaking an investigation into a case or writing a scenario of an imagined case. Roles are chosen for members of the class, questions are written and the courtroom procedures are replicated. A report is then written on the case.

A role play can consist of a courtroom drama or other situations such as mediation, where the parts are played by members of the class.

FOLIO AND REPORT

This task requires you to compile a folio of pieces of work and newspaper articles or articles found on the Internet that are relevant to the topic being studied. A report is written on each article.

CASE STUDY

A case study requires you to research a particular legal case or an element of the legal system, such as the ability to achieve a fair and unbiased hearing, and report on your findings. Your report may be a general report that links your findings with the relevant key knowledge and key skills for the particular outcome. Alternatively, your report may be in response to a set of questions relating to the case study.

TEST

A test is a set of questions that are relevant to the key knowledge and key skills of the particular outcome.

REPORT (WRITTEN, VISUAL, ORAL OR MULTIMEDIA)

This task requires you to produce a report of research undertaken. The research can involve the collection of information from electronic and hard-copy sources such as the Internet, television, radio programs and newspapers.

The report will focus on particular aspects of the course. The report can be written, depend on visual representation such as a poster, be given orally or use multimedia. A multimedia report can include the use of a set of overhead transparencies, a computer presentation using electronic software or a PowerPoint presentation and a combination of visual, oral and written presentation. Each presentation should be supported by a set of explanatory notes.

CHAPTER		FOLIO AND REPORT	STRUCTURED ASSIGNMENT	ESSAY	MOCK COURT OR ROLE PLAY	CASE STUDIES	TEST	REPORT WRITTEN, VISUAL, ORAL OR MULTIMEDIA
1	Law in society					*		*
2	Crime	*				*		
3	Criminal investigation and sanctions	*		*		*		*
4	The courtroom			*	*	*		*
5	Civil law	*	*			*		*
6	Civil law in action	*				*		*
7	A question of rights					*		
8	Contract law		*					*
9	Family law		*		*			*
10	Consumers and the law		*					
11	Workplace laws		*					*
12	Wills and inheritance	*	*					*
13	Sports and the law		*					
14	Tenants and the law		*					*
15	Environmental law		*					*

PRACTICE EXAM QUESTIONS

Practice exam questions are provided throughout the book. These are a very useful means of preparing you for your end-of-year examination and for Year 12.

SUGGESTED TIME ALLOCATION

UNIT 1	AREA OF STUDY		SUGGESTED TIME ALLOCATION
Criminal law in action	1	Law in society	10 hours
	2	Criminal law	24 hours
	3	The criminal courtroom	16 hours
UNIT 2	AREA OF STUDY		SUGGESTED TIME ALLOCATION
Issues in civil law	1	Civil law	11 hours
	2	The civil law in action	15 hours
	3	The law in focus	14 hours
	4	A question of rights	10 hours

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UNIT

1

CRIMINAL LAW IN ACTION



CHAPTER 1

LAW IN SOCIETY

OUTCOME

On completion of this unit you should be able to explain the need for effective laws, and describe the main sources and types of law in society.

KEY KNOWLEDGE

This chapter is designed to help you to understand the key knowledge of:

- the difference between legal and non-legal rules
- the need for laws
- characteristics of an effective law
- the distinction between criminal and civil law
- an overview of the role and characteristics of parliament and subordinate authorities in law-making.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- classify rules as either legal or non-legal
- consider the effectiveness of selected laws
- identify legal problems that might be addressed by criminal or civil law
- describe the role of parliament and subordinate authorities in law-making.

KEY LEGAL TERMINOLOGY

bicameral Two houses of parliament – at a federal level, the House of Representatives and the Senate; in Victoria, the Legislative Assembly and the Legislative Council.

Bill A proposed law.

concurrent powers Law-making powers that are shared by the Commonwealth Parliament and the state parliaments. Under S109 of the Constitution, if there is a conflict then Commonwealth law prevails.

delegated legislation Laws made by subordinate authorities.

enabling Act An Act giving subordinate authorities the power to make laws.

exclusive powers Law-making powers of the Commonwealth Parliament that can only be exercised by the Commonwealth.

executive council A body made up of the governor-general (governor at a state level) and senior ministers. Its task is to pass delegated legislation in areas where an enabling Act has given power to the executive council to make regulations.

law A legal rule.

legislation Acts of parliament.

residual powers Law-making powers left with the states at the time of federation.

statute An Act of parliament.

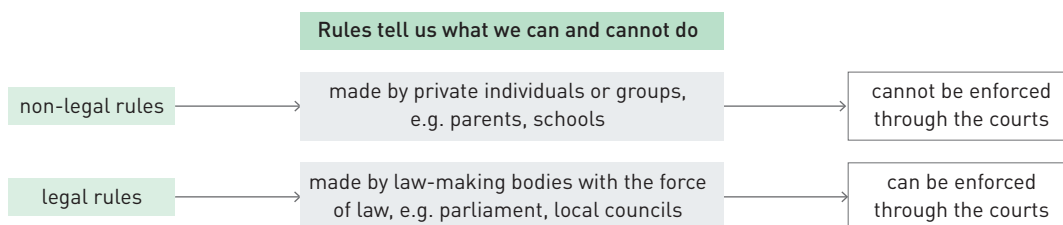
sue Start civil proceedings against another person.

THE DIFFERENCES BETWEEN LEGAL AND NON-LEGAL RULES

In any society, primitive or complex, it is necessary to have rules that govern family, social, political and economic life to provide some form of social order.

Rules tell us what we can and cannot do or what we can expect in dealing with others. Imagine playing in a tennis game or tournament without rules. Would you know what to do or expect? Would you be treated without discrimination? What might happen if you argued with your opponent during the game? Rules help to resolve the conflicts that are inevitable when people live or interact in groups.

Throughout our lives we are bound by rules. Some of these rules are **legal rules** (also known as **laws**), for example traffic laws. Legal rules are made by parliament and are enforceable by the courts. There are also **non-legal rules**, for example school rules and rules of games. Non-legal rules are made by private individuals or groups in society, such as parents and schools, and are not enforceable by the courts.



All rules tell us what we can do and what we cannot do, but the **consequences** may be different. A legal rule is enforceable through the courts, whereas a non-legal rule is enforceable by the people who make the rule. If you break a school rule, you will be punished by the school. If you steal something from a shop you can be punished through the courts, because stealing is breaking a legal rule.



Figure 1.1 Studying in a library – there are many rules relating to behaviour in a library.

LEARNING ACTIVITY 1.1

Legal and non-legal rules

- 1 Look at the photograph of studying in a library.
 - a Make a list of all the rules you can think of in your school library.
 - b Are these rules legal or non-legal rules?
 - c Who will enforce the rules if they are broken?
 - d What is the likely consequence of any of the rules being broken?
- 2 Draw up a list showing:
 - five legal rules
 - five non-legal rules
 - three expectations of society (customs or etiquette) that are not rules.
- 3 Look at the photograph of the two bike riders.
 - a What law is being broken in this situation?
 - b Is this a legal or non-legal rule?
 - c Who do you think would be responsible for making this rule?
 - d What is the likely consequence of breaking this rule?
- 4 Read the case study 'Joe's story' and answer the questions.
 - a Make a list of the legal rules and the non-legal rules mentioned in Joe's story.
 - b Explain what the likely consequence of breaking each rule would be and why you think it is a legal or non-legal rule.
 - c Choose one legal rule and explain why you think it would have general acceptance in the community.
 - d Identify two examples of the law protecting the rights of members of the community.



Figure 1.2 Breaking a law – wearing a bike helmet is compulsory under the law in Victoria.

CASE
STUDY

Joe's story

Joe, a footballer aged 19, lives in Kew with his parents. He works during the day as a bank teller. His hours of work are 9 am to 5 pm, with one hour for lunch. The manager of his branch is very particular about punctuality. Joe plays football on Saturday afternoons for Hawthorn and is an up-and-coming star. He has an arrangement with his parents that he pays \$60 per week for board. He has to vacuum the whole house once a week and do his own washing.

Joe's parents, Noel and Megan, have lived in Kew for many years. Recently they have been greatly disturbed by Stephen and Heather and their daughter Gail, who have moved in next door. They enjoy very loud music until late at night. The loud noise was seriously affecting Noel and Megan's ability to sleep at night. They had tried to discuss the matter with Stephen and Heather but had no success.

During the discussion they noticed that Heather was very nervous and appeared very badly bruised. They had heard serious arguments on numerous occasions and were concerned that Stephen was hitting Heather. Stephen had a violent temper. Gail, who was 14 years old, was often in trouble for coming home later than the expected time of 10 pm.

On the first Saturday in May, Joe set off for the football ground. He was running late but he was careful not to exceed the speed limit of 50 kilometres per hour in a built-up area. He took the short cut around the back of the football ground, which meant he had to turn into a 'no entry' lane. The football club had been trying to change the 'no entry' status of the lane. The football club had gathered 4000 names on a petition.

When Joe finally arrived at the ground he felt agitated, but once the whistle blew, he quickly got into the game.

Gail and her mother and father went to the football ground to watch the game. During the first half, Gail said she was hungry and went in search of something to eat. She had forgotten to bring any money so, when no-one was looking, she took two Mars bars from the front of the counter. When she went back to her parents she told them that she had bought the Mars bars.

During the second half of the game, Joe was penalised for holding another player round the neck. The match continued without incident until towards the end of the game when Joe was reported for tripping the same player, who later tried to kick him. The two players then started to wrestle with each other, but were separated by the umpire. During the game, Joe kicked four goals, but the first one was not allowed because another player had touched it on the line.

When Stephen, Heather and Gail returned to their car, they found that two of their hub caps had been taken. Stephen was very upset.

THE NEED FOR LAWS

Every society has both legal and non-legal rules to regulate behaviour. The main aim of the law is to **protect our society and keep it functioning**. The law aims to protect individual rights and stop behaviour that will ultimately affect the peace and good order of society.

Without laws our society would be in chaos. Laws are needed to provide **guidelines of acceptable behaviour and prevent conflict**.

In all societies conflicts are inevitable. The law must therefore **outline how disputes will be resolved**. In Australia and many other countries, people are able to take their disputes to court and argue their cases before an impartial person in the hope of resolving any disputes that arise in a peaceful way. The penalties or compensation awarded in these cases serve as a deterrent. They help to prevent future conflict, as people are aware of the consequences that will apply if they engage in unacceptable behaviour.



Figure 1.3 Traffic chaos in India

LEARNING ACTIVITY 1.2

The need for laws

- 1 Explain why we need laws. Refer to the photo of traffic chaos in India to illustrate your answer. Is there one rule that is being followed here? Explain.
- 2 Do the quick quiz. Your teacher may ask you to compare your results with classmates. Read the following statements and then decide whether you agree or disagree with each one.
 - a If there were no rules in our society, then society would still function as it does now. AGREE/DISAGREE
 - b If there were no rules in society, then most people would live without fear or threat to their personal safety. AGREE/DISAGREE
 - c If there were no rules in society, then most people's possessions would be safe. AGREE/DISAGREE
 - d If there were no rules in society, then people would still be able to sort out their conflicts. AGREE/DISAGREE
 - e The human race is basically 'good' by nature, so there is no need for rules in our society. AGREE/DISAGREE
 - f If there were no rules in society, then humans would use their animal instincts to survive. AGREE/DISAGREE
 - g If there were no rules in society, then I could do whatever I wanted. AGREE/DISAGREE
 - h If there were no rules in society, then I would be fearful most of the time. AGREE/DISAGREE
 - i If there were no rules in society, then there would be no way I would go to school or do any work. AGREE/DISAGREE
 - j If there were no rules in society, then we would live in chaos. AGREE/DISAGREE
- 3 **Working in groups**, decide what you and your friends would do if there were no rules at your school. Read the situation in 'No rules' and answer the questions. Brainstorm your ideas and write a paragraph describing:
 - a how you would react and how would you survive in this environment
 - b how other people might behave
 - c how new leader/s would be selected, if any.

NO RULES

You are at school and an enormous explosion destroys the science wing. This explosion has a weird after-effect. A blanket of fumes and clouds covers the school and all people over 20 years of age suddenly die. When the fumes clear, you find that the explosion somehow created an immovable dome around the school and the surrounding two square kilometres.

You (and the other children) are trapped inside. You quickly realise that there is no-one of authority inside the dome to enforce the school rules. The resources within the dome are limited to whatever shelter, food and equipment was available in the school and the surrounding two square kilometres before the explosion occurred. The dome is impenetrable and yet it can regenerate a viable atmosphere.

- 4 Working in groups**, draft a set of guidelines for acceptable behaviour expected at a school social, then answer the following questions.
- Why might these guidelines be needed?
 - How will the guidelines be enforced?
 - Discuss at least three other rules that would be needed in the situation described above for the society that had been created to survive.

CHARACTERISTICS OF AN EFFECTIVE LAW

For society to function properly, laws must be effective. Criminal law must be able to protect individuals in society and punish those people who offend against society. To be effective, laws must meet the following criteria.

- **known to the public** – For a law to be enforceable, the public must know about it. If people do not know about a new law, they will not be able to follow it. It is the responsibility of individuals to find out what the law is on a particular matter, but the law-makers also need to keep the public informed of any new laws that are passed. For example, there are road signs to tell us what the road laws are.

Major changes in the law are usually reported in the media, and many are debated in the media before the change takes place. An example of this is the law allowing a registered medical practitioner to perform an abortion on a woman who is not more than 24 weeks pregnant. This change in the law was comprehensively debated in the media before the change in the law took place. This debate both informs the law-makers of public opinion about a proposed change in the law, and informs the public of a change in the law that is about to take place.

- **acceptable to the community** – If a law is not in line with community values, then people may be inclined to disregard the law. For example, prior to the law allowing 24-hour shopping seven days a week in Victoria, many stores opened illegally because consumers and store owners wanted extended shopping hours even though the law prohibited it. People had decided that restricted shopping hours were no longer acceptable to them. On the other hand, people accept the law that makes wearing seatbelts compulsory because they can see the value of wearing seatbelts.
- **able to be enforced** – An effective law must be enforceable. That is, if people break the law, they must be able to be caught and brought to justice. If this does not happen, people may be less inclined to follow the law. In an effort to reduce the road toll, police have rigorously enforced road traffic laws in Victoria. Traffic enforcement strategies such as random breath testing and drug testing, the use of speed and red-light cameras and heavy penalties for infringements deter most drivers from breaking the law.

- **stable** – In order to be effective, it is also necessary that the law, in general, remains stable. If the law were changing constantly, no-one would be certain what the law was and there would be chaos.
- **able to be changed** – Because values in the community change over time, and there are advances in new technology, there is a constant need to change the law. For example, the widespread use of computers has required new laws relating to computers being used to steal another person's identity for illegal gain.

Characteristics of an effective law

known to the public road signs tell us what speed we can drive at 	acceptable to the community drivers accept the compulsory seatbelts law 	stable it has always been against the law to steal 
able to be enforced the police are able to enforce speed laws 	able to be changed new laws have been needed to combat identity theft 	

LEARNING ACTIVITY 1.3

The characteristics of an effective law

- 1 Why do you think a new law needs to be acceptable to the community? Explain, giving an example of a law that is acceptable to the community.
- 2 Why is it necessary for a law to be stable, but able to be changed?
- 3 How do people find out what the law is?
- 4 Why do laws need to be enforceable?
- 5 It is now unlawful to smoke in a car when one of the passengers is less than 18 years old. Do you think this law will be easy to enforce? Discuss.
- 6 Do you think a law that made it compulsory to wear helmets while driving a car would be an effective law? Discuss, considering the characteristics of an effective law.

7 Investigation

Investigate the Victorian Parliament website at www.parliament.vic.gov.au to find a law that has been passed this year. Go to 'Legislation & Bills', click on 'All Acts by Year – Victorian Statute Book' and choose the current year or the previous year. Open up an Act of parliament and go to the purpose of the Act. Choose one that could affect you, such as the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic.). Prepare a report or PowerPoint presentation showing the purpose of the Act and how useful you think this Act will be.

8 Research – fact or fiction?

Look at the Victorian 'laws' below. Determine whether or not you believe this is in fact a law or whether it is fiction. Once you have done this, do some basic research on the web to determine whether it is in fact a law. Check out the *Summary Offences Act 1966* (Vic.) on the Victorian Parliament website (Legislation & Bills, Current Acts – Victorian Law Today). Discuss this with your class.

- a It is illegal to eat cats and dogs.
- b It is illegal to sing an obscene song, tune or ballad within earshot of someone.
- c If you meet up with a pirate, it is illegal to trade with them.
- d If you fly kites or play a game in public which annoys another person, you could be fined.
- e It is an offence to drive a dog or goat harnessed or attached to a vehicle in a public place.
- f When walking on a footpath, you must walk on the left side.
- g It is illegal to slaughter or skin an animal on a public road.

DIFFERENT TYPES OF LAWS

There are many different laws in Australia. Classifying or grouping these laws into categories makes it easier to find the law related to a particular topic and to understand any changes to the law.

Laws can be classified according to:

- the **types of actions** that have taken place and the **outcome required** when a law has been broken; for example:
 - criminal law
 - civil law
- the source of the law; for example:
 - laws made by parliament – Acts of parliament
 - laws made by subordinate authorities – bodies given the right to make laws by parliament such as local councils
 - laws made by courts – the reasons for decisions reached in court when hearing a dispute that are followed in the future.

DISTINCTION BETWEEN CRIMINAL LAW AND CIVIL LAW

Criminal law

Criminal law protects the community by keeping the peace. It relates to acts or omissions against society (for example, criminal offences include murder, theft and assault). When a criminal law is broken, the police (on behalf of the community) take the alleged offender to court. **The main aims of criminal law are to apprehend, prosecute and punish people who have broken the law and to deter others from breaking the law.** The punishment could be minor, such as a small fine, or could be more serious, such as imprisonment.

The prosecution of a person who is thought to have broken the law is generally carried out by the state on behalf of society.

Examples of criminal law	Words commonly used in criminal cases
- crimes against person – assault, rape, manslaughter, murder - crimes against property – theft, property damage, robbery, deception - crimes against morality – prostitution, illegal use of drugs - crimes against the legal system – perjury, contempt of court - crimes against the state – treason	prosecution, the Crown, the state (the party bringing the case on behalf of the state) accused, the offender (the person who has been charged with an offence) suspect (the person who is suspected of having committed a crime) guilty/not guilty charge – when the police formally allege that a person has committed a crime sentence – the punishment handed out to the guilty offender conviction – when an offender has been found guilty, the court records a conviction (the guilty verdict), although in some instances a court decides not to record a conviction so the offender does not have a criminal record

CASE STUDY

Boy found guilty in bullying case

A 17-year-old schoolboy from a rural high school was charged with assault and recklessly causing injury. The victim was a 13-year-old schoolgirl from the same school. She alleged that she was subjected daily to physical bullying and verbal taunts for over six months. The victim stated that the harassment, which was witnessed by fellow students, caused her to become fearful of walking around the school.

The Mildura Magistrates' Court found the boy guilty of the charge of recklessly causing injury. He was convicted and fined \$200. The maximum penalty for this offence is five years' imprisonment. The assault charge was withdrawn.

Civil law

Civil law protects individual rights (for example, family law, property law, tort law, contract law). It relates to disputes between two parties (civil actions). The parties to a dispute can be private individuals, companies or governments. In a civil case, the person whose rights have been infringed sues (brings a civil action against) the other person for the damage done and asks the court to order the defendant to rectify the situation or pay compensation. For example, individuals can sue the state government because of negligence towards them by a government instrumentality, or a local government authority could sue an individual for rates owed to it.

The main aim of civil law is to return the person whose rights have been infringed to their original position. This is done through **civil remedies** (the outcome of a successful civil case). The most common civil remedy is compensation for loss or damages.

Examples of civil law	Words commonly used in civil cases
- tort law – negligence, trespass, nuisance, defamation - family law – marriage, divorce, adoption, de facto relationships - industrial and workplace laws – occupational health and safety, working conditions, work contracts, workplace agreements, union disputes - consumer law – tenancy agreements, sale of goods, advertising laws - property law – wills, planning laws, real estate purchases	plaintiff – the person bringing the case defendant – the person defending the case sue – make application in court in a civil matter compensation – a civil remedy damages – a civil remedy civil wrong – a tort defamation – a civil law, under which a person can claim their reputation has been damaged negligence (although there can also be criminal negligence) – a civil law, under which a person can claim that they have been injured as a result of someone acting negligently towards them

Shopkeeper sued

The case between Brightland Shop Pty Ltd (defendant) and Jim Jones (plaintiff) was heard in the Magistrates' Court. While shopping, Jones slipped and fell on some oil spilt in Brightland Shop. He broke his leg and was off work for six weeks.

He sued Brightland Shop for negligence. He maintained that the oil should have been cleaned up as soon as it was spilt. If this had been done he would not have slipped. He claimed compensation for his pain and suffering and for his loss of earnings. He was awarded \$8000 in compensation.

CASE STUDY

Consequences of criminal or civil cases

When deciding if a case is civil or criminal, you should look at the **consequences** and the **intention** of the case. Does the case seek to punish the offender? Does the case seek a civil remedy such as compensation (damages) or an injunction? (An injunction is a court order either restraining someone from doing something or compelling someone to do something.) The words used in a case can help you when deciding if a matter or issue relates to civil or criminal law.

Some incidents can result in both civil and criminal cases. A person can be found guilty of a crime and punished under criminal law. The same person can then be ordered to pay compensation to their victim in a separate civil action. For example, assault can result in a criminal action, which would seek to punish the offenders, and a civil action, where the person assaulted would be seeking a civil remedy (compensation) for assault (trespass to the person).

In some criminal cases, the punishment of an offender can include a compensation order, which orders an offender to pay compensation to a victim who suffered injury, loss or damage to property as a result of the crime.

LEARNING ACTIVITY 1.4

Distinction between criminal and civil law

- 1 What is the main difference between criminal and civil cases?
- 2 Look back at the case study 'Boy found guilty in bullying case'. Is this a criminal or a civil case? Pick out the elements that tell you what sort of case it is.
- 3 Look at the case study 'Shopkeeper sued'. Is this a criminal or a civil case? Pick out the elements that tell you what sort of case it is.
- 4 Read the case studies 'Shoplifter in court' and 'Blinded woman awarded \$1 million'. Decide which case study refers to a criminal case and which case study refers to a civil case. Give reasons for your decision. Make a list of the words that indicate whether the case is criminal or civil for each case.

Shoplifter in court

A 19-year-old shoplifter pleaded guilty in the Melbourne Magistrates' Court to 372 offences involving goods worth more than \$11 700.

The prosecutor, Senior Constable Beard, said that the offender committed the offences over nine months. He said that she went into stores and placed items into a bag without paying for them. She would then go to the appropriate counter and ask to return the goods, giving false reasons. She would either get a cash refund, or goods in exchange.

CASE STUDY

She was caught leaving a store with goods she had not paid for. She was also identified from an address she had left for a refund cheque to be sent.

The charges included 132 counts of theft from department stores, 115 counts of obtaining property by deception and six counts of possessing an article with the intention to steal.

The deputy chief magistrate, Mr Bryan Clothier, remanded her in custody for sentencing.

CASE STUDY

Blinded woman awarded \$1 million

While a Melbourne woman (the plaintiff) was dancing at a prominent bar in Melbourne, a stick protruding from an artificial pot plant pierced her eye. A crowd had formed on the dance floor and the plaintiff was pushed against the pot plant. She lost all sight in her eye and suffered serious psychological damage. She was a fine arts student and felt the injury would hamper her career. The plaintiff sued the bar for compensation for the injury she suffered.

A County Court jury found the incident was caused by the negligence or breach of duty of the defendant and awarded the woman \$1 million in compensation.

5 Read the case study 'Compensation paid for capsicum spray damage' and answer the questions.

- a Is this a civil or criminal case? If it is a civil case, why are the police mentioned?
- b Explain how some incidents can result in both a civil and a criminal case.

CASE STUDY

Compensation paid for capsicum spray damage

The Victorian Government was ordered to pay Jason Bannerman \$42635 in compensation for inappropriate use of a capsicum spray. Bannerman sued the Victorian Government following an altercation in Shepparton, when a police officer sprayed Bannerman in the face causing an eye injury. The court found that the police officer acted contrary to police guidelines. Bannerman could not see out of his eye for a month and was off work for five weeks.

Bannerman was awarded damages for the pain and suffering and loss of income.



Figure 1.4 Capsicum spray

- 6 Write a mock case study scenario of a situation that can be either a criminal case or a civil dispute. Make sure you use the appropriate terminology. Exchange your scenario with another member of the class and decide whether the scenario you have been given is criminal or civil.

- 7 Collect at least four articles on criminal or civil law from the newspapers or online. For each article, explain the circumstances of the case mentioned and explain why you think the article refers to civil or criminal law.
- 8 Develop a mind map about the law. In your mind map, make connections like the branches of a tree or a spider's web, all stemming from the word 'law'.

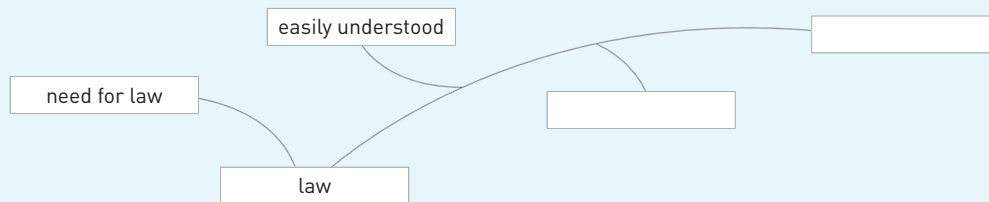


Figure 1.5 An example of the beginning of a mind map to be completed by students – your mind map does not need to follow this pattern.

HINT

In VCE Legal Studies you are expected to be able to refer to recent cases and changes in the law. You should start a file of articles referring to criminal or civil cases or changes in the law which you can use as examples in answers to questions.

HISTORY OF OUR POLITICAL AND LEGAL STRUCTURES

Australia's political and legal structures have been influenced by its historical links to the British Empire. Before the twentieth century the Commonwealth of Australia did not exist. Instead, there were six separate British colonies in Australia, each with a parliament able to make law. By the late 1800s, many colonists felt it was time to unite as one nation to strengthen Australia's defence and to simplify immigration, rail transport, tariffs and trade issues.

After a series of constitutional conventions (meetings), the **founding fathers** (the people responsible for initiating the federal system) proposed that the colonies become a federation of states within the Commonwealth of Australia.

A constitutional monarchy

The *Commonwealth of Australia Constitution Act* (UK) was passed in 1900. This document established the Commonwealth Parliament as a central law-making body. It lists the law-making powers of 'national' interest, which the colonies agreed to give to a Commonwealth Parliament, such as coining money and imposing taxes. The colonies, now known as states of Australia, retained the right to make law in all other areas in their own right or in a shared capacity.

Australia's system of government is a **constitutional monarchy** where the Commonwealth Parliament and the state parliaments operate within the rules established in their constitutions. A **constitution** is a legal document that outlines the basic rules of government and the law-making powers of the elected parliament (also known as the legislature).

The Queen of England (Queen Elizabeth II) is Australia's head of state. The Queen acts as a figurehead and her role is mainly ceremonial. She is represented by the governor-general at a federal level and the governor at a state level.

DID YOU KNOW?

The original Victorian Constitution was granted royal assent in 1855 and the Victorian Parliament was established in 1856. The Victorian Constitution is a legal document that provides the framework within which parliamentary democracy and responsible government operate in Victoria.

SOURCES OF LAW

There are nine parliaments in Australia. Each parliament is a supreme law-making body within its areas of power (jurisdiction).

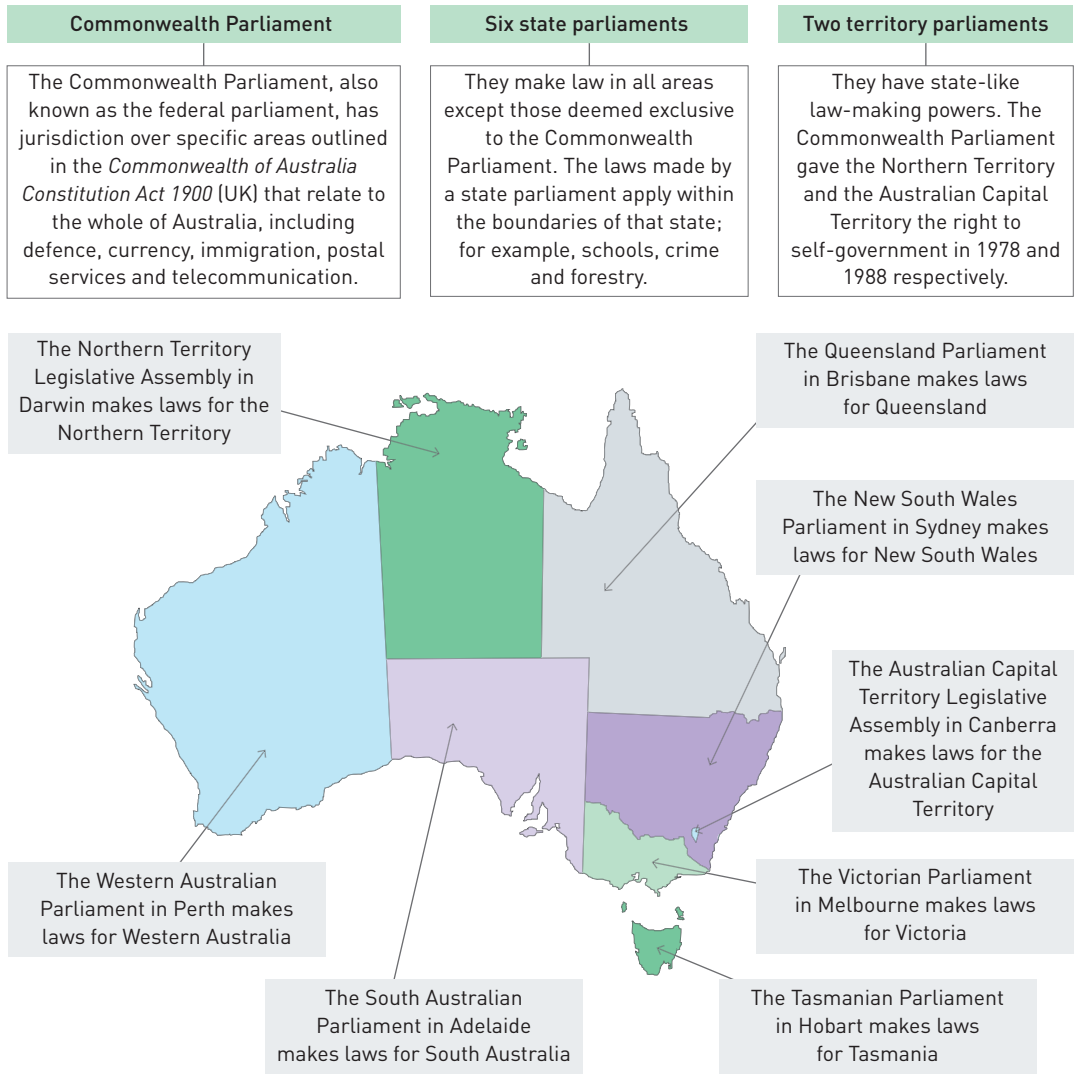


Figure 1.6 In addition to the eight parliaments listed in the diagram, we also have a federal parliament, based in Canberra.

In Australia the Commonwealth Parliament has exclusive power to make law in certain areas, such as coining money. The states and Commonwealth share power in some areas, such as laws on taxation, but other areas such as education are a state power. In shared areas, the Commonwealth Parliament’s law will override state law if there is a clash.

Laws made by parliament are called **Acts of parliament** and are also known as legislation or statute law.

The state parliaments have their own law-making powers and the Commonwealth Parliament is prohibited from making laws in these areas.

Parliaments do not have enough time to make laws on every issue that requires regulation. Australian parliaments can, therefore, pass an Act of parliament giving permission to other bodies to make minor laws on parliament's behalf. These bodies are known as **subordinate authorities** and laws made through subordinate authorities are known as **delegated legislation**. This includes laws made by local councils, which are usually referred to as local laws.

Courts can sometimes make laws when they make a legal ruling in a case. This ruling often clarifies existing law and is known as a **precedent**. Precedents establish principles of law and are followed in the future by courts and individuals and form part of the law. Laws made through the courts are known as **common law**, judge-made law or case law. Parliament can pass legislation to override a precedent.

Three levels of law-making bodies

Australia has three levels of law-making bodies (sometimes referred to as 'the three levels of government', although governments do not make law – this is done by parliament).

The **Commonwealth Parliament** is elected to pass laws on issues of national interest. The Commonwealth Government is responsible for deciding which proposed laws should be put before the Commonwealth Parliament, although any member of parliament can initiate a private member's Bill.

State and territory parliaments pass laws for the governing of the state or territory. Under the Australian Constitution, the state and territory governments are responsible for everything not listed as a federal responsibility, although some law-making powers are shared with the Commonwealth Parliament.

Each state and territory parliament has also established a number of **local councils** to address minor issues in different areas within the state or territory. These local councils are either shire or municipal councils. Their powers are defined by an Act of state or territory parliament. Local councils are responsible for passing by-laws relating to issues such as local roads, building regulations and rubbish collection.

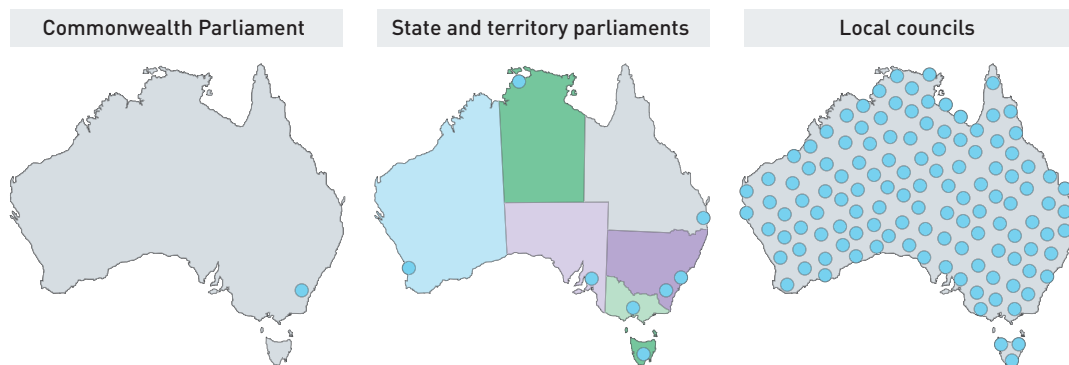


Figure 1.7 Three levels of law-making bodies in Australia

LEARNING ACTIVITY 1.5

Sources of law

1 What were the founding fathers responsible for?

2 Investigation

Using the Internet or a reference book, find out the names of three of the founding fathers.

3 What is a constitution?

4 Why is Australia known as a constitutional monarchy?

- 5 Explain the significance of the *Commonwealth of Australia Constitution Act 1900* (UK).
- 6 Why do you think there are nine parliaments in Australia?
- 7 What is a law made by parliament called?
- 8 Why do parliaments delegate some of their law-making powers?
- 9 What is common law?
- 10 Identify the three levels of law-making bodies in Australia. Explain their areas of responsibility.
- 11 Read the extract from the *Tobacco Amendment Act 2013* (Vic.) and answer the questions.
 - a What is occurring in society that makes this law necessary?
 - b How is this change in the law trying to solve the problem?
 - c Which body passed this law?
 - d Is this law statute law or common law? Explain.

EXTRACT

Tobacco Amendment Act 2013

No. 66 of 2013

Assented to 6 November 2013

The Parliament of Victoria enacts:

PART 1 – PRELIMINARY

1 Purpose

The purpose of this Act is to amend the *Tobacco Act 1987* –

- (a) to prohibit smoking in certain public outdoor areas; and
- (b) to restrict further the promotion and display of tobacco products; and
- (c) to make it an offence to threaten, assault or intimidate an inspector who is exercising a power under Part 3A of that Act; and
- (d) to make other miscellaneous amendments.

Source: *Tobacco Amendment Act 2013* (Vic.)



Figure 1.8 Smoking in an outdoor area

- 12 Read the following information about the law relating to graffiti prevention and answer the questions.
 - a Briefly explain the law relating to graffiti prevention.
 - b Whose rights are protected under these laws?
 - c Who will enforce these laws?
 - d Do you think these laws reflect social values? Explain.

GRAFFITI PREVENTION

In an attempt to take destructive and commonly used spray paint implements out of the wrong hands, the Victorian Parliament has passed laws that make it unlawful to possess a graffiti implement with the intention of using it to mark illegal or offensive graffiti.

It is illegal to sell spray paint to a person who is under 18 (unless the paint is needed for employment), or to advertise spray paint in a publication or on the Internet in a way that could promote or incite the creation of graffiti.

Convicted graffiti vandals can be fined over \$26 000 or be imprisoned for up to two years.

The laws aim to make it easier for police and Protective Service Officers to apprehend and prosecute graffiti vandals. Previously it was difficult to charge graffiti vandals unless they were caught in the act.

The role and characteristics of parliament

Australia's parliamentary system (at the state and federal levels) is modelled on the **British Westminster system**. This system relies on the government of the day having the support of the majority of the members of the lower house of parliament in order to govern. The government is responsible to the parliament.

The role of parliament is to pass laws for the good government of the country or state.

Most Australian parliaments are **bicameral** with two separate houses or chambers. The exceptions are the Queensland Parliament and the parliaments of the territories, which only have one house. The upper house in the Queensland Parliament was abolished in 1922.

Parliament

Parliament consists of the Queen, an upper house and a lower house. In Australia, the Queen is represented by the **governor-general** at a federal level and the **governor** at a state level.

Table 1.1 The structure of parliament

	COMMONWEALTH PARLIAMENT	VICTORIAN PARLIAMENT
Queen's representative	governor-general	governor
Upper house	Senate	Legislative Council
Lower house	House of Representatives	Legislative Assembly

Houses of parliament consist of elected members or representatives known as **parliamentarians**. Parliamentarians hold seats in one of the houses and are elected by the people in a particular geographical area (**electorate**) as their local **member of parliament**.

Most parliamentarians belong to a **political party**. Political parties are made up of people who have a common belief in values, ideas, future directions and political objectives. Those parliamentarians who do not belong to a political party are known as **independents**.

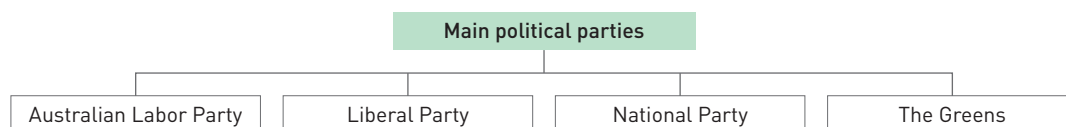




Figure 1.9
Prime Minister Tony Abbott

At an election, each political party tries to get as many of its members as possible elected to parliament. Sometimes political parties form a **coalition** of one or more parties, which contest an election together. In Australia, the Liberal Party and the National Party often agree on policies and form a coalition at a federal level.

Government

The political party (or coalition) with the majority of members elected to seats in the lower house wins the election and forms government. The **government** consists of the members of the political party that has the majority of members in the lower house. The government decides what laws should be put to the parliament, but does not pass laws. The government is responsible to the parliament as all new laws need to be passed by parliament to be valid and enforceable.

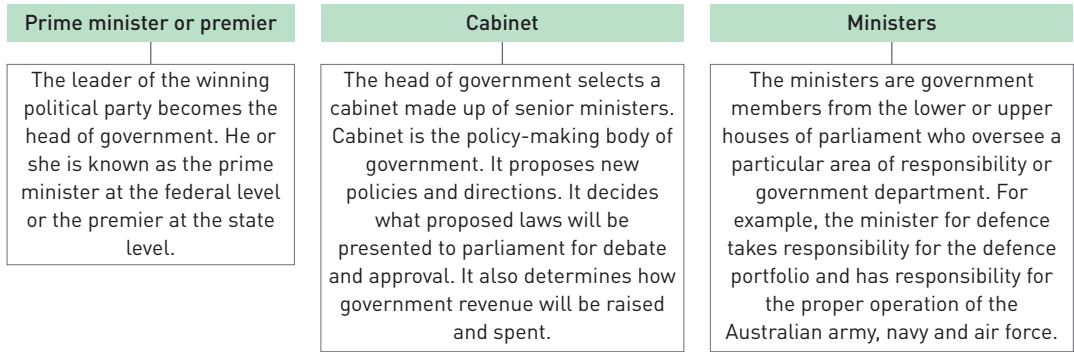
The **prime minister** is the leader of the Commonwealth Parliament. The **premier** is the leader of the state government. The leader of the government chooses ministers who are responsible for different areas of government such as education. The **cabinet** is made up of the prime minister (or the premier at a state level) and senior ministers and decides what proposed laws should be put to parliament.

All parliamentarians are responsible to the people through regular elections. Parliamentarians may be cautious when deciding which laws to support as they depend on the votes of the people in their electorate for re-election.

Following the 2013 general federal election, the Coalition, comprising the Liberal Party and National Party, won government and Tony Abbott became the prime minister.

The opposition

The next largest political party forms the opposition. The **opposition** questions the government about policy matters. The Australian Labor Party formed the opposition after the 2013 federal election.



DID YOU KNOW?

A minister's area of responsibility is known as a portfolio.

LEARNING ACTIVITY 1.6

The role and characteristics of parliament

- 1 What does the Westminster system rely on?
- 2 What is a bicameral system of parliament?
- 3 Are all parliaments in Australia bicameral? Explain.
- 4 What is the difference between parliament and government?
- 5 What does the cabinet do?

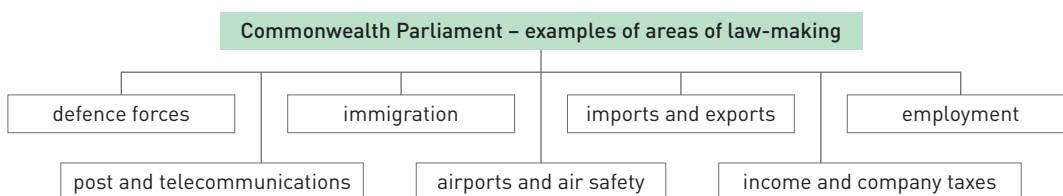
- 6 Who makes up this body?
- 7 What is the role of the governor-general?
- 8 **Internet investigation**
 - a List the major political parties in Australia.
 - b Which political party is in government and which political party is in opposition at the federal level and in Victoria?
 - c What is the name of the prime minister?
 - d What is the name of the premier of Victoria?
 - e What is the name of the governor-general?
 - f What is the name of the governor?

Commonwealth Parliament

The structure of the Commonwealth Parliament is the Queen's representative (the **governor-general**) and two houses, the lower house being the **House of Representatives** and the upper house being the **Senate**. The Commonwealth Parliament has been given power to make laws under the *Commonwealth of Australia Constitution Act 1900* (UK), referred to as the Constitution. This is an Act that was passed in the United Kingdom. It establishes the Commonwealth Parliament and sets out the law-making powers of the Commonwealth Parliament.



Figure 1.10 An Australian defence force soldier – defence is a Commonwealth area of law-making.



House of Representatives

The role of the House of Representatives is to represent the people, introduce and pass proposed laws (Bills), review Bills passed by the Senate and form the government. The government consists of all the elected members of the political party that has the **majority** of members in the lower house (the House of Representatives).

Sometimes neither of the major political parties has a majority of members elected to the House of Representatives. In this case, government is formed by the party that can promise the support of the most independent members and members of minor parties, so they can guarantee the passing of important Bills such as supply Bills (paying wages and so on). A parliament where there is no political

party holding a majority of seats is called a **hung parliament**. The parliament elected in 2010 was the first federal hung parliament since 1940. Following this election the Australian Labor Party (ALP) formed alliances with one Australian Greens party member and three independents. With the promise of their support, the ALP was able to form government.

In 2013, the Liberal–National Coalition won a clear majority of seats in the House of Representatives (90 seats) and were able to form the government. The ALP won 55 seats.



Figure 1.11
The House of
Representatives, the
green house

All the members of the House of Representatives, including the government members, opposition members and any independents that may hold a seat, are elected for a period of approximately **three years**. Elections may be held sooner at the discretion of the prime minister.

At the federal level each state is divided into geographical areas known as **electoral divisions**. Each division has approximately the same number of electors. The voters in each division elect their representative, who takes a seat in the House of Representatives. There are **150 members** of the House of Representatives.

The number of electoral divisions in each Australian state depends on its population. This means that the greater the population the more representation a state will have in the House of Representatives. One proviso is that no Australian state will have **less than five representatives** in the House of Representatives.

Some electorates are much larger in geographical size because they are more sparsely populated. The largest federal electorate in area is Durack in Western Australia, which covers nearly 1.6 million square kilometres, stretching from Kununurra in the north to Geraldton in the south.

DID YOU KNOW?

The House of Representatives is sometimes called the people's house or the house of government. It is decorated in green. This is a tradition adopted from the United Kingdom.



USEFUL WEBSITES

Commonwealth Parliament www.aph.gov.au

Australian Electoral Commission www.aec.gov.au

The Senate

The founding fathers were concerned about the possibility of the more populated states having too much say in the running of the country. It was therefore decided that the states would be equally represented in the Senate to avoid this domination by some states.



Figure 1.12
The Senate in session,
the red house

The Senate consists of 76 senators. Each state elects **12 senators** and each territory elects **two**. All senators are elected for **six years**. A half Senate election is held every three years where only half the senators stand for election. After the election, those senators who are newly elected will serve a six-year term while those who did not go to the polls will face a new election in three years' time.

The Senate was seen by the founding fathers to have two roles: house of review and states' house. It is the role of the Senate to introduce and pass proposed laws (bills) and review Bills passed by the House of Representatives. It is referred to as a **house of review** because most Bills are introduced into the lower house and reviewed in the upper house. It is also seen as a **states' house** because each state has equal representation. It is sometimes referred to as the red house because of the red decorations.

As senators are likely to vote on party lines (according to the demands of their party), the Senate's role as house of review and states' house is diminished.

LEARNING ACTIVITY 1.7

Commonwealth Parliament

- 1 How many seats are there in the House of Representatives?
- 2 How long do members of the House of Representatives hold their seat for?
- 3 What is a hung parliament?
- 4 How often are elections held for the Senate? What is the term of a senator?
- 5 Which house of parliament is usually known as the 'house of review' at a federal level?
- 6 Is the title of house of review appropriate? Discuss.

7 Internet investigation

Visit the Australian Electoral Commission (AEC) website. Use the Electorates search section on this site to find:

- a the name of the electorate for your local area in the House of Representatives
- b the name of the person who has been elected to represent your electorate.

8 Internet investigation

Visit the Commonwealth Parliament website. Use the Senators & Members section on this site to find:

- a the political party of your representative in the House of Representatives
- b the names of at least two senators from Victoria
- c the names of the ministers who hold the following portfolios in federal cabinet:
 - i health
 - ii foreign affairs
 - iii employment
 - iv defence.

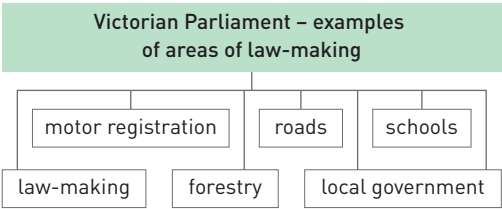
Visit the Australian Electoral Commission (AEC) website (Media centre) to find:

- d the number of Australians enrolled in the last federal election
 - e a summary of the number of members of the House of Representatives elected for each party and the number of independents
 - f a summary of the number of senators elected for each party and the number of independents.
- 9 Why do you think the Australian Labor Party was able to form government in 2010 following the federal election?

Victorian Parliament

The structure of the Victorian Parliament is the Queen’s representative (the **governor**) and two houses, the lower house being the **Legislative Assembly** and the upper house being the **Legislative Council**.

The Legislative Assembly is always decorated in green and the Legislative Council is always decorated in red. This tradition is inherited from the United Kingdom where the House of Commons is always decorated in green and the House of Lords is always decorated in red.



Legislative Assembly

The role of the Legislative Assembly is to introduce and pass Bills and to form government. The government consists of the members of the political party that has the majority of members in the lower house (the Legislative Assembly). The Legislative Assembly can also review Bills passed by the Legislative Council.

Each member of the Legislative Assembly (MLA) represents one electoral district and holds a seat in parliament for a **fixed term of four years**. An election is held on the last Saturday in November, which is four years after the previous election. There are 88 members of the Legislative Assembly.

Each electoral district has approximately the same population (about 37 000 electors). Because the geographical size of electorates varies according to the density of the population, city electorates tend to be smaller in area than the country electorates.

All the members of the party in government sit at one side of the house with the premier as leader of the government. The opposition (the other major party that did not receive enough votes to gain government) sits on the other side of the house with the leader of the opposition. The speaker of the house is the member of parliament who presides over the house and makes sure that the other members of the house follow the rules.



Figure 1.13
The Victorian
Legislative Assembly
in operation

USEFUL WEBSITES

Victorian Electoral Commission www.vec.vic.gov.au

Victorian Parliament www.parliament.vic.gov.au

Legislative Council

There are 40 members elected to the Legislative Council at each election. The role of the Legislative Council is to introduce Bills and review Bills passed by the Legislative Assembly. Bills passed by the Legislative Assembly can be rejected or amended by the Legislative Council.

Members of the Legislative Council hold their seats for **four years**. For upper house elections, the state of Victoria is divided into eight large regions. Five representatives are elected from each region; that is, 40 members in total. Within each region there are 11 electoral districts and over 400 000 voters.



Figure 1.14
The Legislative
Council in operation

LEARNING ACTIVITY 1.8

Victorian Parliament

- 1 How long is the term of a member of the Legislative Assembly?
- 2 How long is the term of a member of the Legislative Council?
- 3 Why is the Legislative Assembly decorated in green and the Legislative Council decorated in red?

4 Internet investigation

Visit the Victorian Electoral Commission (VEC) website and browse the My Government section to find the name of:

- a the lower house district for your school location
- b the upper house region for your school location.

5 Internet investigation

Visit the Victorian Parliament website and browse Members, Ministers to find:

- a the representative and their party for your school's lower house district
- b the representatives and their political parties for your school's upper house region
- c the names of the ministers who hold the following portfolios in the Victorian Government:
 - i multicultural affairs and citizenship
 - ii education
 - iii local government
 - iv police and emergency services
 - v attorney-general
 - vi arts.

Visit the Victorian Electoral Commission (VEC) website to find out:

- d the number of members of the Legislative Assembly elected in the last election, by their party, and the number of independents (if any)
- e the number of members of the Legislative Council elected in the last election, by their party, and the number of independents (if any).
- 6 Why do you think the Victorian Government was able to form government in 2014?

7 Internet investigation

Research the role of the attorney-general of Victoria. Write a short report.

- 8 Construct a poster or brochure outlining the structure of the Commonwealth Parliament and the Victorian Parliament.

INFLUENCING CHANGES IN THE LAW

Parliaments are elected by the people and should therefore make laws that reflect the needs of the people. The law should change when the need arises.

The need for a change in the law is usually highlighted when a **problem** in society becomes apparent and a change in the law is the best way of dealing with it. For example, after severe water shortages, the Victorian Parliament passed laws to introduce water restrictions to encourage the public to save water.

Parliament may become aware of the need for a change in the law in a variety of ways. For example, a pressure group, such as the Victorian Gay and Lesbian Rights Lobby, could try to pressure the government to initiate a change in the law to overcome an injustice that has become apparent, such as gay people being discriminated against and the desire for same-sex marriages.

Parliament may see that there is a need for a change in the law and request a parliamentary committee, such as the Victorian Law Reform Commission or the Victorian Law Reform Committee.

For people to succeed in influencing a change in the law, it is important that the media backs the suggested change, because media coverage means that more and more people become aware of the need for the change.

Individuals or groups can have a voice in influencing a change in the law. They can:

- **contact the media** by:
 - writing a letter or email to a newspaper
 - going on a talk-back show
 - taking part in an online action campaign; for example, by commenting on Twitter or Facebook, or sending an email to members of parliament
- **organise a petition** to parliament with as many signatures as possible; for example, a petition tabled in the Legislative Assembly on 12 December 2013:

Requesting that the Legislative Assembly urges the Victorian Government to request the *Abortion Law Reform Act 2008* (Vic.) be repealed and for it to be replaced with proper legal protection and support for children before birth and their mothers. 249 signatures

- **be involved in demonstrations.**

Creeping censorship

Jon Faine is to be congratulated on his column. The creeping censorship that is being put in place must be recognised for what it is and resisted before it is too late. There are very few independent national broadcasters left in the world and while not perfect, the ABC is vital to a functioning democracy.

RUTH BOSCHEN, Balwyn

Figure 1.15

Example of a letter to the editor of *The Age*, 9 February 2014. This letter is part of an ongoing discussion about whether the Commonwealth Government should change the law in relation to the independence of the ABC.



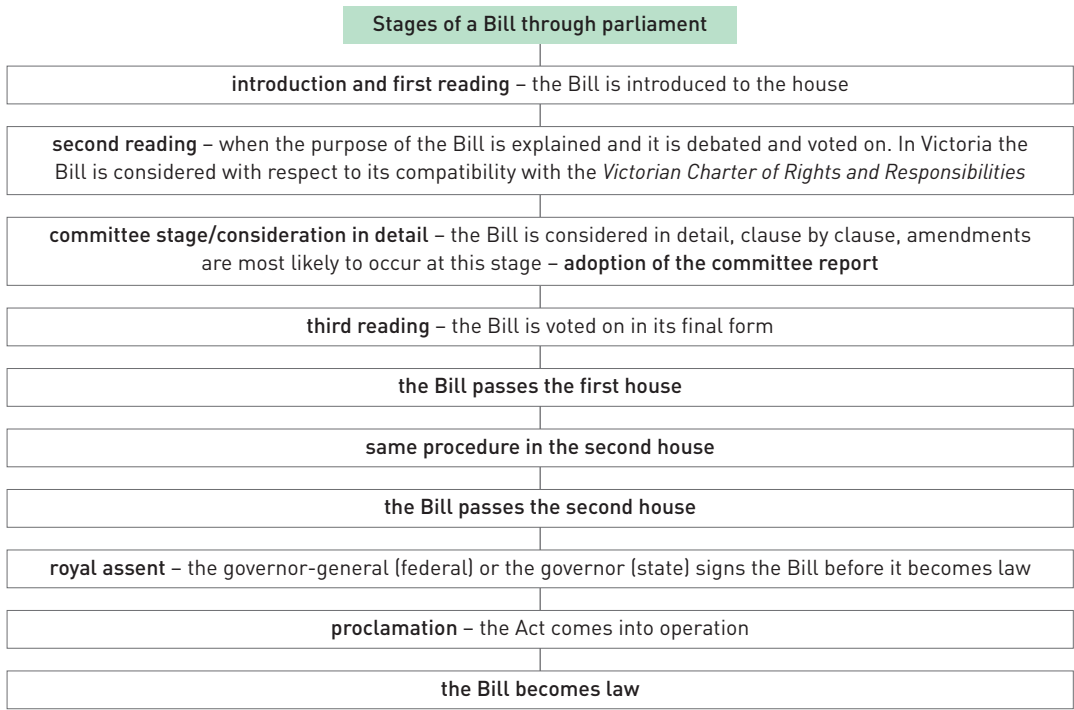
Figure 1.16

A demonstration of approximately 30 000 people trying to influence the Commonwealth Government to initiate changes in the law relating to climate change and to keep the carbon tax legislation.

LAW-MAKING THROUGH PARLIAMENT

The government decides what changes in the law to initiate. Parliament makes the laws. If the government of the day decides to initiate a change in the law, a **Bill** (proposed law) is drawn up and presented to parliament.

Before a Bill can become law it must pass through both houses of parliament; that is, receive a majority vote from the members of each house. Most Bills are introduced into the lower house first. Bills (other than Bills raising taxes or allocating funds) can, however, be introduced into the upper house and then proceed to the lower house.



LEARNING ACTIVITY 1.9

Process of changing the law through parliament

- 1 What usually occurs to make people think there is a need for a change in the law?
- 2 Identify three methods of influencing changes in the law by parliament. Give an example of one method of trying to influence a change in the law.
- 3 What is a Bill?
- 4 What is royal assent? When does a Bill gain royal assent?
- 5 When does an Act come into operation?
- 6 Read the case study 'New laws for puppy farms' and answer the questions.
 - a What problem was discovered with the law?
 - b What did people do to try to influence a change in the law?
 - c How successful were these actions? Explain.
 - d Look at the extract from the *Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Act 2011* (Vic.) and explain the main purpose of this Act.
 - e Explain the process of the passage of a Bill through parliament.

CASE
STUDY

New laws for puppy farms

It was recently discovered that some commercial dog-breeding facilities around Australia churn out massive numbers of puppies while keeping their breeding animals in terrible conditions. This led to a public outcry in November 2011, when thousands of animal lovers participated in rallies in Melbourne, Sydney and Adelaide to protest against these puppy farms.

The puppies bred in these horrific conditions are supplied to pet shops and sold on Internet sites. Often they have health conditions such as hip dysplasia, chronic skin conditions, overshot jaws and heart murmurs. They are also likely to have developed behavioural problems.

One dog that brought the plight of these animals to the attention of the public was Oscar. He was rescued from a puppy farm in Victoria. A pressure group, Animals Australia, has been fighting against cruelty to animals in Australia.

Following this massive community call for a change in the law, the Victorian Government introduced the *Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Bill 2011* (Vic.) in October 2011. This Bill was passed by the Victorian Parliament in December 2011. The *Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Act 2011* (Vic.) provides more regulation over puppy farm activities and amends the *Prevention of Cruelty to Animals Act 1986* (Vic.) to increase penalties for cruelty to animals.

In February 2012, a spokesperson for the RSPCA said animal cruelty laws are still insufficient. More needs to be done as animals continue to be kept in very poor conditions.

EXTRACT

Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Act 2011

No. 75 of 2011

Assented to 13 December 2011

The Parliament of Victoria enacts:

PART 1 – PRELIMINARY

1 Purposes

The main purposes of this Act are –

(a) to amend the *Domestic Animals Act 1994* –

(i) to increase the penalties for various offences under the Act concerning non-compliant domestic animal businesses; and

...

(b) to amend the *Prevention of Cruelty to Animals Act 1986* to increase the penalties for cruelty and aggravated cruelty; and

...

Source: *Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Act 2011* (Vic.)

7 Read the article 'Sexting: Victoria makes it an offence to send explicit images without consent' and answer the questions.

- a** The Australian Federal Police have launched an anti-sexting video warning teenagers of the risk in sending provocative images from their mobile phones. Try to locate this video on the Internet and explain why you think a change in the law is needed.

- b** What will be illegal under these new laws?
- c** Which parliamentary committee has influenced this change in the law?
- d** If you wanted to try to influence the government to initiate a change in the law in relation to sexting, what method might you have used? Give reasons.
- e** Investigate to see if this change in the law has been implemented. Go to the Victorian Parliament website, click on Legislation & Bills and look under All Acts by Year. Select 2014. See if you can find if an Act in relation to sexting was passed by the Victorian Parliament. If so, what is the name of this Act?

EXTRACT

Sexting: Victoria makes it an offence to send explicit images without consent

Oliver Milman, *The Guardian*, 12 December 2013

New laws will crack down on jilted lovers who maliciously send intimate pictures of their former partners to others.

Victoria is to become the first state to modify its laws on 'sexting', making it an offence to distribute explicit images without consent but also exempting young people from child pornography offences.

The Victorian government said it has accepted 11 of 14 recommendations from a parliamentary inquiry into sexting, a practice that involves the distribution of explicit images via mobile phones.

There will be a new law to create an offence for 'non-consensual sexting', which most commonly occurs when jilted lovers maliciously send intimate pictures of their former partners to others.

Coalition MP Clem Newton-Brown, chair of the Victorian Law Reform Committee, said that the unauthorised sending of explicit pictures can have 'very dire consequences for victims who are embarrassed and humiliated'.

However, the government said it would ensure that children who distribute images are not charged with child pornography offences.

The parliamentary inquiry found that there was a legal 'loophole' that has seen, in rare cases, children placed on the sex offenders register.

'As the law stands, children can be charged with creating child pornography if they sext, which I don't think anyone anticipated when the child pornography laws were drafted,' Newton-

Brown told Guardian Australia. 'The real harm is done when images are sent to third parties.'

Under the new legislation, sexting between minors with no more than two years' age difference, or adults, won't be illegal. Forwarding the pictures to a third party will be illegal, although the penalties for this offence are yet to be formalised.



Figure 1.17 Teenage boy using a mobile phone

'This new law will respond specifically to the issue of sexting to ensure that appropriate penalties apply to those who misuse this technology,' Robert Clark, Victoria's attorney-general, said.

'It will make it an offence to intentionally distribute, or threaten to distribute, an intimate image of another person or persons without their consent.

'This will continue to make clear that such behaviour is unacceptable and illegal, while not treating young people who distribute such images as child pornographers or rendering them liable to consequences such as being placed on the sex offenders register.'

Clark said the government would also do more to work with schools to educate children on the proper use of technology.

LAW-MAKING BY SUBORDINATE AUTHORITIES

The Commonwealth Parliament and state and territory parliaments do not have the time or expertise to pass all the laws necessary for the running of the country. They therefore give some of their law-making power to **subordinate authorities**, also known as **subordinate bodies** or **delegated bodies**. These authorities are experts in their field and are more accessible to members of the public. They are subordinate to the parliament that gave them the law-making power.

Parliament passes an **enabling Act** giving the subordinate authority power to make laws. The parliament can take away this authority by repealing the enabling Act. The subordinate authority cannot make laws outside the guidelines set out in the enabling Act. If it does, the laws made will be declared void (outside their power – *ultra vires*).

The rules and regulations made by subordinate authorities are checked by the parliament that gave them the law-making power. Laws made by subordinate authorities are called **subordinate legislation** or **delegated legislation**. The subordinate legislation made by local councils is referred to as **local laws**.

Other than local councils, subordinate authorities are not elected, but their activities are supervised by parliament to ensure that they do not go outside the power given. Laws made by local councils do not go through the same parliamentary checking process as other subordinate legislation, but there is a minister for local government who keeps a check on their activities.

Subordinate authorities can be:

- statutory authorities
- government departments
- executive council
- local councils.

Statutory authorities

Statutory authorities are bodies that are created by an Act of parliament to investigate and make regulations on a specific range of issues; for example, the Environment Protection Authority, which deals with waste disposal and environmental issues, gains its power from the *Environment Protection Act 1970* (Vic.).



Figure 1.18 Australia Post is a statutory authority created under the *Australian Postal Corporation Act 1989* (Cth). The governor-general may make regulations under this Act.

EXTRACT

Australian Postal Corporation Act 1989

Part 8 – Miscellaneous

102 Regulations

The governor-general may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act;

...

Source: *Australian Postal Corporation Act 1989* (Cth)

Government departments

The government decides on the general policies to be administered by government departments such as the Department of Human Services. Some of the responsibilities of this department include disability services, protecting vulnerable children, public housing, youth programs and working with women. Many regulations made by government departments need the approval of the executive council.

Executive council

At a state level, the executive council is made up of the state governor and relevant ministers and is known as the governor-in-council. At a federal level, the executive council is made up of the governor-general and relevant ministers and is known as the governor-general-in-council. Many Acts of parliament give the executive council the power to make regulations. The executive council makes many regulations on behalf of statutory authorities and government departments.

The *Graffiti Prevention Act 2007* (Vic.) creates graffiti-related offences and provides search and seizure powers for members of the police force. Under this Act the executive council (governor-in-council) can make regulations in relation to implements used in creating graffiti and the manner in which searches and seizures can be conducted. These regulations will be created by the appropriate government department and given approval by the executive council.

Local councils

Local councils make local laws for their local area; for example, laws that relate to garbage collection and local swimming pools. Each local area has different needs and local councils are more aware of the needs of the people in their local area. Local councils are also known as shire councils or municipal councils.

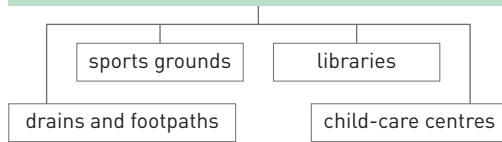
The Victorian Parliament, under the *Local Government Act 1989* (Vic.), gives 79 different local councils in Victoria the power to make laws.



USEFUL WEBSITE

Local Government Victoria www.localgovernment.vic.gov.au

Local councils – examples of areas of law-making



DID YOU KNOW?

Melbourne City Council said they regarded cigarette butts as their biggest single litter problem – over 76 per cent of all litter surveyed in the Melbourne central business district. The lord mayor said that more than 10500 cigarette butts were cleaned from the street every week day and that butts were a blight on the city's streetscape.

Figure 1.19 Local council responsibilities include libraries, swimming pools and recreational facilities at local parks.

LEARNING ACTIVITY 1.10

Law-making by subordinate authorities

- 1 What is an enabling Act?
- 2 Why do you think parliaments delegate some of their law-making powers to subordinate authorities?
- 3 What types of laws do local councils make?
- 4 What is Australia Post? How did it gain its right to make laws?

5 Investigation

You have been asked to provide some information about the local council in the area where you live.

- a What is the name of your local council? Check out the Department of Transport, Planning and Local Infrastructure (DTPLI) website. Look up Local Government.
 - b Explain your local council profile.
 - c What are some of the services offered by your local council?
- 6 Debate the question 'Who really has power in our society?' In your debate consider the power of:
- parliament, which makes laws that are enforceable through the courts
 - members of the public who vote at elections and people who take action to influence parliament to change the law

- subordinate authorities that are delegated power by parliament to make law
- the police who enforce the law
- the courts that apply the law to cases.

Make a list of the main points brought out during the debate.

7 Investigation of subordinate authority

Investigate online a subordinate authority, other than a local council, and prepare a report on its role and activities. Examples of subordinate authorities include the Environment Protection Authority, Dairy Food Safety Victoria, and the Victorian Curriculum and Assessment Authority.

PRACTICE EXAM QUESTIONS

- 1 What are the essential differences between legal and non-legal rules? Explain why we need laws. *(4 marks)*
- 2 Discuss the main differences between criminal and civil law. Give an example of each type of law. *(5 marks)*
- 3 Explain the characteristics of an effective law. *(6 marks)*
- 4 Explain the characteristics of the Commonwealth Parliament. In your explanation include:
 - a the structure of the Commonwealth Parliament
 - b the role of the Commonwealth Parliament
 - c the terms of office for the members of each house.*(4 marks)*
- 5 Why do parliaments delegate their law-making powers to subordinate authorities? Describe two types of subordinate authorities. *(6 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK CASE STUDY

Changes in the law

- 1 Describe the three main levels of law-making bodies in Australia. Name the law-making bodies that can make laws that affect you in the area of your school. *(3 marks)*
- 2 Explain the purpose of subordinate authorities. *(2 marks)*
- 3 Read the newspaper article 'How Georgia and her guinea pigs beat bunglers' and answer the questions.
 - a What law does Georgia want changed? *(1 mark)*
 - b What has Georgia done to try to influence a change in the law? *(1 mark)*
 - c Which law-making body is responsible for making this law? *(1 mark)*
 - d Explain the response to Georgia's actions. *(1 mark)*
 - e What actions do you think you could take to try to influence a change in the law? *(3 marks)*

How Georgia and her guinea pigs beat bunglers

Kimberley Seedy, *Herald Sun*, 7 February 2012

A little girl's love for her guinea pigs has triumphed over crazy council rules that would have forced her to choose between them.

The Yarra Ranges Council in Victoria had planned to limit residents to a maximum of two guinea pigs a household as part of a sweeping review of by-laws. But a determined plea from Georgia McAleer, 10, who was distraught at having to choose which of her guinea pigs to give up, forced a council reversal on the cruel plan.

She was so devastated at the thought of picking between her cute pets – mum Squeak and babies Bandit and Whitey – that she wrote to councillors begging them to reconsider.

Georgia, of Mt Evelyn, said she was very upset when she heard about the proposal. 'As soon as I heard about it, I wrote to them – exactly the same hour, actually,' she said.

'I felt that it was unfair that they were telling people how many pets they can have. It's not right. I think it's really stupid. They shouldn't stop people from having pets.'

The grade 5 student said she couldn't bear to live without her pets. Georgia's dad Anthony McAleer said the proposed restriction on guinea pigs was ridiculous. 'The last thing we want is to be living in a nanny state,' he said.

Georgia's plea has caused the council to take a step back. Council spokesman Troy Edwards assured Georgia her guinea pigs were safe and the council had no plans to take one away now or in the future.

He said the council understood the importance of domestic pets and encouraged more submissions on the by-law.

Cr Tim Heenan said councillors planned to get rid of all the 'trivial' sections of the proposed law, including the restriction on guinea pigs. 'I will not support any local law that is so trivial like that,' Cr Heenan said.



Figure 1.20 Georgia McAleer made an impassioned plea to the Yarra Ranges Council not to force her to choose between her beloved guinea pigs.

- 4 Read the case study 'One-punch killings' below and answer the questions.
- Why is this new law needed? What problem would this law be attempting to overcome? *(4 marks)*
 - Check out to see if a new law to provide tougher penalties for one-punch killings has been passed in Victoria. If it has, give the name of the Act. *(1 mark)*
 - Do you think a change in the law to bring in tougher penalties for one-punch killings would be effective? Explain. In your explanation refer to the characteristics of an effective law. *(10 marks)*

One-punch killings

Cameron Smith complained about a lump on the back of his head when he woke after going out the evening before. He had gone to a Pakenham fast-food shop with his brother. During the short journey, he was approached by a young man who punched him suddenly. He fell back and hit his head on the road. He was unconscious for 10 minutes.

Two days later, Cameron's life support was turned off and his organs were donated. His killer served just over a year in a juvenile detention centre. He was under the age of 18 and had consumed 15 vodka energy drinks before the attack. He had knocked another boy unconscious on the previous weekend.

Cameron's mother is calling for first aid to be taught in schools, alcoholic energy drinks to be banned and new laws that create tougher penalties for one-punch killings. Young people need to be aware that if they punch someone, they may end up in jail for 10 years.

5 Investigation

Investigate an example of individuals or groups trying to influence a change in the law. Explain what change in the law they are trying to influence and what method/s they have used to try to influence a change in the law. How successful do you think this method of trying to influence a change in the law might be? Explain. *(3 marks)*

(Total 30 marks)

ASSESSMENT TASK REPORT (WRITTEN, ORAL OR MULTIMEDIA)

The Victorian Parliament

Arrange a visit to the Victorian Parliament or organise a member of parliament to attend class to speak to you about the role of parliament. Write a report about:

- the shape, colour and appearance of both chambers of the house
- the need for changes in the law
- the role of parliament
- how laws are made
- the need for parliament.

Use a recent change in the law to illustrate some of the points made in your report. Your report can be written, oral or in multimedia.

(20 marks)



CHAPTER 2

CRIME

OUTCOME

On completion of this unit you should be able to explain the key principles and types of criminal law and apply the key principles to relevant cases, and discuss the impact of criminal activity on the individual and society.

KEY KNOWLEDGE

This chapter is designed to help you to understand the key knowledge of:

- the principles of criminal liability, including elements of a crime, the presumption of innocence, the burden and standard of proof, age of criminal responsibility and participants in crime
- crimes against the person and related defences
- crimes against property and related defences.

KEY SKILLS

You should demonstrate your ability to:

- define key terminology and use it appropriately
- explain the principles of criminal liability
- research and gather information about criminal cases, using print and electronic media
- apply legal principles to relevant criminal cases and issues.

KEY LEGAL TERMINOLOGY

assault Assault is defined in section 31 of the *Crimes Act 1958* (Vic.). It involves the direct or indirect application of force by a person to the body, clothing or equipment of another person, where the application of force is without lawful excuse and intentional or reckless, and results in bodily injury, pain, discomfort, damage, insult or deprivation of liberty. Under civil law, a person can also be sued for trespass to the person, which includes assault.

defensive homicide Where a person believes they were acting in self-defence but a court finds the beliefs or actions of the accused unreasonable.

homicide The killing of a person; murder, manslaughter, defensive homicide, infanticide and child homicide are unlawful homicides.

indictable offence More serious offences which can be heard before a judge and jury.

manslaughter A person can be charged with manslaughter (or found guilty of manslaughter) if he or she was criminally negligent, or killed someone while conducting a dangerous and unlawful activity.

strict liability crime A crime where there is no need to prove intention to commit the crime.

summary offence Minor offence heard in the Magistrates' Court.

THE NEED FOR CRIMINAL LAW

Criminal law is used to clarify the types of behaviour deemed criminal by society and the different types of crimes such as murder and theft. It also provides a range of punishments that fit the crimes. In this way people are deterred from committing a crime that would harm individuals and society as a whole. Society is protected and individuals can feel safe to walk the streets.

For society to keep functioning we need laws that clearly spell out what is acceptable behaviour and what is not. If there were no criminal law then individuals would not feel safe because there would be no guidelines of what is acceptable behaviour. There would be chaos. People could take someone's property and there would be no punishment.

DEFINITION OF A CRIME

A crime can be described as an act or omission that is against an existing law, harmful to an individual or society as a whole and punishable by law.

This is a very general definition, as what constitutes a crime may change over time and between different cultures. For example, a tourist couple in Dubai received a six-month jail term (suspended for three years) for French kissing in public. Public displays of sexuality are prohibited in the United Arab Emirates.

Against an existing law

For a crime to be committed, the act or omission must be against an existing law. For example, it is a crime to steal another person's property. Section 74(1) of the *Crimes Act 1958* (Vic.) states that a person guilty of theft is liable to level 5 imprisonment (10 years). Shop theft is treated differently and if the goods are valued at less than \$600, the guilty person would be liable for a fine.

An example of a criminal omission is a failure to inform the appropriate authorities of the birth of a dead child. Section 67 of the *Crimes Act 1958* (Vic.) states that it is an offence to conceal the birth of a dead child. A person concealing the birth of a dead child is liable for level 9 imprisonment (up to six months in prison).

Harmful to an individual or society

When a crime is committed there is usually a victim – someone who is harmed as a result of the crime. The harm may be physical, mental or financial. If a theft takes place, the person whose property has been stolen usually suffers financial loss.

Some crimes, however, can be seen as harming no-one other than the person committing the act. These crimes are known as **victimless crimes**. The use of drugs may not be harmful to anyone other than the person using the drugs. However, it is generally seen as harmful to society as a whole, because it goes against what most people believe is acceptable behaviour, and it can affect others in society.



Figure 2.1

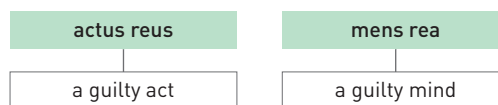
The personal use of drugs is referred to as a victimless crime, but can be harmful to society as a whole – police test drivers for drugs.

Punishable by law

Committing a crime is different from breaking a non-legal rule because a person who has committed a crime can be punished through the courts as a consequence of committing the crime.

Elements of a crime

Generally, for a crime to exist there must be a guilty act and a guilty mind.



Guilty act and guilty mind

It is a crime to steal someone's property. It would not, however, be a crime if a person forgot to return someone's property and there was no intention to keep it. In this instance there would be the **guilty act (actus reus)** of keeping someone's property, but the **guilty mind (mens rea)** would not exist because there was no intention to keep it.

In some instances a person cannot form the intention to commit a crime for some reason such as they are in a deep sleep when the crime is committed or they are mentally incapable.

Types of crimes

Crimes can be classified according to their seriousness.

- **Summary offences** are minor criminal offences that are heard in the Magistrates' Court.
- **Indictable offences** are more serious criminal offences that can be heard before a judge and jury.
- **Indictable offences heard summarily** are indictable offences that can be heard in the Magistrates' Court as if they were summary offences.

LEARNING ACTIVITY 2.1

Definition of a crime and elements of a crime

- 1 Why is criminal law needed? Discuss.
- 2 What is the definition of a crime? Do you think this definition is appropriate? Explain.
- 3 What is a victimless crime? Give an example of this type of crime.
- 4 What is the name given to someone who has been injured as a result of a crime?
- 5 Why do you think a criminal act must be punishable by law? Explain.
- 6 What is the meaning of:
 - a mens rea
 - b actus reus?
- 7 Read the case study 'Teenager accused of murdering homeless man' and answer the questions.
 - a Describe what occurred and what may have caused the teenager to kill the homeless man.
 - b Explain this crime in terms of the definition of a crime and the elements of a crime.
 - c Discuss who may be affected by this crime.
 - d What punishment do you think the teenager should receive? Give your reasons.

CASE STUDY

Teenager accused of murdering homeless man

A Melbourne teenager, who had completed Year 12 one year ago, has been accused of stabbing to death a homeless man, Wayne 'Mousey' Perry. Perry's friends said he was a kind and generous man. The accused had been a happy and privileged teenager who enjoyed larking around with friends. He had never been in police custody before this occasion.

Fairfax Media was told by the teenager's friends that his behaviour had changed over the last few months since he had started using drugs. He was using cannabis and had suicidal thoughts.

The teenager said he'd got a bike for his eighteenth birthday and he knew that the homeless man had stolen it. The Melbourne Magistrates' Court heard that the teenager had become mentally ill and was a drug user.

THE PRINCIPLES OF CRIMINAL LIABILITY

Burden of proof

In criminal proceedings the prosecution has the burden of proving that the accused is guilty (also known as the **onus of proof**). The accused is **presumed innocent until proven guilty**.

When a crime is committed, and a suspect has been found, prosecutions are carried out in an endeavour to achieve justice for the victim and society as a whole. The **director of public prosecutions** (DPP) is responsible for bringing prosecutions in the County Court, Supreme Court and High Court on behalf of the state of Victoria. The DPP is an independent statutory officer appointed by the governor-in-council to conduct criminal prosecutions on behalf of the state.

Prosecutions in the Magistrates' Court are mostly carried out by Victoria Police, although there are instances when prosecutions are carried out by Corrections Victoria, the Department of Primary Industry, local councils, VicRoads and the Victorian WorkCover Authority (WorkSafe).

Strict liability crimes

Some crimes are strict liability crimes. This means that there is no necessity to prove intention to commit the crime (a guilty mind) for a person to be found guilty. It is sufficient for the person to have committed the act which is against the law. Strict liability crimes include:

- traffic offences
- serving liquor to under-age persons.

STRICT LIABILITY CRIME OF ALLOWING A MINOR ON GAMBLING PREMISES

For the protection of minors, the *Gambling Legislation Amendment (Responsible Gambling and Other Measures) Act 2008* (Vic.) states that 'If a minor enters a casino, the casino operator is guilty of an offence and liable to a fine of not more than 120 penalty units'. **Penalty units** provide the monetary value of a fine. The value of a penalty unit in July 2013 was \$144.36.

Reversal of the onus of proof

In some instances the onus of proof is reversed and the accused has to prove that he or she did not commit the crime. For example, anyone carrying a knife or other controlled weapon without excuse in a police-designated public area, such as a train station, may have to prove that they did not intend to use the knife as a weapon.

Standard of proof

In criminal trials the prosecution must prove that the alleged offender is guilty of a crime **beyond reasonable doubt**. This is known as the standard of proof. If there is any reasonable doubt as to the guilt of the accused, then the verdict should be not guilty. It is not possible for a juror or magistrate to be absolutely certain because he or she was not there when the crime was committed, but they must be as sure as rationally possible. Reasonable in this instance is what the average person in the street would believe to be the case; that is, when the evidence is looked at in a logical and practical manner.

In the Magistrates' Court, a magistrate decides on the verdict. In the County Court and Supreme Court, a jury of 12 will make this decision and then the judge will sentence the offender if required.

The jury must first attempt to reach a **unanimous verdict**. If this is not possible, a **majority verdict** consisting of 11 out of 12 is acceptable (or 10 out of 11, if only 11 jurors remain) for criminal offences other than murder, treason, trafficking or cultivating a large commercial quantity of drugs or narcotic plants and Commonwealth offences (for which only a unanimous verdict will be accepted).

If a unanimous decision or majority verdict cannot be reached in a trial before a judge and jury, the jury is said to be a **hung jury**. If there is a hung jury, the accused is free to go, but the Office of Public Prosecutions (OPP) can decide at a later date to bring the accused to trial again.

burden of proof

prosecution

standard of proof

beyond reasonable doubt

Presumption of innocence

A person is presumed to be innocent until he or she is proved to be guilty. Everyone is entitled to be treated as innocent. The burden is placed on the prosecution to prove guilt and a person cannot be found guilty of a crime until there is sufficient evidence to prove that the person committed the crime beyond reasonable doubt.

This protects individuals from being wrongly arrested and treated as if they are guilty and is consistent with the rules of natural justice. Under the **rules of natural justice**, everyone is given a reasonable opportunity to put forward their case and be heard by an unbiased, independent decision-maker.

Age of criminal responsibility

It is presumed that a child under the age of 10 years cannot form the intention to commit a crime. A child less than 10 years cannot, therefore, be charged with committing a crime.

It is also assumed that a child between the ages of 10 and 14 is mentally incapable of committing a crime. This is known as the legal principle of **doli incapax**. This principle can be overturned if it can be shown that the child had a mischievous disposition and knowledge that he or she was doing wrong.

CASE STUDY

13-year-old boy charged with murder

Elliott Fletcher, 12, from St Patrick's College in Shorncliffe, was stabbed in the chest during a fight in the schoolyard before school began. He was rushed to the Royal Children's Hospital but died shortly after arrival.

A fellow student, aged 13, was charged with murder. He was denied bail.

Participants in crime

A person or offender who has been accused of a crime is referred to as the **accused**. The person proving the case on behalf of the state is the **prosecution**.

Under sections 323 and 324 of the *Crimes Act 1958* (Vic.) anyone who aids, abets, counsels or organises an indictable or a summary offence is to be treated as if he or she was the main offender (principal offender). It is an offence to:

- encourage a person to commit a crime
- assist a person committing a crime
- give advice to a person about committing a crime
- organise the commission of a crime
- knowingly conceal information about a crime.

Accessory to a crime

A person can be found guilty of the offence of being an accessory to a crime (provided the crime is one for which the sentence would be more than five years). An accessory to a crime is any person who knowingly obstructs the apprehension, prosecution, conviction or punishment of the main offender of a crime, even though they believe the person is guilty of the offence or some other serious criminal offence.

LEARNING ACTIVITY 2.2

Principles of criminal liability

- 1 Explain the terms 'burden of proof' and 'standard of proof'.
- 2 Explain strict liability crimes. Give an example.
- 3 What does the reversal of the onus of proof mean in relation to a crime? Give an example of a type of offence where the onus of proof is reversed.
- 4 What are the benefits of the presumption of innocence?
- 5 What should the verdict be if the jury have reasonable doubt about whether the accused committed the crime?
- 6 How old must a child be before he or she can be charged with a crime?
- 7 Read the case study '14-year-old boy found not guilty of murder' and answer the questions.
 - a Do you think Boy A could be found to be a participant to a crime, or an accessory to a crime? Give reasons.
 - b Why do you think Boy A was found not guilty?
 - c If Boy B was under 14 years old, do you think he could have been found guilty of the murder? Explain.

14-year-old boy found not guilty of murder

Two 14-year-old boys were accused of murdering a 63-year-old retired nurse. Boy B, who pleaded guilty, said in court that the two of them had talked about killing someone in the weeks before the crime. B claimed that, after A reneged on their plan, he said 'I'll do it' and A replied 'Yeah, OK'.

According to B, A stood and watched as B put the knife in the victim's stomach and stabbed her twice. B told jurors he had wanted to murder someone 'since Year 1'. Justice Peek asked jurors to 'consider A's actions "in context", remembering that he was 14 years old and had been threatened by B, whom he knew had a knife'.

Boy A was found not guilty.

CASE STUDY

8 You decide

Could the person in each of the situations below be charged with a crime? Give a short explanation for each situation.

- a Daniel, 13, encourages Jack, 10, to drop a large rock from a bridge that spans a freeway. The rock hits a car travelling on the freeway. It goes through the windscreen and hits the driver in the chest, killing him instantly.
- b Luke, 26, works as a mechanic. He regularly takes spare parts from his work and fits them to his car. He tells other workmates that he will return them or pay for them if his employer finds out.
- c Nick, 21, is sleepwalking. A gunshot wakes him. He is standing over his dead father. His mother screams 'Nick! Why did you do it?'
- d John goes out with a girl for a few weeks. After a date one night, they return to John's place and are about to have sex. His girlfriend asks him to wear a condom but he refuses. At that point she refuses to have sex but he continues despite her struggles and her protests.

- e Madeline owns a pub. The police come in one night and point out a number of under-age drinkers. She tells the police that the drinkers all look 18 and that she had no idea they were only 16 years of age.
 - f Jasmine, who is 32, drives through a red light. When the police pull her over she tells them that she did not mean to do it. She was daydreaming and it was not until she was halfway through the intersection that she realised the lights had changed to red.
 - g Josie, 20, is an epileptic. One day she has a violent fit at work. A fellow worker goes to her aid. While having the fit, Josie kicks the fellow worker.
- 9 What is the difference between an accessory to a crime and someone who aids and abets an offence?
- 10 For each of the following cases decide if the person (whose name is highlighted) is an accessory to a crime or is aiding or abetting a crime.
- a Joe and Mike walk into a service station and wave a blood-filled syringe at the attendant. They demand money from the till. John waits for them in the car. He has the engine running, ready for a speedy getaway. **Pete** knows nothing about the crime until his friends ask him to hide the money for them. He agrees and buries it in his backyard.
 - b Bill, 25, has a sexual relationship with Mandy, his 15-year-old girlfriend. The police go to Mandy's home to look for Bill. Mandy's brother **Oliver**, who is Bill's best friend, gives the couple money to flee the state and lies to police about their whereabouts.
 - c **Maxine** and Mary are bored. As a joke, Maxine gives Mary a list of phone numbers and tells her to make obscene phone calls to each of them. Mary makes the calls.
 - d **Bob** is 34. He is in charge of a shoplifting ring. He has a gang of 10 people who regularly steal for him. He also has a group of people who will sell the stolen goods to others. At no point does he steal or sell the goods himself.
- 11 Make up a scenario that covers each of the principles of criminal liability.



Figure 2.2
Shoplifting

CRIMES AGAINST THE PERSON AND RELATED DEFENCES

Offences against the person include murder, attempted murder, manslaughter, culpable driving, rape, assault and kidnapping.

Homicide

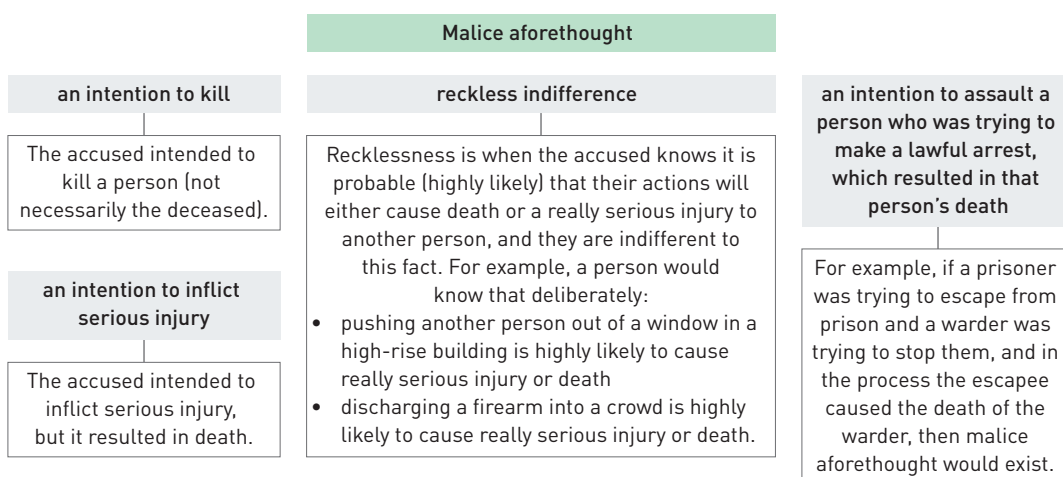
Homicide is the killing of a person. Murder, manslaughter, defensive homicide, infanticide and child homicide are unlawful homicides.

Murder

Murder is the unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (10 years old and over) and of sound mind. The maximum penalty for murder is imprisonment for life. In April 2014, Attorney-General Robert Clark suggested lifting this maximum sentence from 20 years to 25 years.

For a person to be found guilty of murder the prosecution must prove the following elements of murder.

- **The killing was unlawful.** This distinguishes murder from lawful killing. The accused did not have a lawful reason for causing another person's death. Examples of a lawful killing are:
 - the use of the death penalty in countries where capital punishment is legal
 - a soldier killing an enemy soldier in battle
 - a person acting in self-defence and a court considers such action as reasonable.
- **The accused was a person over the age of discretion.** The accused must be at least 10 years of age. The law presumes that people under 10 are incapable of forming the intent to commit a crime.
- **The victim was a human being.** The victim must be a human being; not an animal.
- **The accused was a person of sound mind.** The accused's actions must be voluntary, conscious and deliberate. A person who has a mental disability may not be of sound mind.
- **The accused caused the victim's death.** The accused's actions must contribute significantly and substantially to a person's death. This is often left to the jury to decide. There must be a direct causal link between the accused's actions and the death of the victim.
- **Malice aforethought existed.** Malice aforethought is the intention to commit the crime (a guilty mind or 'mens rea'). For malice aforethought to exist, the accused must have acted voluntarily and have one of the following states of mind.



Unintentional killing in the process of committing a violent crime

A person who has no intention to kill, but does kill in the process of committing a violent crime (which is punishable by imprisonment of 10 years or more) is liable to be convicted of murder, as though he or she had killed that person intentionally.

LEARNING ACTIVITY 2.3

Murder

- 1 Explain two of the elements of malice aforethought.
- 2 How can a killing be murder when there is no real intention to kill or inflict really serious injury?
- 3 **You be the judge!**
Read the case study 'A man dies after being stabbed during a road rage incident'. Give your considered opinion about whether this is murder. Explain your reasons.

CASE STUDY

A man dies after being stabbed during a road rage incident

A man was attacked after two cars nearly collided late at night. Police say when the cars stopped, a group of men got out of one of the vehicles and allegedly threatened the driver and passengers of the other car. A 22-year-old passenger went to speak to the men and was stabbed to death with a knife.

- 4 Read the case study 'Coulston found guilty of cold-blooded execution' and write a report demonstrating how each of the elements of murder is appropriate to this case.

CASE STUDY

Coulston found guilty of cold-blooded execution

Ashley Mervyn Coulston, 38, was convicted of the murder of three young people in their Burwood home.

Justice O'Bryan said in the Supreme Court that Coulston had committed wicked crimes that would be remembered among the most heinous killings in Victorian criminal history.

'The circumstances that, after careful planning and whilst of sound intellect, you invaded a private home and executed in cold blood three innocent young people whom you did not know, highlights the heinousness of these murders,' Justice O'Bryan said. According to Justice O'Bryan, the motive was unclear, but the evidence pointed most obviously to robbery and sexual gratification.

Coulston was jailed for life. Justice O'Bryan did not set a minimum parole period, and said he should never be released.



Figure 2.3 Ashley Mervyn Coulston

- 5 Read each of the situations below and state the type of malice aforethought that applies in each case; the intention to kill, the intention to inflict serious injury or reckless indifference.
 - a A two-year-old child dies. The parents, with the intention of punishing the child, had refused the child food for long periods of time.
 - b Cash was due to inherit a fortune if Sunny died, so after careful planning he poisoned Sunny.
 - c Smith was angry at Waterford and used a rifle to try and shoot Waterford in the arm. Smith was a terrible shot and Waterford died as a result.
- 6 Read the case study 'Beekeeper guilty of murder' and answer the questions.
 - a How did the victim die?
 - b What was the accused's motive?
 - c Did he intend to kill Mr Knight? Explain why the accused was found guilty.

Beekeeper guilty of murder

Donald Alcock, a beekeeper, was found guilty of murder in the Brisbane Supreme Court. He shot Anthony Ross Knight, also a beekeeper, in the back while he was sleeping, and stole \$40 000 worth of Mr Knight's honey.

Alcock had pleaded not guilty to murder, claiming when he shot Mr Knight he only meant to maim him so he could take the honey and sell it to solve his financial problems.

An autopsy revealed Mr Knight had been shot once in the back. The bullet had lodged in his spine. A fragment of the bullet had exited from his neck.

Alcock was sentenced to life imprisonment with a non-parole period of 15 years in prison.

CASE STUDY

- 7 Read the case study 'Victim met father and son on goth website' and answer the questions.
 - a Why do you think the father was found guilty of murder?
 - b Why do you think the son was acquitted of all charges?
 - c Do you think the son should have been found guilty of aiding and abetting in a murder or an accessory to murder? Explain.
 - d What decision would you have reached in this case? Explain.

Victim met father and son on goth website

A father and son from Victoria met Carly Ryan, 15, on a gothic networking website by posing as a fictitious 'emo' character. The jury at the trial was told that Ryan fell in love with the character called 'Brandon Kane', who was an Internet construct of the father or the son (or both). She thought he was a 20-year-old guitarist.

About 12 months before she died, Ryan had become involved in an emo youth subculture, whose members wore distinctive clothing, listened to heavy metal or punk music and wore heavy eye make-up and body piercings.

The court heard that the father (Garry Newman, 51) had posed as Brandon's adoptive father as a ploy to meet Ryan. Newman went shopping with her and bought her gifts. He went to her fifteenth birthday party and got angry when she rejected his sexual advances.

CASE STUDY

During the trial, the court heard that the father and son had used their fictitious character to lure Ryan to the beach. The son said he had met with the girl at the beach and Newman came up behind him and pushed Ryan down and started punching her. She died on the beach.

Nick Vadasz, the barrister representing the Newmans, said: 'At the end of the day, a very real question and one you must decide on (is) was it a deliberate and planned act or did the unfortunate death of Carly Ryan come about as the result of misadventure. The issue is ... what exactly happened on the beach?'

The father was found guilty of murder and sentenced to 29 years in prison. The son was acquitted of all charges.

Causation

In respect of an offence of murder or manslaughter, the accused's act must have caused the victim's death. There must be an unbroken link (referred to as a **causal link** or **causal chain**) between the act of the accused and the death of the victim. If the accused shoots the victim and the victim falls down and dies as a result of the gunshot, then there is a clear, unbroken link between the act of the accused and the death of the victim.

If something intervenes to break that link, then the accused may not be found guilty of the murder of the accused, but could be charged with a lesser crime, for example assault.

It is unnecessary for the act of the accused to be the sole cause of death for it to be murder, but the act of the accused must have contributed 'significantly' to the death.

EXAMPLE OF A BREAK IN THE CAUSAL LINK

Jack strikes Richard and leaves Richard unconscious under a tree. Minutes later lightning strikes the tree, a branch falls and kills Richard. The lightning represents a break in the causal link.

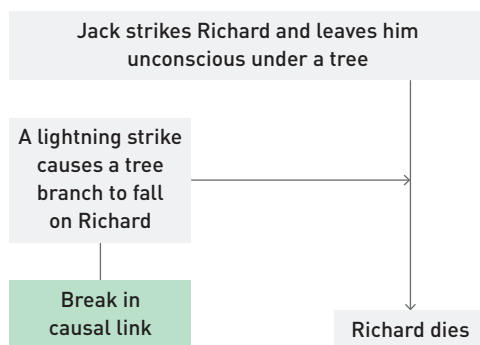


Figure 2.4 Lightning causing a break in the causal link

Taking your victim as you find them

It is a general principle that an offender must 'take their victim as they find them'. If the victim dies as a result of an injury inflicted by the offender because of an unexpected vulnerability (such as recovering from a head operation), the causal link is not broken by the vulnerability. The offender will be seen to have caused the death of the victim and therefore be liable for the charge of murder, if malice aforethought exists, or manslaughter.

LEARNING ACTIVITY 2.4

Causation

- 1 What is a causal link?
- 2 Give an example of how a causal link can be broken.
- 3 If you had a fight with a person on the beach and left him or her unconscious on the deserted beach, do you think you could be found guilty of murder if the victim had drowned when the tide came in, while still unconscious on the beach? Discuss.
- 4 Read the case study 'Is a heart attack a break in causation?' Do you think the two girls should have been found guilty of murder? Discuss. In your discussion comment on causation and taking the victim how you find them.

Is a heart attack a break in causation?

Two 14-year-old girls beat up a taxi driver and stole his taxi. He died as a result of a heart attack triggered by the assault. The taxi driver had had two previous heart attacks. The girls pleaded not guilty to murder but guilty to manslaughter. They were sentenced to six years in a detention centre, with a minimum of three and a half years.

CASE STUDY

- 5 Read the case study 'Death at a football match – vulnerability of the victim'. Do you think the offender in this case should be found guilty of murder? Explain.

Death at a football match – vulnerability of the victim

At a football match, the offender turned and hit a spectator, who then fell to the ground and died. Unknown to the offender, the victim had a steel plate in his head. The victim's vulnerability does not mean that the offender is less liable for the death. However, the offender is not likely to have intended to cause serious injury.

CASE STUDY

- 6 Create a poster to highlight the key elements of murder and causation. Briefly explain each element.

BELIEVE IT OR NOT!

A Victorian man kept up a charade that his wife had run off with a truck driver named Ray in 1983, while keeping her remains in a drum in his backyard for 23 years. Frederick William Boyle, 58, of Carrum Downs was charged in 2008 with the murder of his wife, after his son-in-law found her remains while cleaning up the backyard. Boyle was found guilty of murder and sentenced to 23 years in prison with a minimum of 17 years.

Attempted murder

Under the *Crimes Act 1958* (Vic.), a person who attempts to commit a serious crime is guilty of the indictable offence of attempting to commit that offence. For example, if a person plans a murder and their attempt fails, then he or she can still be charged with attempted murder. For a person to be found guilty of attempted murder, the person must be shown to have:

- intended to commit the murder

- believed that the murder was to take place
- been more than merely preparing to commit the murder, and
- been immediately, and not remotely, connected with committing the murder.

The penalty for attempting to commit a crime is proportionate with the penalty for the crime itself. The maximum penalty for attempted murder is 25 years in prison.

CASE STUDY

Man found guilty of attempted murder

Heinz Karl Kinkermann tried to kill himself and his wife. His wife was suffering from advanced Parkinson's disease and dementia, and was no longer able to communicate. Kinkermann pleaded guilty to attempted murder, which has a maximum penalty of 25 years. Supreme Court Justice Betty King pointed out that under our present law it is not permissible to end a life, however much that person is suffering.

She said Kinkermann deserved mercy, and a suspended sentence was the most appropriate sentence if it had not been abolished in 2011. Kinkermann was given an 18-month community corrections order.

Kinkermann and his wife were found unconscious by the district nurse and rushed to hospital. Kinkermann has been forbidden from seeing his wife, who remains in a non-communicative state in palliative care.

BELIEVE IT OR NOT!

A Melbourne man, too scared to commit suicide, paid contract killers \$10 000 to do it for him. The man agreed to drive to a secluded area with the contract killers. The agreement was that the man was to take sleeping pills to induce a coma before being hit with an iron bar and left in the bush. The man was found alive and hospitalised. The contract killers were charged with attempted murder.

Survivor of suicide pact who kills deceased party is guilty of manslaughter

If two or more people enter into a suicide pact, and one person dies but another does not, the accused (the survivor) can be found not guilty of murder but guilty of manslaughter. The court must be satisfied, on the balance of probabilities, that the act was done or the omission made as part of a suicide pact.

Conspiracy to murder

A person can be charged with conspiracy to murder if he or she agrees with any other person that a course of conduct should be carried out that will involve the commission of murder (or any other offence). To be guilty of a conspiracy offence the accused must have every intention of committing the offence.

Manslaughter

Manslaughter applies in situations where death occurs as the result of criminal negligence or an unlawful and dangerous act. A person may be charged with manslaughter if their actions fall within these categories.

- **criminal negligence** – The accused must owe the victim a duty of care. The accused's actions (or inaction) must fall below the expected standard of care that a reasonable person would have exercised in the same situation, and this lack of care resulted in a person's death. For example, it would be considered criminal negligence if:
 - a parent neglects to get medical treatment for a child when a reasonable person could have foreseen that without treatment the child was likely to die

- a demolition company legally allowed to demolish a building does so with little regard for public safety and a person died.
- **unlawful and dangerous acts** – The actions of the accused were unlawful and so dangerous that a **reasonable person** in the same circumstances, would have realised that it was highly likely a person would die or be seriously injured. For example, a person who throws bricks at a passing car to scare the driver may not have known or intended that such action would result in death. If the brick penetrates the vehicle and kills an occupant, then the accused can be charged with manslaughter because the accused intended to throw the brick. This action was both an unlawful and a dangerous act and it resulted in a person's death. Even though the offender did not intend to do serious harm, a reasonable person would assume that such action could be dangerous. To be found guilty of this form of manslaughter, it must be proved beyond reasonable doubt that:
 - the physical act that killed the victim was intentional and not accidental; there is no need to show that the accused intended to do harm
 - the act was unlawful; this generally means the act must be a crime and committed without lawful excuse
 - the act was dangerous; a reasonable person would have realised that the act was likely to cause a serious injury or death
 - the accused did not act in self-defence.

Special provisions exist where a person survives a suicide pact. Section 6b of the *Crimes Act 1958* (Vic.) states that the survivor of a suicide pact who kills the other party is guilty of manslaughter. A suicide pact is an agreement between two or more people to kill each other and die together.

The maximum penalty for manslaughter is 20 years in prison.

Charged with manslaughter through criminal negligence

Gursewak Dhillon has been charged with the manslaughter of Gurshan Singh through criminal negligence. Gurshan Singh, a three-year-old Indian boy, disappeared from his home in March 2010. The accused allegedly placed the unconscious child in the boot of his car. He was still alive at that time. He drove around for at least three hours. He eventually stopped at Oaklands Junction, where he removed the child from the boot and placed him in the grass and did not check to see if he was alive.

CASE STUDY

Defensive homicide

The police may charge a person with the crime of defensive homicide, or a court may find a person not guilty of murder but guilty of defensive homicide, if the accused thought he or she was acting in self-defence but the court found the beliefs or actions of the accused were unreasonable. For a person to be found guilty of defensive homicide rather than murder, the accused must believe their actions were necessary to protect themselves or another person from the threat of death or a really serious injury. A court must find that the offender's actions were not reasonable in the circumstances.

The maximum penalty for defensive homicide is 20 years in prison.

NOTE

In June 2014, the Victorian Government stated it will abolish the defensive homicide law. Attorney-General Robert Clark said, 'The law was supposed to help family violence victims, but instead it's been hijacked by violent men who've been able to get away with murder'. Luke Middendorp was convicted of defensive homicide. He had stabbed his girlfriend five times when he was drunk. He was sentenced to 12 years in prison, with a minimum term of eight years.



Figure 2.5
Gurshan Singh, who disappeared in March 2010

CASE STUDY

Actions went further than self-defence

Michael Paul Smith pleaded not guilty to the murder of Arthur Karatasios, claiming self-defence. A jury in the Victorian Supreme Court acquitted Smith of murder but found him guilty of the lesser crime of defensive homicide, because his actions went further than self-defence.

Karatasios had been drinking heavily and was 'looking for trouble'. A fight broke out and Smith stabbed Karatasios in the back five times. Smith received three minor stab wounds to his legs in the violent scuffle.

In a victim impact statement tendered to the court, Mr Karatasios's brother said his nephew, now 8, was old enough to understand how his father had been senselessly killed.

Justice Simon Whelan yesterday jailed Smith for seven years, with a minimum non-parole term of five and a half years.

Infanticide

The crime of infanticide is outlined in section 6 of the *Crimes Act 1958* (Vic.). Infanticide is where a mother kills a child (under two years of age) in circumstances that would ordinarily be murder but for the fact that she has a mental condition caused by the effects of that child's birth.

The police may charge a mother with infanticide or a woman can plead infanticide as a partial defence to murder. Alternatively, a jury may return a verdict of not guilty due to mental impairment.

The maximum penalty for infanticide is five years in prison.

Child homicide

Under the *Crimes Amendment (Child Homicide) Act 2007* (Vic.), a person who kills a child who is under the age of six years, in circumstances that would normally be called manslaughter, is guilty of the offence of child homicide.

The maximum penalty for child homicide is 20 years in prison.

Table 2.1 Homicides recorded by offence 2011–12 to 2012–13

OFFENCE	2011–12	2012–13
Accident – fail to assist – death	2	2
Accident – fail to stop – death	5	5
Murder	87	94
Aid and abet suicide	0	2
Accessory after the fact to murder	4	3
Manslaughter	10	11
Survivor suicide pact	0	1
Accessory after the fact to manslaughter	0	1
Drive in manner dangerous causing death	22	30
Drive at dangerous speed causing death	3	4
Culpable driving causing death	36	25
Total homicide	167	178

Source: Victoria Police Crime Statistics 2012–13

LEARNING ACTIVITY 2.5

Murder and other unlawful homicides

- 1 Look back at the case study 'Man found guilty of attempted murder' and answer the questions.
 - a What has to be proved for an attempted murder conviction?
 - b Why do you think Heinz Karl Kinkermann was found guilty of attempted murder? Do you agree with the sentence given? Discuss.
 - c What do you think Kinkermann would have been found guilty of if his wife had died? Explain.
- 2 Read the case study 'Not guilty of murder but guilty of manslaughter' and answer the questions.
 - a What is the difference between the offence of murder and the offence of manslaughter?
 - b Why do you think Porritt was found not guilty of murder but guilty of manslaughter in this case?
 - c Do you agree with the decision? Explain.

Not guilty of murder but guilty of manslaughter

Glen Malcolm Porritt was found not guilty of murdering his mother but guilty of manslaughter. The court heard that Porritt's mother was a ferocious and intimidating woman who cruelly punished her children.

Porritt claimed that he had gone to the family home to ask his parents to reimburse him \$7000 for acne treatment he had paid for himself as a teenager. Porritt claimed his mother came at him with a knife. He restrained her to stop her stabbing him. She went upstairs to call the police. Porritt followed her to stop her making the call to the police. A struggle ensued in which his mother was stabbed 57 times on the face, chest and arms.

The prosecution claimed that Porritt had stabbed his mother while she was reading in bed. He was later found to be suffering from Asperger's syndrome.

The court found that the prosecution had failed to prove beyond reasonable doubt that Porritt had intended to kill his mother, or had acted with reckless indifference to the probability of causing her death. He was sentenced to a maximum of five years with a minimum of 22 months for manslaughter.

CASE STUDY

- 3 Look back at the case study 'Charged with manslaughter through criminal negligence' and answer the questions.
 - a Explain the two categories of manslaughter.
 - b Why do you think Gursewak Dhillon was charged with manslaughter through criminal negligence?
- 4 Look back at the case study 'Actions went further than self-defence' and answer the questions.
 - a Explain the offence of defensive homicide.
 - b Why do you think the jury reached the decision of defensive homicide in this case?
 - c Do you agree with the outcome in this case? Explain your reasons.
- 5 Do you think the defensive homicide law should be abolished? Discuss.
- 6 **You be the judge!**
Read the Holzer case. Decide whether the accused should be found guilty of murder, manslaughter or defensive homicide. Give reasons for your answer. State the maximum sentence for the crime committed.

CASE STUDY

R v. Holzer (1968) VR 481

Holzer picked a fight with a friend of the deceased (Harvey) on the footpath outside a cafe. The accused then punched Harvey in the mouth while he was standing on the nature strip with his back to the gutter. The punch caused the deceased to fall backwards and strike the back of his head on the roadway. He died from the injuries he sustained.

Holzer maintained that he did not want to cause any real serious harm. He stated that when he threw the punch at Harvey's mouth he thought it would cut his lip or bruise his lip. He just wanted to tell Harvey to wake up to himself.

7 You be the judge!

Read the case study 'Pregnancy leads to death'. Decide whether the accused would be found guilty of murder, manslaughter or infanticide. Give reasons for your answer.

CASE STUDY

Pregnancy leads to death

A teenager hid her pregnancy from family and friends because she feared their reactions. On the day of the birth the girl stayed home while her family visited relatives in a nearby suburb. The girl gave birth in her bedroom. She cut the umbilical cord and wrapped the baby in a thick blanket, covering the child's face so the child's cries could not be heard. She then placed the bundle in her wardrobe.

When the teenager's family discovered what had happened, they phoned for medical assistance. Unfortunately, the baby had died from suffocation. The girl admitted that she did not want to be a mother but denied deliberately harming the child. The girl was later diagnosed with psychosis and depression caused by the stress of the pregnancy.

- 8 Read the case study 'Sam and wife jailed over daughter's death'. Explain why Sam and his wife were convicted of manslaughter rather than murder.

CASE STUDY

Sam and wife jailed over daughter's death

Sam and his wife have been jailed over the death of their baby daughter. They were convicted of manslaughter. The baby became ill at four months old. She had severe eczema. She was being fed regularly but all the nutrition was going to fight the eczema. Sam and his wife took the baby to medical practitioners but failed to complete any medical treatment, preferring to use only homeopathic treatments.

The baby's body needed more nutrition than her mother's milk could provide, and her immune system became depleted. She died at nine months old.

- 9 Read the case study 'Death of skateboarder' and explain why you think the driver of the vehicle was originally charged with manslaughter. Do you think the lesser offence of dangerous driving occasioning death is more appropriate? Discuss.

Death of a skateboarder

A teenage driver was given bail and ordered to appear in Wagga Wagga Local Court on 20 February 2012 following the death of his friend. The teenager was charged with manslaughter after his 17-year-old friend died. The victim was on his skateboard and was being towed by the 17-year-old accused.

The manslaughter charge was withdrawn and the young driver pleaded guilty to dangerous driving occasioning death, which has a lesser sentence.

CASE STUDY

10 In each of the following case studies the victim died. For each case study you should:

- explain if the accused caused the victim's death (if there was a causal link)
- decide whether the accused should be charged with murder or manslaughter and explain your reasons.
- a** Tom stabbed Alan (who was unarmed) during a quarrel. Alan died two days later from the stab wound.
- b** Jordan stabbed a man during a quarrel. The victim was admitted to hospital, where he died several days later due to poor medical treatment (*Jordan v. R* (1956) 40 Cr App R 152 Court of Criminal Appeal).
- c** Blaue stabbed a woman and pierced her lung. The woman was admitted to hospital but she refused a blood transfusion on religious grounds, although she was informed that she would die if she did not have it (*Blaue v. R* (1975) 3 All ER 446; (1975) 1 WLR 1411, Court of Appeal, Criminal Division).
- d** Bristow poisoned a victim with arsenic. The doctors wrongly diagnosed the symptoms. They thought that the victim was suffering from alcoholism. If the doctors had taken the proper steps, the toxic effects of the arsenic might have been stopped (*Bristow v. R* (1960) SASR 210 at 216–17).

11 Read the case study 'Sister slain after scissors stabbing' and answer the questions.

- a** How did the victim die in this case? Is there a causal link between the actions of the accused and the death of the victim? Explain.
- b** Decide whether the accused should be found guilty of murder, manslaughter or defensive homicide. Give reasons for your answer.
- c** What is the maximum sentence for this crime?
- d** What punishment do you think would be appropriate in this case? Give reasons for your answer.

Sister slain after scissors stabbing

A man stabbed his sister-in-law to death after she attacked and seriously injured his wife. The wife's younger sister, who suffered from a delusional disorder, lived with the family from time to time.

One afternoon, the wife arrived home to find her sister huddled in the corner of her bedroom. As the wife entered the room, the sister lunged at her with scissors. The younger sister stabbed and punched the older sister a number of times.

CASE STUDY

Hearing the commotion from the back garden, the man looked in the window and saw his wife injured and bleeding on the floor. He entered the house through the kitchen, picking up a knife. As he approached the bedroom his sister-in-law lunged at him; this time she was unarmed. She began to punch, kick, bite and scratch him. She would not allow him near his wife and threatened to kill him. During this time, the wife managed to drag herself into a nearby bathroom, where she lapsed into unconsciousness.

When he saw his wife was unconscious, the man lost his temper and stabbed his sister-in-law in the neck and shoulders 10 to 15 times. As she slumped to the floor, he left the room to telephone for an ambulance. His sister-in-law died in hospital the next day. His wife was also admitted to hospital. She underwent surgery and was discharged one month later.

- 11 Look back at table 2.1 and identify the largest percentage increase from 2010–11 to 2012–13. Why do you think this might be the case?

HINT

You should start a folio of newspaper and Internet articles about crimes that have been committed. Collect as many articles about offences against the person and offences against property. These can be used in a folio exercise at the end of this chapter.

Defences to homicide

The accused, or his or her legal representative, may not necessarily specify a particular defence to a crime, but will attempt to show the flaws in the case for the prosecution. In doing this, the accused will hope to make it difficult for the prosecution to prove that he or she is guilty.

Defences to homicide include:

- self-defence and defensive homicide (although the Victorian Government has said it intends to abolish the law of defensive homicide)
- duress
- sudden or extraordinary emergency
- mental impairment
- automatism
- intoxication
- accident.

Self-defence and defensive homicide

The *Crimes Act 1958* (Vic.) sets out the rules of self-defence for murder and manslaughter offences. For murder cases, the common law test established in *Zecevic v. DPP* (1987) 162 CLR 645 has been enshrined in the *Crimes Act* as a two-step process. To be acquitted of murder, using the defence of **self-defence**, the accused must prove he or she:

- had a belief that it was necessary to act to defend themselves or another person from serious harm or injury
- had reasonable grounds for this belief.

Both the above points must be proved for the killing to be seen as self-defence. If self-defence is proved the accused will be **acquitted**.

In determining whether the accused reasonably believed their actions were necessary, the court may consider the plausibility of the belief including any past history between the accused and the victim, the immediacy of the perceived threat and the severity of the action taken.

Where a person cannot prove that they acted in response to a perceived threat of serious harm, the person will be found guilty of murder.

EXTRACT

Judge clarifies self-defence in murder trial

Mark Russell, *The Age*, 27 February 2014

Phillip Bracken shot dead his de facto wife in a West Footscray street. He pleaded not guilty to murdering Helen Curtis, claiming he acted in self-defence after she had earlier threatened to kill his father. She was agitated and angry. The woman had a shotgun in her car, which she got hold of and went towards Bracken. Shots were fired. Bracken said she had threatened to kill him.

Bracken claimed that he been abused, controlled, threatened and intimidated by her over a period of time.

The jury asked the Supreme Court to clarify the issue of self-defence. Justice Maxwell told the jury a person was not guilty of murder if the killing was done with a lawful justification or excuse; in this case, self-defence. People had a right to defend themselves or others from attacks or threatened attacks.

‘The law says that people may even commit acts which would otherwise be murder if they believe those acts are necessary to defend themselves, or another person, from being killed or really seriously injured,’ Justice Maxwell said.

He said the jury had to assess Mr Bracken’s state of mind at the moment he shot Ms Curtis dead. ‘What threat did he believe he or his father faced? Did he believe he was defending himself or his father from the infliction of death or really serious injury? If so, did he believe it was necessary to react to that threat with force?’

The prosecution alleged that Phillip Bracken’s acts were plainly disproportionate to any threat he or his father faced.

The jury accepted Bracken’s claim of self-defence and acquitted him of the murder.

If the perceived threat is lawful conduct, the grounds for self-defence would not be seen as reasonable. Self-defence will not apply in murder or manslaughter cases where the accused knowingly responds to lawful conduct; for example, resisting arrest by a policeman brandishing a gun.

If a person can prove that they acted in response to a perceived threat of serious harm, but the court finds this belief not to be reasonable, then the person will be guilty of **defensive homicide**. Defensive homicide is an offence in its own right as well as a lesser alternative offence in cases of murder. If the accused is found guilty of defensive homicide, he or she will be liable for up to 20 years in prison.

Victorian Attorney-General Robert Clark said the defensive homicide law was supposed to help victims of domestic violence but it was not working because it has allowed killers to avoid conviction for murder by arguing they were acting in self-defence. In June 2014, the Victorian Parliament introduced the *Crimes Amendment (Abolition of Defensive Homicide) Bill*. This proposed legislation aims to abolish the offence of defensive homicide. Under this Bill, if a person in a family violence situation acts in genuine and reasonable self-defence (even if the person is responding to harm that is not immediate), they will be acquitted of any offence, but if their actions were not reasonable, they will be convicted of murder.

Special provisions in family violence cases allow a court to determine that **the accused reasonably believed his or her conduct was necessary, even when the threat of harm was not immediate** or the force used in response to the threat of harm was excessive. In deciding such cases, the court can examine the history of violence in a family relationship and its social, economic and psychological effects.

LEARNING ACTIVITY 2.6

Self-defence and defensive homicide

- 1 Read the case study 'Self-defence' and answer the questions.
 - a Do you think Sky's actions were necessary in the circumstances? Explain.
 - b Do you think that Sky would be acquitted? Give reasons.
 - c Do you think that the court's decision in this case might have been different if the following had happened? Give reasons.

Joseph, after dropping the knife, got up and walked away. Sky, feeling angry at the attack, picked up the knife and ran after him. When she caught up with him, she stabbed him and killed him.

CASE STUDY

Self-defence

Sky was walking home one night along a dark street in Kew. Joseph was an ex-employee of Sky's. When he saw her coming he jumped out at her, brandishing a knife. He threatened to slit her throat because she was the person responsible for him losing his job.

Joseph lunged at Sky and slashed her arm. Unknown to Joseph, Sky has a black belt in judo. She kicked Joseph in the stomach. He fell to the ground and dropped the knife. As Joseph reached up at Sky's throat, she picked up the knife and stabbed him twice. Sky has now been charged with Joseph's murder.

- 2 Look back at the extract 'Judge clarifies self-defence in murder trial' and answer the questions.
 - a Why did Bracken plead not guilty to murder?
 - b Why do you think the jury found Bracken not guilty of murder? Explain how the defence he used fits with the verdict. If you would have reached a different decision explain why.
- 3 Read the case study 'Man found guilty of defensive homicide' and answer the questions.
 - a Why do you think the jury found Middendorp not guilty of murder but guilty of defensive homicide? If you had been on the jury, what decision would you have given?
 - b What sentence was given in this case? Do you think it was appropriate?

CASE STUDY

Man found guilty of defensive homicide

Luke John Middendorp was found not guilty of the murder of Jade Bownds, 22, but guilty of the lesser charge of defensive homicide. Jade Bownds was fatally stabbed in the back four times by her former partner, Middendorp.

The killing occurred in a domestic environment. Justice Byrne described the pair's relationship as 'tempestuous and violent'. Middendorp was jailed for 12 years, with a non-parole period of eight

years. With the time he had already spent in prison, he will be released in six years. The mother of the victim has called for an overhaul of the law relating to defensive homicide, believing it results in a sentence that is too lenient.

- 4 Read the case study 'Woman found guilty of defensive homicide' and answer the questions.
 - a Present an argument in favour of the finding of defensive homicide.
 - b Do you think a finding of not guilty because of self-defence could have been reached in this case? Explain.

Woman found guilty of defensive homicide

A Melbourne woman was sentenced to seven years' imprisonment for killing her husband. Gemma Elizabeth Edwards had been a victim of domestic violence over many years. On occasion, the deceased was drunk, abusive and violent. In her police interview, Edwards said her husband had been drinking heavily the night before she killed him and had threatened to kill her. After repeated bashing, he had said he was going to get some petrol from out the back and he was going to set her on fire and ruin her face.

She grabbed the spear gun, thinking it would not harm him because he had used it on her before and it had not caused a serious injury. She just wanted to stop him. She shot him with the spear gun. He got really wild and angry and she grabbed a kitchen knife and stabbed him repeatedly. She said she was in fear for her life.

CASE STUDY

- 5 Read the case study 'Man claiming self-defence' and answer the questions.
 - a Why do you think Zheng attacked Papo?
 - b Why was Zheng acquitted?
 - c Do you agree with the court decision, or would you have found Zheng guilty of defensive homicide or manslaughter? Discuss.
 - d Who do you think would be affected by this crime and the outcome of the trial?

Man claiming self-defence

In October 2013, the Supreme Court heard a man who was bludgeoned to death with a tyre lever while sitting in his car outside a South Melbourne brothel had been trying to find his girlfriend, who he wrongly believed was being held as a sex slave.

The barrister for the accused, De Jun 'Kevin' Zheng, a driver for the brothel, claimed that Zheng had been sitting behind the reception counter at what was then called Madam Leona's brothel in York Street minding his own business when the victim, who had taken the drug ice, arrived, punched him in the face and stole several mobile phones before leaving.

Zheng claimed he was acting in self-defence. He said he feared the victim was reaching for a weapon inside his car before he repeatedly struck him with the tyre lever.

The Crown prosecutor, Michele Williams, SC, claimed that the defence of self-defence was a nonsense. She said the victim was attacked with such ferocity that he suffered a broken nose, a

CASE STUDY

broken jaw, a fractured head, and his trachea was dislocated from his larynx. 'He was not a threat to the accused man,' Ms Williams said.

The Supreme Court jury found Zheng not guilty of murder and not guilty of the alternative charges of defensive homicide and manslaughter. He was able to go free. The family of the victim felt devastated at the outcome of the trial.

Duress

This defence is rarely used. For the defence of duress to be successful, the accused must show that there was an extremely serious threat to themselves or their family involving the death or serious injury of the accused or their family. This defence could lead to an acquittal if it is successful.

Under the *Crimes Act*, a person acts under duress when they reasonably believe that:

- a threat of harm will be carried out unless the person commits a crime – the threat must be of such gravity that an ordinary person, of the same sex and maturity as the accused, would have given in to the threat in a similar way to the accused
- committing a crime is the only reasonable way of avoiding the threatened harm
- their conduct is a reasonable response to the threat made.

In murder cases, duress would only be relevant in cases where the threat involved death or really serious injury; for example, a person with a gun to the head of the accused threatened to kill the accused unless the accused shot another person.

A person cannot claim duress once he or she voluntarily engages in violent acts (for example assault or rape) as part of a group and is then coerced or threatened by the group to continue with, or escalate, the violence.

Sudden or extraordinary emergency

A person will not be guilty of homicide if the person reasonably believes that:

- there is a sudden or emergency situation
- their actions are the only reasonable way of dealing with the emergency situation
- their conduct is a reasonable response to the emergency situation. In murder cases, the emergency must involve a risk of death or extremely serious injury.

Mental impairment

The defence of mental impairment replaced the common-law defence of insanity. The *Crimes Act* states that this defence exists in cases where the person was suffering a mental illness at the time of the crime and as a result the person:

- did not know what he or she was doing because they had little understanding of the nature and quality of their actions
- did not know the conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

In cases where the prosecution, accused and judge agree that the evidence supports a verdict of not guilty by reason of mental impairment, then a judge alone rather than a judge and jury will hear the case.

In cases where there is disagreement, there will be a trial by jury. The prosecution will try to prove beyond reasonable doubt that the accused was aware that his or her actions were wrong while the accused must prove mental impairment.

If the accused is successful, the verdict will be not guilty because of mental impairment. The court will either make a supervision order or release the accused unconditionally. A supervision order is for an indefinite term. It can be non-custodial or custodial, in which case the accused is released, but must comply to certain conditions. If the supervision order is custodial, it must be served in an appropriate place such as a psychiatric hospital or institution. A prison is seen as a place of last resort. A custodial or non-custodial order will be reviewed at the end of a specified period.

R v. Porter (1936) 55 CLR 182

When Mr and Mrs Porter separated, Mr Porter continued to take care of their 11-month-old son. Mr Porter desperately wanted a reconciliation with his wife, but his efforts had been unsuccessful.

He showed signs of a nervous breakdown and became extremely emotional. He did not sleep and he took aspirin, phenacetin and caffeine.

He went on a trip from Canberra to Sydney, during which he did not sleep for three days. He went to see his wife when he returned. He was very distressed and he completely lost control of his emotions. When she told him she did not want anything to do with him or the child he threatened to use poison. When he left her he went to get some strychnine and his wife rang the police. The police found him at home sobbing. He had given the poison to his child and was about to take it himself. The child died and the father was charged with murder.

In the judge's summing-up to the jury, he emphasised that the state of mind had to be one of 'disease, disorder or disturbance' and that if the offender were to be found not guilty on the grounds of insanity (now referred to as mental impairment), he must either not have known what he was doing or not have known that what he was doing was wrong.

The jury decided that when Porter gave the poison to the child he had such a mental disorder, disturbance or derangement that he was incapable of reasoning.

Mr Porter was found not guilty of murder on the grounds of insanity.

CASE STUDY

Automatism

This defence is concerned with involuntary actions that are not caused by a disease of the mind. For a crime to be committed, the prosecution has to prove that there was some voluntary act (actus reus) and a guilty mind (mens rea). For the defence of automatism to exist, the accused must show that he or she was unable to form the intention to commit the crime (a guilty mind).

The accused must prove the defence of automatism 'on the balance of probabilities'. For the defence of automatism to be accepted and the accused acquitted, it must be shown that the act was:

- involuntary – done by muscles without any control of the mind (such as a spasm or a reflex action); or
- done by a person who was not conscious of what they were doing, such as suffering from concussion or while sleepwalking.

LEARNING ACTIVITY 2.7

Duress, mental impairment and automatism

- 1 Explain the defence of duress. Give an example of when this defence could be used.
- 2 Look back at the case study *R v. Porter* and answer the questions on the next page.

- a In what situation do you think a person could use the defence of mental impairment?
 - b Look at what has to be proved for a successful defence of mental impairment in the light of this case. Do you agree with the verdict? Discuss.
- 3 Read the case study 'Boy found not guilty of murder' and answer the questions.
- a What defence would the boy have used in this case?
 - b Why was this defence successful?
 - c Do you think the decision is a fair outcome? Discuss.

CASE STUDY

Boy found not guilty of murder

A 17-year-old boy pleaded not guilty to the murder of his father. He was 16 when he shot his father dead at point-blank range while in a trance-like state. The boy's state of mind was compared to sleepwalking. He was 'awakened' by the sound of the gun going off.

The defence called three psychiatrists, who testified that the boy was not responsible for his actions because of his state of mind. According to the prosecution, the boy was devastated by his mother's death, and ever since that time he had frequent arguments with his father. On the day of the shooting the boy crept up behind his father, who was lying on a couch, and shot him with the father's 12-gauge shotgun, which was kept in a wardrobe. The sister of the boy gave evidence to the effect that the boy loved his father, but that he set impossibly high limits for her brother and herself.

The Supreme Court jury acquitted the boy of the charge of murder.

- 4 Read the case study 'Not guilty verdict' and answer the questions.
- a From the information given, do you think Karen Brown should have been found guilty of murder? Explain.
 - b The jury does not give a reason for its decision. Do you think the jury acquitted Ms Brown on the grounds of self-defence or automatism? Discuss the possible reasons.

CASE STUDY

Figure 2.6
Acquitted of
the murder on
the grounds of
automatism



Not guilty verdict

Karen Brown, a security guard, shot dead a robber who had beaten her with knuckle-dusters. At the trial, her lawyers argued that at the time she fired the gun she experienced a brief period of automatism. Ms Brown said she did not remember anything from the time the robber, William Aquilina, 25, bashed her and dragged her along the ground by her backpack, until she was in hospital later. She suffered concussion and a fractured nose, eye socket and wrist from the bashing.

During the trial, two witnesses claimed that she had given up fighting for the bag holding \$40 000 that she was carrying and had walked away before turning towards him and shooting him through a car window as he sat in the front seat. He died of a bullet wound to the head.

After the shooting, she staggered dazed and confused into the hotel, her head 'bubbling' with blood and the gun dangling from her hand. She said, 'I have been robbed. Call the police. I think I killed him.'

The prosecution had to prove that Ms Brown shot Aquilina out of revenge or anger and she was not acting in self-defence at the time she fired the gun.

The jury delivered their verdict of not guilty.

- 5 Read the case study 'Jury rejects automatism' and answer the questions.
 - a Explain the difference between the defence of automatism and the defence of mental impairment.
 - b Why do you think the jury rejected Woodbridge's defence of automatism? Explain.

Jury rejects automatism

In October 2009, a jury rejected claims that Penelope Woodbridge was in a state of automatism when she crashed into an oncoming car, killing Evette Haddad, 60, and seriously injuring Haddad's husband.

The court heard that Woodbridge's blood alcohol content (BAC) was about six times the legal limit (0.307) when she crashed through safety barriers on the median strip and ploughed into another car on Pennant Hills Road.

The jury deliberated for three hours before finding Woodbridge guilty of manslaughter, and of causing Mr Haddad serious injury while under the influence of alcohol.

The jurors rejected her psychiatric evidence that she was not acting voluntarily, having been in a dissociated state triggered by a traumatic phone call from her former husband. The trial heard evidence that Woodbridge had a history of being treated for alcohol dependency. In 2005, after she crashed her car through a series of front yards in her neighbourhood, she returned a BAC reading of 0.28 per cent.

CASE STUDY



Figure 2.7
Penelope Woodbridge

- 6 Read the case studies 'Memory-loss murderer' and 'Killing while on drugs' and answer the questions.
 - a What essential element in the offence of murder appears to be missing in these two crimes?
 - b Do you think the defence of automatism could have been used in either of these cases? Explain.
 - c Do you think the accused could have been found guilty of manslaughter rather than murder in either of these cases? Explain.

Memory-loss murderer

In March 2014, Ross Streeter pleaded guilty to killing his father and uncle and was jailed for 34 years. Streeter claimed to have no memory of the shootings. There appeared to be no motive for the murders. A psychiatric report showed that Streeter's mental state was normal.

CASE STUDY

CASE STUDY

Killing while on drugs

In April 2014, Harley Hicks was found guilty of murdering a baby during a Bendigo home burglary when he was high on the drug ice. He pleaded not guilty to murdering 10-month-old baby Zayden Veal-Whitting in 2012. Zayden's mother found the baby lying in blood-stained sheets shortly after realising her home had been robbed.

According to the Crown the motive for the killing was to silence the baby so Hicks would not be caught while committing the robbery. Hicks's defence claimed Hicks did not enter the house, did not steal anything and did not kill Zayden.

Intoxication

Intoxication is not a separate defence but it may be relevant in proving if mens rea did or did not exist, or whether the accused acted voluntarily and with criminal intent. If the accused is so drunk or affected by drugs that he or she cannot form the intention to commit the crime (mens rea) then a court may decide that there is no crime and the accused has to be found not guilty. This will rarely happen, because it is very unlikely that a person could be so badly affected by alcohol or drugs and still commit a crime.

While the so-called 'drunk's defence' has led to acquittals in assault cases, it is not as successful in homicide cases because the accused is often charged with, or found guilty of, the crime of manslaughter.

If a person's intoxication is self-induced, the court must compare the accused's belief or actions to those of a reasonable person who is not intoxicated. If a person's intoxication is not self-induced, the standard of a reasonable person intoxicated to the same extent as the accused must be considered.

CASE STUDY

Queen v. O'Connor

In *Queen v. O'Connor* [1980] HCA 17; 146 CLR 64 (1980), O'Connor stabbed an off-duty policeman in an attempt to steal from the policeman's car. He was charged with theft and assault but argued that he did not intend to commit the crimes and that he could not remember the incident because of his consumption of a large quantity of alcohol and medication.

He appealed his conviction and the appeal was allowed. The High Court of Australia, in a majority decision [4-3], ruled that **while intoxication is not a separate defence it may be relevant in proving whether the accused acted voluntarily and with the intent to commit the crime.**

CASE STUDY

Acquittal because too drunk

A rugby league player, Noa Nadruku, was acquitted of assaulting three women, including his wife, because he was too drunk to know what he was doing. Nadruku was said to have drunk 28 schooners of beer, six stubbies and half a bottle of wine in an 11-hour drinking binge.

Media reports at the time commented that it was unfair for a person to rely on a self-induced state of intoxication to escape criminal liability, even though such verdicts were rare.

The magistrate in this case, Mr Shane Madden, said he had no choice but to follow the High Court's decision in the 1980 O'Connor case, once evidence had been accepted that Nadruku had drunk so much that he did not know what he was doing. According to Mr Madden, if parliament, or anyone else, does not like the defence of intoxication, it is up to the Victorian Parliament to change it.

Following the Nadruku case, the use of self-induced intoxication as an excuse in criminal law was the subject of a Victorian parliamentary inquiry. After considerable debate and discussion in the community, and following the Victorian Law Reform Commission's report *Defences to Homicide*, the law was clarified in this area in 2005.

Under section 9AJ of the *Crimes (Homicide) Act 2005* (Vic.), if intoxication is self-induced the actions of the accused must be compared to a 'reasonable person who is not intoxicated'. This means that where a person voluntarily gets drunk, their intoxication cannot be used as an excuse.

However, in circumstances when intoxication is not voluntary or self-induced, the court may consider the impact of the intoxication on a person's intention to commit a crime. The actions of the accused must be compared to those 'of a reasonable person who is intoxicated to the same extent as the accused'. It is assumed that intoxication is not self-induced if it is:

- involuntary
- due to fraud, reasonable mistake, accident, extraordinary emergency, duress or force
- due to the proper use of a prescription drug where the person did not know of the drug's effects
- due to the use of non-prescription medication where the person uses it in accordance with the manufacturer's advice and the person did not know of the drug's effects.

LEARNING ACTIVITY 2.8

Intoxication

- 1 Explain the significance of the *Queen v. O'Connor* case.
- 2 Look back at the case study 'Acquittal because too drunk' and answer the questions.
 - a What occurred in this case?
 - b How did the Noa Nadruku case lead to a change in the law? Explain that change in the law.
- 3 Read the case study 'Man stabbed his de facto while drunk' and comment on whether the defence of intoxication is appropriate in this case. Give reasons.

Man stabbed his de facto while drunk

Jack Brown had an argument at home with his de facto partner, Melissa Turrell. He left the house at 4 pm and drank the best part of a 750 ml bottle of whisky at a friend's place until 3 am the next day. He had also taken 'painkillers' throughout the day.

A neighbour found Turrell dead in her backyard at about 9 am the following day. She had been stabbed in the neck. The police arrived to find Brown unconscious in the hallway of the house; a blood-stained kitchen knife was on the floor nearby. Brown's fingerprints were on the knife. He remembers nothing about the killing.

CASE STUDY

- 4 Read the case study 'Deadly effects of involuntary intoxication' and answer the questions.
 - a What crime do you think Maxine would have been charged with? Give reasons for your answer.
 - b Explain why a person's intoxication may affect the outcome of a criminal case.
 - c Was Brown's intoxication self-induced? Explain how the law determines this.
 - d What impact will Maxine's intoxication have on the outcome of this case? Explain your answer.

CASE STUDY

Deadly effects of involuntary intoxication

Maxine loved to party. She didn't like to get drunk or use drugs so she regularly drank Diet Coke at parties. A group of party-goers thought it would be funny to spike her drinks. They continually served her a sweet fruit punch that masked the taste of the alcohol. When she complained of a headache, the group gave her a white pill (an illegal drug) and told her it would cure her headache.

Later in the evening, Maxine began screaming and another party guest tried to calm her down. Maxine pushed him away, picked up an ice pick and stabbed him in the neck. He died in hospital the next day. It was later revealed that the reason Maxine did not drink at parties was that she was taking prescription antidepressant medication.

Accident

In some cases the accused may claim the death was the result of an accident. There is no separate defence of accident in criminal law, but an accused who is claiming that the death was an accident is saying that they did not possess a guilty mind (*mens rea*). If *mens rea* did not exist, the accused cannot be found guilty of a crime. If the court accepts that the death occurred as the result of an accident, the accused would be acquitted.

LEARNING ACTIVITY 2.9

Accident

- 1 If you were a defence lawyer and your client claimed that the murder she is charged with was an accident, how would you argue this on behalf of your client?
- 2 Read the case study 'Two men acquitted of manslaughter' and answer the questions.
 - a Why were the two men charged with manslaughter?
 - b What defence do you think was appropriate in this case?
 - c What would your decision be in this case if you were one of the jurors? Explain.

CASE STUDY

Two men acquitted of manslaughter

Two Townsville men in north Queensland have won an appeal and have been acquitted of killing a man.

Glenn William Nuggins and Arthur Ramiend Langlo were convicted of the manslaughter of Wesley Johnson. They were accused of pushing Mr Johnson onto rocks in a Townsville creek. He died several days later from head injuries.

The Court of Appeal found that there was not enough evidence to show that Mr Johnson had been pushed. His injuries could have been caused by a fall. The court heard that witnesses, who were drunk at the time, had changed their stories during the investigation.

Mr Nuggins and Mr Langlo were acquitted of the charge of manslaughter and their convictions were overturned.

LEARNING ACTIVITY 2.10

Defences to homicide

1 Class activity

Read the case study 'Desire for cigarettes led to death' and complete the following exercise.

- The class is to divide into pairs – you may want to ask the teacher for assistance in finding a study partner for this exercise.
- One of the pair is to write out the arguments that the legal representative for the accused might use to prove that the four youths are not guilty. The other student is to work on the arguments that the prosecution might use to prove that the youths are guilty.
- The partners then share their responses and discuss what they think the jury's decision might have been in this case.

Desire for cigarettes led to death

Four youths from Brunswick aged between 16 and 20 appeared before the Supreme Court charged with murder. On the night of the killing, they harassed another youth and stole his cigarettes. This youth then called his 21-year-old brother, who came to the rescue armed with an iron pole. The 21-year-old hunted down the four youths, who were hiding in bushes in a local park because they did not want to fight him and feared for their safety.

When he bailed them up, the four hit back with sticks and kicks, leaving the 21-year-old with a shattered skull and a piece of stake embedded in his face. The deceased had drugs in his system at the time of his death.

CASE STUDY

2 In each of the following situations, the victim/s died. For each case decide:

- the crime the accused will be charged with in the first instance
 - whether the accused can argue a particular defence as an excuse for the crime
 - what the defence involves and its likely success
 - a possible verdict and possible reasons for the verdict.
- a Michael was out shooting rabbits on his property with a friend. As they were climbing over a fence, Michael's gun went off and the friend was shot.
 - b Jacinta picked up a knife and stabbed a man who was attempting to rape her.
 - c Bree wanted her partner's money so she laced her partner's food with sleeping tablets and then set fire to their house while he slept. He died of smoke inhalation.
 - d Alfonso had a verbal argument with his brother over an unpaid debt. His brother pushed him away and Alfonso turned and punched him. The brother fell to the ground, hit his head and died in hospital.

- e Pedro met with Sam to collect \$20 000. Both were well-known criminals. Sam had a reputation for shooting first and asking questions later. When Sam reached into the car for something, Pedro panicked, pulled out a gun and shot Sam.
 - f Bernadette, who normally didn't drink, drank copious amounts of tropical fruit punch at a party. Her friends told her it was non-alcoholic but it actually contained vodka, rum and champagne. When she saw her boyfriend talking to another girl she hit him on the side of the head with a full beer bottle. He fell to the ground and died.
 - g Cynthia's husband had abused her and their three children for over 10 years. Cynthia and the children left the family home. Her husband tracked her down, tore up the apprehended violence order Cynthia had taken out against him and threatened to take the children. When she resisted he threw her on the bed and began to strangle her. When she stopped struggling he sat on the bed. She then pulled out a knife and stabbed him with it several times. He died from the stab wounds.
 - h Stan killed his mother because he wrongly thought she was going to evict him from the family home. His psychiatrist confirmed Stan had stopped taking the medication that helped him to control his mental condition with tendencies to violence.
 - i Marita's jealous and violent ex-husband kidnapped her son from a previous relationship. He threatened to kill the child unless Marita helped him with a robbery. During the robbery, a security guard fired at Marita and her ex-husband. Marita, under instructions from her ex-husband, fired back, killing the guard.
- 3 Read the case study 'Mum shoots intruder dead'. This case was in California. In Victoria, do you think the accused would be acquitted because of self-defence or found guilty of murder, manslaughter or defensive homicide? Justify your answer.

CASE STUDY

Mum shoots intruder dead

In California, a young mum who had a baby and had just lost her husband found two men breaking into her home. One of the men was armed with a 12-inch hunting knife. The distressed mother shot one of the men in the stomach. He died at the scene. Authorities said the shooting was in self-defence.

Driving offences causing death or serious injury

Culpable driving causing death

A person can be found guilty of culpable driving causing death if that person was responsible for the death of another road user while driving a motor vehicle. The prosecution must prove that the driver was doing one of the following:

- **driving recklessly** – that is, consciously and unjustifiably disregarding a substantial risk that the death of another person or the infliction of grievous bodily harm on another person may result (for example, driving at high speed in adverse road conditions)
- **driving negligently** – that is, failing to a gross degree to observe a reasonable standard of care (this includes driving while fatigued to such an extent that the driver ought to have known that there was a risk of falling asleep)
- **driving under the influence of alcohol or a drug to the extent of being incapable of properly controlling the vehicle.**

The maximum penalty for culpable driving causing death is 20 years in prison.

Table 2.2 The number and percentage of people sentenced for culpable driving causing death, by sentence type, between 2007–08 and 2011–12

SENTENCE TYPE	2007–08		2008–09		2009–10		2010–11		2011–12	
Imprisonment	19	(76%)	15	(83%)	15	(100%)	8	(80%)	7	(78%)
Youth justice centre order	3	(12%)	0	–	0	–	1	(10%)	1	(11%)
Wholly suspended sentence	1	(4%)	2	(11%)	0	–	1	(10%)	1	(11%)
Partially suspended sentence	1	(4%)	1	(6%)	0	–	0	–	0	–
Non-custodial supervision order	1	(4%)	0	–	0	–	0	–	0	–
People sentenced	25		18		15		10		9	

Source: Sentencing Advisory Council, Victoria, *Sentencing Snapshot*, May 2013

Table 2.3 The number of people sentenced for culpable driving causing death, by sentence type and gender, between 2007–08 and 2011–12

SENTENCE TYPE	MALE		FEMALE	
Imprisonment	59	(82%)	5	(100%)
Youth justice centre order	5	(7%)	0	–
Wholly suspended sentence	5	(7%)	0	–
Partially suspended sentence	2	(3%)	0	–
Non-custodial supervision order	1	(1%)	0	–
Total	72		5	

Source: Sentencing Advisory Council, Victoria, *Sentencing Snapshot*, May 2013

Dangerous driving causing death

A person who drives a motor vehicle at a speed or in a manner that is dangerous to the public and thereby causes the death of another person is guilty of an indictable offence.

A person can be found not guilty of culpable driving but guilty of the lesser offence of dangerous driving causing death.

The maximum penalty for dangerous driving causing death is 10 years in prison.

Dangerous driving causing serious injury

In cases where serious injury rather than death is the outcome of dangerous driving, the offender can be charged with dangerous driving causing serious injury. The maximum penalty for this is five years in prison.

LEARNING ACTIVITY 2.11

Driving offences causing death or serious injury

- 1 Examine table 2.2. Imprisonment is by far the most common sanction for culpable driving causing death. Do you think this is the most appropriate sentence for this offence? Discuss.

- 2 Discuss the trend that is apparent from this table. Why do you think this is the case?
- 3 Examine table 2.3. Consider the people most at risk of committing this offence. What do you think the reasons are for this? Discuss.
- 4 Read the case study 'Culpable driving causing death' and answer the questions.
 - a What would need to have been shown in this case for a verdict of culpable driving causing death?
 - b What are the differences between culpable driving causing death and dangerous driving causing death?
 - c Why do you think the offender was acquitted of all charges?

CASE STUDY

Culpable driving causing death

The offender drove his truck onto a level crossing north of Kerang. His truck collided with a V-Line passenger train bound for Melbourne. Eleven people were killed.

The prosecution alleged that the truck driver did not take proper care when entering the intersection.

The driver gave evidence in his defence and said he could not explain why he did not see the flashing warning lights until it was too late. Experts were able to establish that the intersection was sufficiently flawed to present difficulties to the driver. Two other truck drivers testified to say they found it difficult to see the flashing red lights at the crossing.

The driver was found not guilty of 11 charges of culpable driving causing death and eight of negligently causing serious injury.



Figure 2.8 The truck driver was found not guilty of 11 charges of culpable driving causing death and eight of negligently causing serious injury.

- 5 Read the case study 'Guilty of dangerous driving causing death' and answer the questions.
- What has to be proved for an accused to be found guilty of dangerous driving causing death?
 - What is the maximum sentence for this offence?

Guilty of dangerous driving causing death

In February 2014, a Shepparton man, Remo Sarikaya, 34, was found guilty of dangerous driving causing the death of 89-year-old Molly Bell.

The jury also found Sarikaya guilty of failing to stop after the collision and failing to render assistance to Mrs Bell who was left lying severely injured and unconscious in her driveway.

CASE STUDY

- 6 Read the case study 'Six teenagers killed by motorist in Mildura' and answer the questions.
- 'The offence of culpable driving should be abolished and replaced with murder.' Do you agree? Discuss.
 - Do you think the sentence in this case is appropriate? Discuss.

Six teenagers killed by motorist in Mildura

Thomas Towle was cautioned by his younger brother to drive carefully past a sixteenth birthday party as he left his brother's house. Towle did not heed this warning and lost control of his car, driving in excess of 100 km/h. He ploughed into a group of teenagers as they stood beside the road. Six teenagers, all under the age of 18, were killed and four seriously injured as a result of Towle's actions.

He was found not guilty of culpable driving but guilty of six charges of dangerous driving causing death. At the time, the maximum penalty for this offence was five years (since increased to 10 years). He was also found guilty of four charges of dangerous driving causing serious injury.

He was sentenced to serve a total maximum of 10 years' imprisonment with a minimum of seven years. His driving licence was cancelled and he was disqualified from driving for 10 years.

CASE STUDY

7 Think, pair, share

Read the case study 'Annie's New Year's day' and answer the questions.

- Individually describe the facts of the case and **think** about the issues in this case, including what factors might be considered by a judge in deciding what punishment would be appropriate for Annie.
- Identify and list the offences that Annie has committed.
- Explain the consequences of Annie's actions.
- Do you think Annie would be pleading guilty to culpable driving causing death? Explain.
- Form **pairs** and discuss thoughts and ideas about the case. Consider important factors about Annie's gender, age, background and problems she was dealing with at the time the offences were committed. What factors do you think will be considered by the judge when making a decision about the punishment she should receive?
- Form groups of four and **share** your thoughts and ideas. Reach a decision about what the group thinks the outcome of this case should be.

CASE STUDY

Annie's New Year's day

Annie spent most of New Year's day with her friend Bob. She drank two cans of beer at home, six cans at a hotel and then two more cans back at home. At about 7 pm she drove Bob to the shop to get cigarettes. She lost control of her car and hit a stationary car with a man and two children inside. She was travelling at 110 km/h in a 70 km/h zone. Annie suffered serious injuries and had no recollection of the collision. Bob was killed instantly. The man in the other car suffered depression and long-term injuries to his leg. His anger and frustration about what had happened later placed strain on his family. Annie's blood alcohol content at the time was 0.14.

She had one prior conviction for driving over 0.05 and she was unlicensed when the collision happened. She was divorced with two children, aged 11 and 8. Her husband had violently abused her and her father had sexually abused her as a child. She started drinking at the age of 8 and was made a ward of the state.

Annie pleaded guilty to the charges. Since the collision she has sought counselling for her alcohol problem.

Source: adapted from *You Be the Judge: Culpable driving causing death*, VCE case study, Sentencing Advisory Council, Victoria

Rape

Rape is unwanted sexual penetration. This includes penetration of the vagina, mouth or anus of another person and includes penetration with a penis, another part of the body or an object. Under section 38 of the *Crimes Act 1958* (Vic.) a person commits rape if:

- he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting or not giving any thought to whether the person is not consenting or might not be consenting
- after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting
- he or she (the offender) compels a person to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated consents to the act.

Meaning of consent

Consent means free agreement (saying 'yes'). Under section 36 of the *Crimes Act 1958* (Vic.), circumstances in which a person does not freely agree to an act are when:

- the person submits because of force or the fear of force to that person or someone else
- the person submits because of the fear of harm of any type to that person or someone else
- the person submits because he or she is unlawfully detained
- the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing
- the person is incapable of understanding the sexual nature of the act
- the person is mistaken about the sexual nature of the act or the identity of the offender
- the person mistakenly believes that the act is for medical or hygienic purposes.

Defence to rape

In defence to a charge of rape, the accused might try to argue that consent was given or that he or she was unaware that the other person did not give their consent. The belief that the victim was

consenting to the sexual act must be reasonable. A person does not have to protest or physically resist, or sustain physical injury, to show that he or she did not consent. It is also not a defence to say that he or she had agreed to a sexual act with that person on an earlier occasion.

Judge's directions to a jury

Where relevant, a judge must direct or explain to a jury that:

- if a victim does not say or do anything to indicate consent then that is enough to show the illegal sexual act took place without the victim's agreement (silence does not mean consent).
- a victim might have a good reason for delaying the report of a sexual offence and this delay should not ordinarily affect the victim's credibility. A judge is forbidden from suggesting that a delay in reporting makes the victim's evidence unreliable unless the delay has put the accused at a forensic disadvantage (that is, the collection of medical evidence that could prove guilt or innocence is made difficult or impossible).

The maximum penalty for rape is 25 years in prison.

DID YOU KNOW?

It is illegal for a person to have sex with their spouse, de facto partner, girlfriend or boyfriend without their consent.



USEFUL WEBSITE

Victorian Centres Against Sexual Assault www.casa.org.au

Proposed changes to rape laws

The Victorian Government released a public consultation paper in October 2013 relating to its review of the family and welfare of the family. The paper proposed changes to what the prosecutor must prove about an accused's state of mind in relation to rape cases. These changes aim to make it easier to prove rape was committed even if the accused person believed consent was involved.

Under current laws, a person could be guilty of rape if aware it was possible the victim did not consent, or if the person did not consider whether there was consent. Under the proposed changes, an accused would be able to be found guilty of rape if they **did not reasonably believe** the victim consented.

The paper proposes that the maximum sentences for assault with intent to rape, and sexual intercourse with a child under 16, be raised from 10 to 15 years.

The committee also proposed creating two new offences. This has now been done. The offences relate to:

- child endangerment – that is, relevant wanton or reckless behaviour when a person in authority is aware of, and consciously disregards, a substantial and unjustifiable risk that his or her acts or omissions place a child in a situation that might endanger the child's life, health, welfare, morals or emotional wellbeing.
- grooming a child under 16 for sexual conduct.

CRIMES AMENDMENT (PROTECTION OF CHILDREN) ACT 2014 (VIC.)

The *Crimes Amendment (Protection of Children) Act 2014* creates a new offence. Under this Act, it is an offence to negligently fail to remove a substantial risk of a child becoming a victim of sexual assault.

CRIMES AMENDMENT (GROOMING) ACT 2014 (VIC.)

The *Crimes Amendment (Grooming) Act 2014* is based on the findings and recommendations of the Family and Community Development Committee in its report *Betrayal of Trust*, tabled on 13 November 2013. The Act amends the *Crimes Act 1958* by inserting **a new offence of grooming for sexual conduct with a child under the age of 16 years.**

The attorney-general stated that the Act 'will not require proof that any sexual offence was actually committed with the child, nor that there was any specific conduct involved in the grooming, such as exposing the child to indecent material or seeking to persuade the child to take part in sexual activity'. Rather, he stated that the grooming offence is 'cast broadly so as to apply to any communication with either a child or their parent or carer, where that communication occurs with the intention of making it easier to engage or involve the child in a sexual offence'.

Other types of sexual assault

There are many other crimes which are also described as sexual assault. Sexual assault can include any sexual behaviour that makes someone feel threatened, intimidated, uncomfortable or frightened. This kind of sexual behaviour involves one person using physical or emotional force against another person who has not agreed to it. Some sexual assaults are more serious than others. They can range from sexual harassment to serious indictable crimes such as life-threatening rape. **These types of crimes are an abuse of power and are never the fault of the victim.**

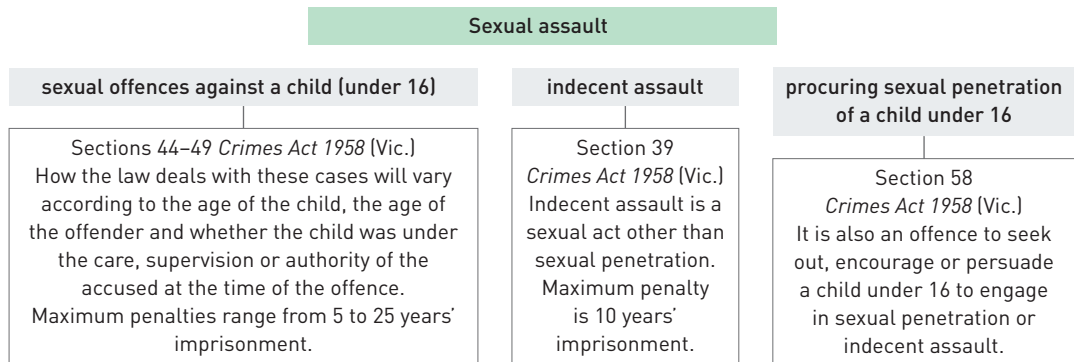
Child pornography

Under sections 67A–70 of the *Crimes Act 1958* (Vic.) it is illegal to make or possess child pornography or to invite a minor (a person under 18 years) to be involved in the making of pornography.

Child pornography means a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context. A person who prints or otherwise produces child pornography is guilty of an offence. A person can also be found guilty of child pornography if he or she invites or causes a minor to make child pornography.

A conviction under child pornography laws could result in the offender being placed on the sex offender register. This could affect the offender's work prospects for the rest of their life and create the wrong impression about the type of person they are.

Maximum penalties range from five to 10 years' imprisonment.



PROPOSED CHANGES TO SEXTING LAWS

Many teenagers have been put on the sex offender register because they have been found guilty of child pornography, which includes malicious sexting. Because being put on the sex offender register for these sort of offences is, in most cases, inappropriate, some police have not always followed through with prosecutions of children for malicious sexting.

Under the proposed changes in the law, sexting will not be illegal if it takes place between consenting minors with no more than two years' age difference between them. However, it will

be an **offence to distribute, or threaten to distribute, explicit images of another person without their consent.**

The attorney-general said, 'This will continue to make clear that such behaviour is unacceptable and illegal, while not treating young people who distribute such images as child pornographers or rendering them liable to consequences such as being placed on the sex offender register'.

LEARNING ACTIVITY 2.12

Rape and other sexual offences

- 1 Read the case study '12-year-old boy found guilty of rape' and answer the questions.
 - a Briefly explain what rape is.
 - b Why do you think the boy's lawyers tried to convince the Court of Appeal that he did not know that what he was doing was wrong?
 - c What is a defence to rape and when is it not a defence?

12-year-old boy found guilty of rape

A 12-year-old boy was found guilty of rape and attempted rape in the Children's Court in Townsville. The boy's lawyers took the case to the Court of Appeal arguing that the boy was too young to understand that what he had done was wrong.

A psychiatrist gave evidence that the boy was capable of understanding that what he had done was wrong and he was someone who was 'quite likely to become a very dangerous young man'.

The Court of Appeal dismissed the attempt to have the conviction quashed. The court stated that they were satisfied that the boy knew that what he was doing was wrong.

CASE STUDY

- 2 In the following situations, decide if you think there is free agreement and whether the offender is likely to be charged with rape. Give reasons.
 - a A woman went to the doctor regarding a stomach complaint. She agreed to have a vaginal examination. She felt uncomfortable about the way the examination took place. She found out later from another doctor that the examination was totally unnecessary.
 - b Teresa visited a new boyfriend at his flat. He would not let her go home. He tied her to the bed. After he had held her for three days against her will he talked her into letting him have sex with her.
 - c James knocked Miriam out with a punch to the jaw. While she was unconscious he had sex with her.
 - d After Gregory had been drinking heavily for many hours he took a girl back to his room for a coffee. He had sex with her. He gave no thought to whether the girl was consenting.
- 3 Explain the change in the law in relation to child endangerment.
- 4 Read the information about the *Crimes Amendment (Grooming) Act 2014* and explain the problem that this change in the law is trying to overcome, and the change in the law to overcome the problem.
- 5 Under the law in 2013, a person could be found guilty of child pornography and put on the sex offender register if caught sexting maliciously. What new law has been proposed in relation to sexting? How could this new law assist the offender, the victim and society as a whole?

Assault

Assault is defined in section 31 of the *Crimes Act 1958* (Vic.). It involves the direct or indirect application of force by a person to the body, clothing or equipment of another person, where the application of force is:

- without lawful excuse, and
- intentional or reckless and results in bodily injury, pain, discomfort, damage, insult or deprivation of liberty.

Application of force includes application of heat, light, electric current or any other form of energy, and application of matter in solid, liquid or gaseous form. Injury includes unconsciousness, hysteria, pain and substantial impairment of bodily function.

The maximum penalty for general assault is five years in prison.

The maximum penalty for common assault under the *Summary Offences Act 1966* (Vic.) is a fine of 15 penalty units or three months in prison. Aggravated assault attracts a fine of 25 penalty units or six months in prison. Penalty units provide the monetary value of a fine. The value of a penalty unit in July 2013 was \$144.36.

BELIEVE IT OR NOT!

An Australian tourist in Texas was charged with assault after she placed her hand on the arm of a woman who began to talk on her mobile phone during a cinema screening. The Texan woman was charged with disorderly conduct for verbally abusing the Australian.

Other offences against the person

There are various other types of offences against the person listed in sections 15–34 of the *Crimes Act 1958* (Vic.). They include:

- intentionally or recklessly causing injury
- intentionally or recklessly causing serious injury in circumstances of gross violence
- knowingly administering drugs to another person without their consent
- knowingly infecting another person with a very serious disease; for example, HIV (human immunodeficiency virus)
- threatening to kill or injure another person
- stalking another person – including cyber-stalking
- conduct endangering life of persons
- negligently causing serious injury
- setting traps to injure or kill another person whether a trespasser or not
- extortion by making demands on another with threat to kill or destroy property
- performing female genital mutilation on a child under 18.

SERIOUS INJURY

According to the *Crimes Act 1958* (Vic.), serious injury means an injury (including the cumulative effect of more than one injury) that endangers life or is substantial and protracted. It also includes the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm.

Intentionally or recklessly causing serious injury

A person who, without lawful excuse, intentionally or recklessly causes serious injury to another person is guilty of an indictable offence. **Serious injury** includes a combination of injuries.

The penalty for intentionally causing serious injury could be up to 20 years in prison and recklessly causing serious injury could be up to 15 years.

The penalties are less for intentionally or recklessly causing injury (not serious) – intentionally up to 10 years and recklessly up to five years.

For knowingly infecting another person with a very serious disease the maximum penalty is 25 years in prison.

Intentionally or recklessly causing serious injury in circumstances of gross violence

A person must not, without lawful excuse, intentionally or recklessly cause serious injury to another person in circumstances of gross violence.

The maximum penalty for intentionally causing serious injury is 20 years in prison and 15 years for recklessly.

CIRCUMSTANCES OF GROSS VIOLENCE

- The offender planned in advance to engage in violent conduct that was intended to cause serious injury, or the offender was reckless as to whether the conduct would cause a serious injury and a reasonable person would have foreseen that the conduct would be likely to cause serious injury.
- The offender was in the company of two or more people when the serious injury was caused.
- The offender participated in a joint criminal enterprise with two or more people causing the serious injury.
- The offender planned in advance to carry a firearm or weapon for the purpose of, and was actually used for, causing serious injury.
- The offender continued to cause serious injury after the person was incapacitated.
- The offender caused serious injury to the other person while the other person was incapacitated.

Stalking

It is an offence to engage in stalking. The maximum penalty for stalking is 10 years in prison.

Stalking includes:

- following the victim
- contacting the victim
- publishing material relating to the victim on the Internet or other electronic communication
- causing an unauthorised computer function in the computer of the victim (including any unauthorised access or modification of data held in a computer or the impairment of an electronic communication)
- tracing the victim's use of the Internet or other electronic communication
- entering or loitering outside the victim's home, place of business or other places frequented by the victim
- interfering with property of the victim

- making threats to the victim
- using abusive or offensive words, or performing abusive or offensive acts in the presence of the victim, or directing abusive or offensive acts towards the victim
- giving offensive material to, or bringing it to the attention of, the victim
- keeping the victim or any other person under surveillance
- acting in any other way that could reasonably be expected to cause physical or mental harm to the victim, or arouse apprehension or fear in the victim for their safety or that of another person.

Defences to assault

Defences to assault include the lawful use of force, self-defence and duress.

Lawful use of force

A person will not be found guilty of assault if it is shown that the force used was lawful. The use of force must not be disproportionate with the actions taking place. In general, a person cannot consent to a crime being committed against them. However, there are situations where consent can be given to acts which could otherwise be seen as an assault – as in surgery or in games, sports or contests.

The violent act must be within the rules of the game for it not to be assault; for example, when a boxer hits another boxer in a boxing match, or when a football player in a game of football tackles another player. However, if the footballer, for example, punched another player so hard as to cause him or her serious injury, the player could be charged with assault.

The lawful use of force	
use of force to protect another person	
use of force to escape unlawful imprisonment	
use of force to prevent crime	
use of force to protect property	
use of force in making an arrest	
consent to the use of force	
use of force, as is reasonable under the circumstances, in correction of a child	



Figure 2.9 In a boxing match the boxers consent to the use of force.

DID YOU KNOW?

The *Justice Legislation Amendment Act 2007* (Vic.) prohibits the carrying of dangerous articles for self-defence and makes it an offence to possess, carry or use a prohibited weapon in, or in the vicinity of, licensed premises.

Self-defence

Self-defence is a defence used by an accused on trial who alleges that he or she was in fear of immediate attack and injury. For this defence to result in an acquittal, the accused must show that he or she believed on reasonable grounds that it was necessary in self-defence to do what he or she did.

If the accused had that belief and there were reasonable grounds for it, or if the jury has reasonable doubt about the matter, then the accused is entitled to an acquittal.

Duress

A person is seen to have acted under duress if he or she commits a crime as a result of fear induced by certain threats. The Irish Court of Criminal Appeal in *Attorney-General v. Whelan* (1934) stated that ‘threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as justification for acts which would otherwise be criminal’.

If a person commits a crime under the threat of death or serious physical harm being inflicted on another person, and an ordinary person would have done the same in such circumstances, then the person will be acquitted. The defence may apply in a case where a woman smuggles drugs into another country because she genuinely believes that her violent ex-boyfriend will kill her son, whom he holds hostage.

Necessity

The defence of necessity may allow a person to be acquitted of a crime. The common-law defence of necessity no longer applies in murder cases. Instead, the accused would use the statutory defence of sudden or extraordinary emergency, which is a similar defence to necessity.

R v. Dudley & Stevens

In the case of *R v. Dudley & Stevens* (1884) 14 QBD 273, sailors stranded in a lifeboat with no food chose to kill and eat a cabin boy to survive. The court ruled that a reasonable person would choose to sacrifice his or her own life rather than kill another person. The sailors were found guilty of murder.

CASE STUDY

There are three elements to the defence of necessity:

- The criminal act must be done to protect the accused or someone else from irreparable evil or harm.
- The accused must honestly believe, on reasonable grounds, that there was a situation of imminent peril.
- The criminal act must be reasonable and not out of proportion to the peril avoided.

Intoxication

As in homicide cases, intoxication is relevant in proving whether the accused acted voluntarily and with the intent to commit the crime. Where the intoxication is self-induced, the court must compare the accused’s belief or actions to those ‘of a reasonable person who is not intoxicated’. If intoxication is not self-induced then the comparison will be made to ‘the standard of a reasonable person who is intoxicated to the same degree’.

LEARNING ACTIVITY 2.13

Assault and other offences against the person and defences

- 1 Describe the offence of assault using the case study ‘Assault by youths’ to illustrate points made.

CASE STUDY

Assault by youths

Ali was among a gang of youths who kicked, punched and spat on three women at the Southbank promenade. One youth grabbed the breasts of one of the women. Ali pleaded guilty to five charges, including assault in company, indecent assault and intentionally causing injury. He was sentenced to 12 months in a youth training centre.

- 2 Explain why each of the following situations is an assault or other crime against the person.
 - a Jeremy was stalking Melinda. He waited for her every day after school and followed her home. She felt frightened of him.
 - b Chris worked at a jewellery shop. Rudy came into the shop and threatened Chris with a syringe which he said was full of blood infected with HIV.
 - c Simon had been badly injured in a fight with Paris. Simon's brother, carrying a large knife, went to Paris's home and threatened to kill him. Paris escaped and reported Simon's actions to the police.
 - d Jake and Joeline had a baby boy. They were very young and did not know how to look after the baby. They left the baby locked in a cupboard. The baby was found two days later. It was malnourished, traumatised and very weak.
- 3 Read the case study 'Three charged over Birrarung Marr assault' and answer the questions.
 - a Explain the circumstances of this assault.
 - b One boy was charged with assault and another boy was charged with intentionally causing serious injury. How do these two charges differ and which offence carries the highest maximum sentence?
 - c What is the maximum sentence that the boy charged on summons (under the *Summary Offences Act*) is likely to receive?

CASE STUDY



Three charged over Birrarung Marr assault

Manrajwinder Singh, a 20-year-old student from Reservoir, was assaulted at Birrarung Marr on 31 December 2013. Singh was standing with a friend near the footpath at Birrarung Marr park when they were approached by eight men and one woman.

After a brief conversation, one of the offenders kicked Singh in the jaw, causing him to fall unconscious to the ground. While he was on the ground another man picked up a stick and beat him with it. He was taken to hospital in a serious condition. His friend suffered swelling and abrasions to the face.

A 17-year-old boy was charged with intentionally causing serious injury. A 16-year-old boy was charged with assaulting Singh and was remanded in custody. Another 16-year-old boy was granted conditional bail after the court was told that the boy was assisting the police in the case. A 15-year-old boy was released and will be charged on summons.

Figure 2.10

Manrajwinder Singh

- 4 Read the case study 'Prisoner escape and the defence of necessity' and answer the questions.
 - a What is required to prove the defence of necessity?
 - b Do you think this defence would be successful in the circumstances in this case study? Give reasons.

Prisoner escape and the defence of necessity

If a prisoner escapes from prison to get away from another inmate who has threatened to kill him, and during the escape he assaults a guard, he may claim that the assault was a necessary part of protecting himself from evil and harm. The likelihood of the other inmate carrying out the threat to kill the prisoner is very high in the prison situation and is relevant to the prisoner genuinely fearing for his life.

CASE STUDY

- 5 Explain the defence of duress and use an example to show how it could be applied to the offence of assault.
- 6 When a person is hurt in a sporting contest by another player, this may or may not be considered assault. Explain one example that would not be assault and another example that would be assault.
- 7 In each of the following situations, state the defence you think would be the most appropriate. Give your reasons. In each case, do you think the defence would be successful?
 - a Will was walking down the street when Harrison stopped him. An argument followed. Harrison had a knife, and threatened to kill Will. Will knocked Harrison to the ground. Harrison suffered severe bruising and a broken arm.
 - b Meika had been kidnapped. A police officer found where she was being held and entered the premises. The kidnapper told Meika that if she did not hit the police officer over the head with an iron bar, she would be shot. The kidnapper held a shotgun pointed at Meika while Meika assaulted the police officer.
 - c Jassi was studying in her house when she heard loud shouting outside her house. A man was beating a woman. Jassi went rushing out to help. She pulled the man away from the woman. When the man again started beating the woman, Jassi knocked him unconscious.
 - d Matilda woke suddenly to a noise in another part of the house. She got up and slowly crept through the house. She grabbed a cricket bat. In the lounge room a man was in the process of unplugging the DVD player and television. She hit him on the head with the bat and knocked him out. She then called the police.
 - e A plane crashed in a remote part of the mountains. The survivors knew they could not be rescued for months but they had no food. The group decided to kill a person who was seriously injured from the crash to use the body as food for the others.

Kidnapping and blackmail

Under the *Crimes Act 1958* (Vic.) a person can be found guilty of kidnapping if he or she:

- detains another with the intention of demanding payment or a ransom for the release of the person
- detains another with the intention of gaining an advantage (of any sort) even if no demand or threat is made.

Section 82 of the *Crimes Act* also makes it an offence to engage in blackmail. Blackmail is when a person makes unwarranted, menacing demands or threats with the intention of obtaining some personal gain or causing loss to another.

The maximum penalty for kidnapping is 25 years in prison and 15 years for blackmail.

LEARNING ACTIVITY 2.14

Kidnapping and blackmail

- 1 Read the case study 'Newborn dumped in deserted dwelling' and answer the questions.
 - a What occurred in this case?
 - b Explain the offence of kidnapping using this case as an example.
 - c Do you agree with the outcome of this case? Give reasons.

CASE STUDY

Newborn dumped in deserted dwelling

Mark and Cheryl McEachran pleaded guilty to kidnapping, causing serious injury and reckless conduct endangering life after they took a three-week-old baby girl from a Melbourne supermarket car park. Mark hit the baby's mother, pulled her to the ground and sprayed her in the face with the contents of an aerosol can while Cheryl took the baby.

Despite having children of her own, Cheryl had a strong desire to have another but she had difficulty conceiving.

The pair intended to raise the child as their own but ended up abandoning the baby in a derelict house after the police released video footage of the pair in the supermarket car park. Five hours later a woman passing by heard the child's cries and contacted police. The baby was found on the floor in a room littered with rubbish. She was dressed in a jumpsuit and had little other clothing as protection.

Both were sentenced to jail. Cheryl McEachran will serve at least four and a half years in jail and Mark McEachran a minimum of seven and a half years. A longer jail term was given to Mark because he was responsible for leaving the child in the derelict house.

- 2 Make up a scenario that involves the crime of kidnapping. Explain why the situation you have described is kidnapping and what punishment you would give in the circumstances.
- 3 What is blackmail? What is the maximum penalty for blackmail?

CRIMES AGAINST PROPERTY AND RELATED DEFENCES

Theft, robbery and burglary

Theft is an indictable offence that involves dishonestly taking (stealing) a person's property with the intention of permanently depriving the person of it. Minor theft charges are usually heard under the summary jurisdiction of the Magistrates' Court.

Theft includes **shoplifting** (also known as shop stealing or shop theft). Shoplifting is theft, even though the value of the goods that are stolen may be small. To be termed shop theft, the value of the

goods must be valued at, or displayed for sale at, a price less than \$600. Someone caught shoplifting can be given a 'cautioning notice' by the police. This does not require them to go to court. Alternatively they could be prosecuted in court.

A person is guilty of **robbery** if he or she uses force on any person, or puts any person in fear of force being used on him or her, immediately before or during the act of stealing. If the offender is carrying a firearm or offensive weapon, they can be found guilty of armed robbery.

A person is guilty of **burglary** if he or she enters any building as a trespasser with the intent to:

- steal
- assault a person
- damage the building or property.

If the trespasser is carrying a firearm or offensive weapon, they can be found guilty of **aggravated burglary**.

The maximum penalty for **theft** is 10 years in prison, **robbery** 15 years, **armed robbery** 25 years, **burglary** 10 years, **aggravated burglary** 25 years and **shop theft** a fine of two penalty units.



Figure 2.11 \$1.5 million in cash was seized from a Mercedes-Benz during a routine police patrol in Cabramatta on 20 November 2009.

Differences between theft, robbery and burglary

theft	dishonestly taking a person's property
robbery	using force, or putting a person in fear of force, during the act of stealing
burglary	entering a building with the intent to: • steal • commit assault as a trespasser • damage a building or property as a trespasser

BELIEVE IT OR NOT!

An extended family of thieves operating in the US state of Florida for nearly five years stole between \$67 million and \$122 million worth of goods by shoplifting. They could hit up to eight stores per day. The goods were sold on websites such as eBay. The thieves were very organised and kept the stolen goods in a massive warehouse.

Fraud

Fraud is divided into a series of offences including the offence of **obtaining property by deception** with the intention of permanently depriving the other person of it and **obtaining financial advantage by deception**.

Fraud is a serious offence with consequences that can be very severe, leaving victims in considerable financial debt. It is therefore necessary for the law to clearly indicate to the community that such activities are unacceptable. It is also necessary to try to deter others from committing similar crimes.

The maximum penalty for obtaining property by deception or obtaining financial advantage by deception is 10 years.

CASE STUDY

Fraudster jailed

Emily Judith McLeod, 66, was found guilty of six charges of obtaining property by deception from Aleksander Atanasov, who suffered from a brain injury. Mr Atanasov said McLeod approached him at the casino soon after he had won \$10 000. She said he could make good money by investing with her. She offered him a quick return of \$900 on the money. The prosecutor, Daniel Porceddu, said that Mr Atanasov genuinely believed he would receive high interest returns on the money he handed her.

The court heard McLeod had a long history of convictions and there was absolutely no chance of her rehabilitating. The community needed protection from her. She was sentenced to 30 months in jail with a minimum of two years.



Figure 2.12 Bernard Madoff, the high-flying New York financier, stole the savings of thousands of American investors during a period of 18 years. He pleaded guilty to what is seen as the world's biggest fraud. He was operating a complex Ponzi scheme, using investors' money to pay dividends, not profits. Authorities say the scheme cost investors at least US\$13 billion (A\$14.05 billion). Madoff, 71, is serving a 150-year prison sentence. He has gone from his Manhattan penthouse to sharing a cell with a drug offender at a federal prison, where he apparently eats pizza cooked by a child molester and hangs around with a mob boss and a convicted spy.

Computer crimes

Some of the computer crimes covered by the *Crimes Act 1958* (Vic.) include:

- unauthorised computer access, modification or impairment with intent to commit a serious offence (up to five years' imprisonment)
- unauthorised modification of data to cause impairment (up to 10 years' imprisonment)
- unauthorised impairment of electronic communication (up to 10 years' imprisonment)
- possession of data with intent to commit a serious computer offence (up to three years' imprisonment)
- producing, supplying or obtaining data with intent to commit a serious computer offence (up to three years' imprisonment)
- unauthorised access to or modification of restricted data (up to two years' imprisonment)
- unauthorised impairment of data held in a computer disk, credit card or other device (up to two years' imprisonment).

Identity theft

Identification information includes name and address, credit card numbers, driver's licence number, passport number, digital signature and Australian business number.

It is an offence to make, use or supply identification information (maximum three years' imprisonment). It is also an offence to possess identification information or equipment used to make identification documents (maximum three years' imprisonment).

It is not an offence to attempt to commit an identity crime offence.

Destroying or damaging property

It is illegal to intentionally destroy or threaten to destroy property belonging to another person without lawful excuse. It is also illegal for a person to destroy his or her own property for personal gain. If a person's life is endangered, the offence carries a heavier penalty. It is an offence to possess anything with the purpose of using it to destroy or damage property.

Arson

Deliberately lighting or spreading bushfires is a crime, often referred to as arson. Arson causing death is a more serious offence.

The maximum penalty for destroying or damaging property is 10 years in prison and arson causing death 25 years.

Graffiti

The *Graffiti Prevention Act 2007* creates graffiti-related offences, provides search and seizure powers for members of the police force and gives local councils the power to enter private property for the purpose of removing graffiti. Under this Act a person must not:

- mark property without express consent (penalty: two years' imprisonment)
- possess an implement for creating graffiti, without lawful excuse, on property of a transport company, in an adjacent public place or in a place where the person is trespassing (penalty: 25 penalty units)
- possess a graffiti implement with the intent to mark graffiti (penalty: 25 penalty units).

Graffiti artists plead guilty

Operation Greyline was set up in response to a spate of graffiti attacks that took place on the Central Coast in New South Wales. As a result of the two-month investigation, Mark Crawley and Samuel Hurst, who are part of notorious graffiti crew 'The Creeps', pleaded guilty to 76 counts of graffiti.

The police Vandaltrack system identified more than 125 tags belonging to The Creeps around the Gosford area. This included a 400-kilometre round trip to Kiama where Crawley and Hurst and two other unidentified vandals 'bombed' an eight-car train and nearby overpass with a series of murals, some covering the entire sides of the carriages.

Figure 2.13 Graffiti similar to that of Samuel Hurst



**CASE
STUDY**

Table 2.4 Defences to property crimes

DEFENCE	EXPLANATION
Factual dispute	The accused may claim that the facts put forward by the prosecution are wrong and that the prosecution does not have enough evidence to prove his or her guilt.
Lack of intent	To commit a crime it is essential that there is a guilty act (actus reus) and a guilty mind (mens rea). An accused may try to establish as a defence that he or she did not have the intention to commit the crime (mens rea).
Honest and reasonable mistake	If an offender conducts himself or herself in a way to show that there was a genuine, honest and reasonable mistake then this may be available as a defence. The criminal act would not have been committed with a guilty mind.
Defence of impossibility	This defence can be used when the accused can claim that it is not possible for him or her to have committed the crime because they were elsewhere at the time, for example in another state.
Mistaken identity	The accused can claim that there was a situation of mistaken identity, that he or she was not the person who it is alleged committed the crime.
Duress	The basis of the defence of duress is that the accused committed the crime because he or she was overwhelmed by another person and forced into committing the crime. The accused would have to show that an ordinary person would have also been overwhelmed in the circumstances. A person may be forced to commit a criminal act under the threat that their family member or close associate will be killed if they refuse.
Intoxication	This defence requires the accused to show that he or she was so intoxicated that he or she was unable to form the intention to commit the crime and that the intoxication was not voluntary.
Necessity	This defence exists for cases where someone has been so overwhelmed by a certain situation that they have felt forced to break the law. However, there cannot be the situation where people can simply decide not to obey the law and apply their own set of values to situations when they arise. This defence does not apply in murder cases.
Mental impairment	For this defence to be available to the accused, the accused must have been unable to appreciate the physical nature of what he or she was doing and the consequences of his or her behaviour.
Bona fide claim of right	If a person is charged with theft and related offences, he or she may be able to claim, by way of defence, a genuine belief that he or she had a bona fide claim of right to the money or property that is claimed to be stolen. This defence extends to a person who takes property on behalf of another person, or in collaboration with another person, who they believe has a bona fide claim of right to the property in question. For example, if you were given a piece of jewellery by a friend, you would assume that the friend rightfully owned that jewellery.

LEARNING ACTIVITY 2.15

Crimes against property and defences

- Look back at the case study 'Graffiti artists plead guilty' and answer the questions.
 - Which charge or charges may Samuel Hurst and Mark Crawley have pleaded guilty to? Explain your reasons with reference to the case study.
 - What maximum penalty are both accused likely to receive?

- 2 Read the case study 'Fake ID card' and answer the questions.
 - a What offences was Ms Teh charged with, and which one did she plead guilty to?
 - b How did she obtain her fake ID?
 - c Do you think the final outcome of this case is fair? Discuss.
 - d What long-term consequences might there be from this type of criminal action?

Fake ID card

During a court hearing, the magistrate warned teenagers about the dangers of using fake ID cards. If anyone is caught they could end up with a criminal record. Evelyn Teh was caught during a police blitz. She was charged with, and pleaded guilty to, making a false document. The charges of perjury, making a false statement and using a false document were withdrawn.

She used a friend's birth certificate and Medicare card to apply for a proof-of-age card. She wanted to go to an end-of-Year-12 party at a licensed venue. The magistrate placed Ms Teh on a six-month good behaviour bond, without conviction.

CASE STUDY

- 3 Look back at the case study 'Fraudster jailed' and answer the questions.
 - a What was McLeod charged with?
 - b What is a maximum sentence she could have been given for this crime? Why do you think she was given a jail sentence?
- 4 Read the case study 'Computer hacker in the United Kingdom' and answer the questions.
 - a Make a list of offences you think Onikoyi committed.
 - b What penalty did Onikoyi receive? Do you think this was adequate given the seriousness of the offences? Explain.
 - c What is the maximum sentence Onikoyi could have received if the offences had taken place in Victoria?
 - d In the light of this case and other similar cases, do you think others may be deterred from doing similar things? Discuss.

Computer hacker in the United Kingdom

A total of 238 UK students had their bank accounts raided after a hacker tricked them into handing over their passwords.

Olajide Onikoyi, 29, from Manchester, sent fake emails to potential victims inviting them to click on a link to update their student-loan details. He used his bogus website to collect personal details, access accounts and remove hundreds of thousands of pounds.

Onikoyi was jailed for nearly four years. A number of other people have also been jailed over the scam, which police say involved a total of £1.5 million stolen through unauthorised access to accounts.

CASE STUDY

- 5 Describe three defences to property charges and make up a scenario describing a situation when each defence could be used.

- 6 Read the case study 'Volunteer found guilty of arson' and answer the questions.
- What was Brendan Sokaluk charged with?
 - What occurred in this case?
 - Which court was this heard in?
 - What is the maximum sentence for arson causing death?
 - What sentence was Sokaluk given? If you were the judge in this case what sentence would you give? Explain.

CASE STUDY

Volunteer found guilty of arson

Brendan Sokaluk, a former Victorian Country Fire Authority volunteer, was found guilty of killing 10 people by deliberately lighting a bushfire on Black Saturday. The jury found him guilty of 10 charges of arson causing death.

Sokaluk is autistic and has a mild intellectual disability. He told police he may have accidentally started the fire when he threw his cigarette out of his car window.

Sokaluk told the court, 'Part of my cigarette thing fell on the floor, so I got a bit of paper out to grab it and stuff ... I thought it was dead and I've chucked it out the window, but I didn't know it had lit up'.

In the words of his lawyers, Black Saturday arsonist Brendan Sokaluk is a 'bit of a misfit' and a simpleton.

On 27 April 2012, Brendan Sokaluk was sentenced to 17 years and nine months in prison, with a minimum of 14 years.



Figure 2.14

The aftermath of the Churchill bushfire, which killed 10 people

- 7 Read the case study 'Chartwell collapse leads to charges against the director and the company secretary' and answer the questions.
- What is a Ponzi scheme?
 - Why do you think Hoy and Rau were charged?
 - Do you agree with the outcome of this case? Discuss.

CASE STUDY

Chartwell collapse leads to charges against the director and the company secretary

In December 2007, a group of a Geelong investment firm's largest investors were told all was well with the firm they had invested so much money with. Chartwell Enterprises had just bought a stockbroking firm, which Chartwell executives said could cause short-term cash flow problems, but investors should continue to support the company. Five months later, administrators had been appointed. Chartwell collapsed owing \$58 million.

The prosecutor alleges that investors' funds were misappropriated or returned to them via a Ponzi scheme. A Ponzi scheme is a fraudulent investment operation that pays returns to separate investors from their own money or money paid by subsequent investors, rather than making the promised investments and actual profits earned.

Hoy was living a lavish lifestyle, owning assets including a boat, a Rolls-Royce and restaurants, which were funded by Chartwell investor money. It was alleged during the committal hearing that Chartwell money was used to fund renovations to Rau's home in Geelong.

Graeme Hoy, 58, was sentenced to a minimum of nine years after pleading guilty in the Victorian Supreme Court to 44 fraud-related charges after the collapse of the Geelong-based investment company Chartwell Enterprises in 2008. Ian Rau was jailed for 18 months after he pleaded guilty to eight charges.



Figure 2.15 Former Chartwell company secretary Ian Rau outside the Geelong Magistrates' Court



Figure 2.16 Graeme Hoy, former director of Chartwell, leaves the Geelong Magistrates' Court.

PRACTICE EXAM QUESTIONS

- 1 Explain two of the principles of criminal liability. (4 marks)
- 2 Explain the difference between murder and manslaughter. (6 marks)
- 3 Describe three defences to murder. (6 marks)
- 4 Describe the offence of assault and explain one defence to assault. (4 marks)

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK FOLIO AND REPORT

Types of crimes

The folio and report is designed to be completed throughout the study of Unit 1. This particular exercise relates to types of crimes and defences to crimes. At this stage of your study you should be collecting data such as newspaper articles and reports of radio and television programs. The report can be completed after you have completed the unit of study on types of crimes and their defences.

Collect three articles on different types of crimes (you should have articles about at least two different types of crimes) and identify how each crime reflects the basic features of the relevant type of crime. Write a report about each article. In your report:

- identify the source and date of the article
- describe the type of crime
- list the basic features of the type of crime
- explain how these features apply to the crime referred to in the article
- explain or suggest any possible defences that may apply.

(15 marks)

ASSESSMENT TASK CASE STUDIES

Crimes and defences

- 1 Read the case study 'Umbrella death' and answer the questions.
 - a Discuss four principles of criminal liability, applying them to this case. *(4 marks)*
 - b Explain the prosecution's case. You will need to show how each element of murder relates to this case. *(5 marks)*
 - c What arguments might a barrister acting for the accused use to lessen the boy's criminal liability? *(2 marks)*
 - d The jury found the accused guilty of murder. They believed the accused had acted towards Christopher with the intention of doing him really serious injury and that his actions were not a reasonable response given the circumstances that he was faced with. The appeal court considered the distinction between **murder with reckless indifference** and **unlawful and dangerous manslaughter**. Looking at the definition for murder with reckless indifference (malice aforethought) and the definition of dangerous and unlawful manslaughter, and at the circumstances of the accused (youth, background etc.), which do you think would have been an appropriate verdict? Give your reasons. *(5 marks)*
 - e What was the final sentence in this case? Explain why you think this decision would have been reached by the court and whether you think it is fair in the circumstances. *(4 marks)*

Umbrella death

Christopher died as a result of being struck in the side of the head with a steel-tipped umbrella by a 14-year-old boy. The 14-year-old, who cannot be named, was mouthing off offensively to people at the tram stop. Christopher, aged 18, was with a group of young people celebrating their last day of secondary school. The 14-year-old made several comments about the way a girl in Christopher's group was dressed. He called her a 'disgrace and a slut'.

The group ignored him at first but when he continued, Christopher asked, 'What did you say?' The 14-year-old then struck Christopher twice in the side of the head with the steel tip of the umbrella he was carrying. Witnesses described the blows as hard and javelin-like. The second blow penetrated Christopher's skull with the tip going into his brain. Christopher fell to the ground. He was taken to hospital in a coma and later died.

The court was told that the 14-year-old came from a dysfunctional family where violence was accepted as an appropriate response when challenged.

The then 14-year-old was found guilty of murder and sentenced to 14 years' detention, with a fixed minimum non-parole term of nine years.

The sentence was reduced to 12 years' jail with a minimum of eight years by the Court of Appeal.

Chief Justice Marilyn Warren and justices Peter Buchanan and Frank Vincent of the Court of Appeal found that the trial judge had not properly explained the differences between reckless murder and manslaughter by a dangerous act. The lawyer for the accused argued that, at the time, the youth and reckless manner of the accused meant that he did not have the intent required for murder. The crime was not planned or premeditated and was not committed with a weapon carried for the purpose. It was committed with an object already to hand on the spur of the moment in response to an unjustifiably but genuinely perceived fear. A reasonable man would have appreciated the danger of the action taken by the accused. However, the accused stressed he did not foresee the probability of death or really serious injury. He argued that he had no intention to kill or do really serious injury to Christopher.

- 2 Read the case study 'Camouflage killer' and answer the questions.
 - a What has to be proved for the defence of self-defence to be successful? Explain how self-defence may be appropriate to this case. (4 marks)
 - b Might the defence of defensive homicide be more appropriate in this case? Explain. (2 marks)
 - c Do you think the accused should have been acquitted or found guilty of defensive homicide? Give your reasons. (2 marks)

Camouflage killer

A mother of five argued that she killed her abusive husband to protect her children. The woman wore camouflage gear and waited in the bushes for over 90 minutes to kill her husband. She used a gun from an extensive collection kept on the family property. She fired six shots at her husband while he tried to fix a Land Rover vehicle that he thought had a flat battery.

During the court case the jury heard that the husband controlled the woman's every movement. Witnesses testified that the woman and her children had endured years of harsh treatment. The woman's barrister argued that she had suffered ongoing physical, emotional and sexual abuse. The woman said she was constantly told what to do, including having sex against her will. Her husband forced her to do heavy work while pregnant and threatened to kill her if she left. She said her husband terrified the children and he would often take to them with a stick. On one occasion he threatened to shoot one of his daughters if the child did not shut up.

The woman told the court that she had to kill her husband of 17 years, otherwise she would be the one lying dead. The prosecution argued that the woman killed in cold blood and urged the jury to convict her of murder.

The woman pleaded not guilty to murder, although she admitted shooting and killing her husband. The prosecution had to disprove that the woman had acted in self-defence. During the trial, the prosecution stated that an unhappy marriage did not give a wife the right to play judge, jury and executioner in deciding her husband did not deserve to live.

The jury found the woman was not guilty of murder or manslaughter.

- 3 Read the case study 'Farquharson found guilty' and answer the questions.
- What crime was the accused charged with in this case? (1 mark)
 - What are the elements of this crime that need to be proved by the prosecution for this crime? How do these elements apply to this case? (4 marks)
 - What defence was used in this case and what had to be proved for this defence? (4 marks)
 - What was the original outcome of the Farquharson case? Why do you think this outcome was reached? What was the outcome of the Court of Appeal case? (3 marks)

(Total 40 marks for the three case studies)

Farquharson found guilty

A Supreme Court jury found Robert Donald William Farquharson deliberately set out to drown his three children, Jai (10), Tyler (7) and Bailey (2), when he plunged his car into a dam near Winchelsea on Father's Day in 2005. Farquharson pleaded not guilty to three charges of murder, insisting it was a freak accident caused when he blacked out from a coughing fit.

The court heard Farquharson was depressed and desperate for revenge against his estranged wife. He vowed to make her 'suffer every Father's Day for the rest of her life'. Friends said he had told them he was going to kill his children to pay back his former wife, Cindy Gambino. The prosecution argued Farquharson was overcome with hate and anger, and he had either acted on impulse or plotted to commit the cruel murder by driving his car off the Princes Highway into a dam during an access visit.

Somehow the car carrying the boys left its lane of the Princes Highway, crossed the oncoming Geelong-bound lane, broke through a post-and-wire farm fence and careered across the grass into eight metres of water. Farquharson swam to safety. The boys released their seatbelts but were unable to get out of the car.

Farquharson was given three life sentences with no parole after the jury found him guilty of murdering his three sons. Justice Philip Cummins said he had acted as a result of a 'burning resentment' towards his wife. Justice Cummins said 'his aim was to ensure all three sons were killed so their mother was left with no consolation'.

In December 2009, the Court of Appeal quashed Farquharson's conviction, set aside his sentence and ordered a retrial. The Court of Appeal maintained there were significant errors made during the 2007 trial. The prosecution had not informed the court that the main witness against Farquharson, Greg King, had criminal charges pending. The appeal court also found that the judge failed to properly instruct the jury about how much weight they should give to King's taped conversations between himself and Farquharson. The retrial was in April 2010. He was again found guilty.



Figure 2.17 Robert Farquharson

ASSESSMENT TASK CASE STUDY

Boys break into school

Read the case study 'Boys break into school' and answer the questions.

- 1 What is the difference between the crimes of theft, burglary and robbery? (3 marks)
- 2 Did the boys commit any or all of the crimes of theft, burglary and robbery? Explain. (3 marks)
- 3 What is fraud? Explain two different types of fraud. How did the boys commit fraud in this case? (4 marks)
- 4 What other crimes are the boys alleged to have committed, or may they have committed? Explain these offences in relation to this case study. (5 marks)
- 5 If you were acting on behalf of these boys, what advice would you give them? Are there any defences that the boys could use? Explain. (3 marks)
- 6 Explain the verdict you would reach in this case. (2 marks)

(Total 20 marks)

Boys break into school

Two youths aged 16 and 17 broke into a school and caused \$30 000 worth of damage when they went on a two-hour vandalism rampage. The boys jemmied open a door to a classroom with the intention of stealing any valuables they could find. They managed to find a camera and a small tape recorder which they later sold at a local Cash Converters store. The pair tipped paint on floors, daubed it on walls and poked holes in plaster with a steel bar in one classroom. They then moved into another room and set fire to a pile of papers and books in one corner. The fire caused extensive damage to the classroom.

The police were able to trace the boys from records held at the Cash Converters store. The store's records showed that the boys had, over a period of time, 'cashed in' a camera, a tape recorder and six skateboards. When questioned by police, the boys admitted entering the school building and taking the tape recorder and camera, but they denied lighting the fire or causing any other damage. They said, 'We jemmied open the door but we didn't wreck the place or light any fire. Someone else done that.'

The boys were also found in possession of a stolen bankcard. Police investigations revealed that the bankcard belonged to a teacher at the school and that the boys had used it to purchase two pairs of rollerblades to the value of \$386.

The boys were questioned about some young children who had been assaulted in the local area – the police believe they could have been responsible for threatening young people with a knife until they handed over their possessions.



CHAPTER 3

CRIMINAL INVESTIGATION AND SANCTIONS

OUTCOME

On completion of this unit you should be able to explain the key principles and types of criminal law, apply the key principles to relevant cases, and discuss the impact of criminal activity on the individual and society.

KEY KNOWLEDGE

This chapter is designed to help you to understand the key knowledge of:

- the criminal investigation process, including police powers, and individual rights and responsibilities in dealing with police
- sanctions under criminal law and their effectiveness
- trends in crime, sentencing and recidivism
- a comparison of one aspect of sentencing in Victoria with that of an international jurisdiction
- the impact of criminal acts on individuals and society
- alternative avenues for seeking compensation for victims of crime.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about criminal cases, using print and electronic media
- discuss the effectiveness of criminal sanctions
- analyse data on sentencing and crime trends in Victoria
- compare one aspect of Victoria's sentencing approaches with that of an international jurisdiction
- discuss the impact of criminal acts on individuals and society.

KEY LEGAL TERMINOLOGY

bail The procedure that enables accused people to be released from custody after being charged awaiting their hearing or trial.

charge When the police formally allege that a person has committed a crime.

custodial sentence A sentence where the offender is detained in custody (in prison).

denunciate When a court shows disapproval.

guideline judgment Advice given by the Court of Appeal that directs what other courts should do when passing sentence in certain types of cases.

prima facie case On the face of it; there is sufficient evidence to suggest that the accused has committed a crime.

question of law A dispute about the law that applies to a particular situation.

recidivist A person who continues to commit crimes despite being punished for them.

rehabilitate Restore to a life without crime; restore reputation.

remand A suspect is refused bail and is held in custody until the trial.

right to silence A person can remain silent during police questioning, except in circumstances when they may be required to give their name and address; a person can also elect to not give evidence in court.

summons A document telling the accused which court will deal with their criminal case and the mention date (date of first hearing).

surety Person who guarantees the appearance of an accused person at their trial if they have been released on bail.

THE ROLE OF THE POLICE IN THE COMMUNITY

The role of the police is to serve the community and the law. The police preserve the peace, protect life and property. They prevent crime, detect and apprehend offenders and assist victims of crime or other people in times of emergency.

When a crime is reported, the police will investigate the crime and try and find the person responsible. They will:

- talk to any victims or witnesses
- question possible suspects
- examine the scene
- look for physical or forensic evidence
- charge the offender and ensure the person is taken to court.



Figure 3.1 Victoria Police in action



Figure 3.2
There are 11 different ranks within Victoria Police, ranging from constable to chief commissioner. Epaulettes of five ranks are shown (from top to bottom): Senior Sergeant, Inspector, Superintendent, Deputy Commissioner, Chief Commissioner

Victoria Police have forensic experts to assist with investigations. These experts analyse evidence found at crime scenes. They do drug and blood analysis, and examine physical evidence like paint or fibres and biological material like blood or hair. These items are examined for clues which can either implicate or exonerate a suspect in a crime. These forensic specialists may also be asked to provide expert testimony in court.

Crime prevention and community safety

The police are committed to preventing crime. Their regular patrols on foot or in police cars, on major roads or at sporting events or other public gatherings may deter potential offenders and assist with public safety. The police also use education campaigns and the media to highlight road safety initiatives and to give the public advice on how to secure their property and ensure their personal safety.

The **Public Order Response Team (PORT)** aims to restore and maintain order in the community. Its members provide a rapid response to public order incidents and are trained to deal with volatile and hostile crowd situations and certain emergencies.

Crime Stoppers Australia is an initiative which relies on the cooperation of the public, the media and the police. The public can call Crime Stoppers anonymously with information that might help to prevent or solve a crime. Crime Stoppers Australia also uses public campaigns to educate the community about crime-related issues like violent crime, identity fraud and hoon driving.

The police have supported **Neighbourhood Watch Victoria** since the early 1980s. This program relies on the support of the public who liaise with local police to help reduce crimes in designated Neighbourhood Watch areas. This crime prevention strategy now operates in many urban and rural locations across Victoria.

Police protection of the community
directing traffic
preventing crime
investigating crime
assisting victims after a crime has been committed
assisting in state emergency situations



Figure 3.3 Protective services officers who assist police with crime prevention and community safety

LEARNING ACTIVITY 3.1

The role of the police in the community

- 1 Explain two responsibilities of the police.
- 2 How do the police help to prevent crime?
- 3 Explain two ways that the police protect the community.
- 4 Explain the role of Crime Stoppers. How can this scheme help members of the community?

POLICE POWERS AND INDIVIDUALS' RIGHTS

The job of police officers is very difficult. They have to deal with a wide variety of situations and may often find themselves in danger. To do their job of law enforcement, they need powers which enable them to investigate crimes and bring offenders to justice.

The powers of the police need to be balanced against the rights of individuals who may be suspected of a crime. If police have too much power, individuals may be unjustly treated. On the other hand, if their powers are too few or too limited, crime prevention and law enforcement becomes very difficult.

Every person has the right to be treated as innocent until proven guilty. It is therefore necessary to provide safeguards for individuals when dealing with the police, particularly when a person is arrested and detained for questioning or further investigation. A criminal court has the power to exclude any police evidence obtained unfairly or illegally.

Arrest

Individuals can refuse to attend the police station **unless they are under arrest**. People can generally refuse to answer police questions but **they must provide police with their name and address** if police reasonably believe the person has committed an offence, is about to commit an offence or could assist with the investigation of a serious offence. Refusal to comply is an offence and may lead to arrest.

Police powers of arrest are outlined in the *Crimes Act 1958* (Vic.). Police can arrest an offender either **with a warrant or without a warrant**. Arrest **with a warrant** is uncommon. Warrants are used when a person ignores a summons to go to court or if the offender is in hiding or is an escapee. A court must issue the arrest warrant and it should be shown to the offender at the time of arrest.

Most arrests occur **without warrant**. The police do not always take the offender to the police station or place them under arrest when a person commits a summary (minor) offence. If the police believe the person will not immediately reoffend and if the person's identity can be verified, then police note the details of the offence and send the offender a summons at a later date. A **summons** is a document which outlines the charge(s) and directs the offender to appear at court on the mention (first hearing) date. Alternatively a **notice to appear** (at court) may be given on the spot in non-complex cases; for example, driving while disqualified, suspended or unlicensed.

Police can arrest without warrant any person found committing a summary or indictable offence if police reasonably believe it is necessary to:

- ensure the appearance of the offender in court
- preserve public order
- prevent the continuation or repetition of an offence or the commission of a further offence
- ensure the safety or welfare of the public or the offender.

Police will usually arrest **without warrant** any person reasonably believed to have committed an indictable (serious) offence either in Victoria or elsewhere which, if committed in Victoria, would be an indictable offence.

Police can use **reasonable force** when making an arrest. This will depend on the circumstances. In making an arrest the police will usually:

- tell the suspect they are under arrest and, depending on the circumstances, touch the suspect to indicate clearly that they are detained and must remain with police
- give a reason for the arrest unless the suspect makes it impossible to be given the information
- caution the suspect that anything said may be used as evidence in court

- inform the suspect of the right to contact a friend, relative or lawyer to inform them of their whereabouts – this contact is facilitated at the police station
- take the suspect to the police station for questioning.



Figure 3.4
Police attending a
crime scene

DID YOU KNOW?

Jim Morrison (of the 1960s rock group The Doors) was the first rock star to be arrested on stage.

POLICE BLITZ

Police have used social networking media – Twitter – to ‘tweet’ general details about breath test readings and speeding cars as part of a road safety blitz. Police hoped that posting the details of bad driving behaviours would deter others from doing the same.

During a one-month blitz between November and December 2013, police dealt with 1274 drink driving offences, 328 drug offences and 11 732 speeding offences on Victorian roads. Police detected an average of 146 unregistered vehicles, 72 unlicensed drivers and 39 disqualified or suspended drivers for each day of the blitz. A further 108 drivers per day were fined for mobile phone offences despite constant warnings of the dangers of using such devices while driving.

Source: statistics taken from the Victoria Police News website

Searches

Search with warrant

If police reasonably believe that a search of private premises is necessary **to find evidence** related to a crime, then they must apply to a court for a **warrant**. The police must follow set procedures when applying for and then executing the warrant.

Search without warrant

The *Crimes Act 1958* (Vic.) allows the police to enter and search premises **without a warrant** for the purpose of finding and arresting a person who police reasonably believe:

- is committing a serious indictable offence (punishable by five years’ imprisonment or more)
- has committed a serious indictable offence in Victoria or elsewhere
- has escaped from legal custody.

Police can search a person **without warrant** after an arrest. The purpose of the search is to find evidence, weapons or other items that may cause injury or aid an escape. The suspect's clothing and immediate possessions can also be searched. Searches should be conducted by a person of the same sex and with consideration to privacy where possible. Prisoners and anyone entering jails or courthouses can be searched **without warrant**.

Police also have the right to stop, detain and search **without warrant** a person, their vehicle or immediate possessions under specific Acts of parliament. In conducting these searches police must comply with legislative provisions which outline who can be searched, where and for what purpose. In all cases, police should identify themselves and explain the purpose of the search before detaining the person. Reasonable force can be used if the person refuses to comply. If an illegal item is found during the search, the police will seize the item and deal with the issue according to the law. In general, these searches are conducted when police suspect a person:

- has illegal drugs in a public place
- has or will commit a firearms offence
- has a spray-paint can on or near public transport property or elsewhere as a trespasser for the purpose of illegal graffiti
- is under 18 and is 'chroming' or inhaling chemical substances, or the person is an adult who is supplying chemical substances to people under 18 for the purpose of inhaling
- has a weapon (e.g. a knife, imitation firearm, martial arts equipment or other dangerous items like a broken bottle or an explosive) in a public place without permission or lawful excuse. In addition, police can declare a public place a designated weapons search area for a limited time. Police can then randomly search any person in the declared area for weapons
- is in a targeted terrorism area.

Police can also enter and search premises if the occupier gives them permission, if they need to stop a breach of the peace (a fight) or if there is a breach of an intervention order in progress. Police usually exercise these powers in family violence situations.

The police or other authorised officers at major sporting events can ask spectators to walk through screening equipment, turn out pockets, inspect bags or ask a person in possession of the bag to empty the contents in their search for prohibited items. A person who refuses will be denied entry or asked to leave the venue.

SEARCH WARRANTS USED TO COMBAT OUTLAW MOTORCYCLE GANGS

In 2013, police used search warrants to enter bikie clubhouses and other premises connected with motorcycle gangs to search for weapons, explosives, drugs and stolen goods. The raids followed fights between rival gangs involving drive-by shootings and the use of petrol bombs.

Types of searches

The police must make a written record of all body searches. There are different types of body searches including:

- **pat-down (frisk) search** – Police use their hands to see if items are concealed in clothing. The police can ask for outer clothing like coats, hats and shoes to be removed and can ask people to turn out their pockets during a search.
- **full (strip) search** – This must be done in private (usually at the police station) and should not involve any touching of the body. This kind of search involves an officer (of the same sex as the person being searched) supervising the removal of clothing for further examination.

LEARNING ACTIVITY 3.2

Police powers – arrest and searches

- 1 Why do you think it is necessary to provide safeguards for individuals when dealing with the police?
- 2 What is a summons?
- 3 When can a suspect be arrested without a warrant?
- 4 Under what circumstances is a person likely to be arrested with a warrant?
- 5 What has to occur when an arrest is being carried out?
- 6 What is a pat-down search?
- 7 Explain two rights that individuals have in relation to arrest and/or searches.
- 8 Create a poster or brochure explaining Victoria Police's powers of arrest and search.

Detaining and questioning

A person does not have to go to the police station for questioning unless under arrest. A person must be told why they are under arrest.

If a person is taken into custody for questioning, he or she must be:

- released unconditionally **within a reasonable time** of being taken into custody (what is a reasonable time depends on the circumstances in the situation, including how long it has taken to get the person into custody, the number of people to be interviewed, and any delays such as the time taken for a lawyer to attend), or
- released on bail, or
- brought before a bail justice or the Magistrates' Court within a reasonable time of being taken into custody.

BAIL OR REMAND

A person charged with an offence has the right to apply to be released on bail until their trial. Bail refers to the procedure that enables accused people to be released from custody after being charged awaiting their hearing or trial. Conditions can be specified, and a guarantor (surety) can be required.

Someone who is refused bail will be held on remand in a remand centre, until the case comes to trial, or until bail is granted in the future.

Individuals' rights during questioning

Police caution

Before the police ask a suspect any questions they must caution the suspect about their rights. The police must tape the caution given at the beginning of any police interview. The caution states that the suspect is '**not obliged to say or do anything but anything you say or do may be given in evidence**'.

The right to contact a lawyer and a relative or friend

Before questioning begins, an investigating official must inform the person in custody that he or she may communicate with a friend or relative to inform them of his or her whereabouts and may also communicate with a lawyer.

A person has the right to communicate with a lawyer and a relative or a friend unless it will result in the escape of an accomplice or the destruction of evidence.

If the lawyer attends the police station, the suspect should be given the opportunity to speak with the lawyer in private and may have the lawyer present during questioning.

The right to silence

While members of the community are expected to assist police in their investigations, a suspect in a crime cannot be forced to make a statement or answer police questions – except in particular circumstances where police can ask for a person's name and address.

Taping of police interviews

Police interviews relating to indictable (serious) offences must be audiotaped or videotaped. In minor offences, the police can write down the questions and answers, and use these notes as evidence in court.

The right to a person in attendance

People under 18 must have a parent, guardian or independent person with them during police questioning.

The right to an interpreter

The police must provide an interpreter when questioning non-English-speaking suspects.

Photographs

The police may want to take a suspect's photograph while in police custody but a person can refuse to give the police permission to do so.

Identification parades

A person can refuse to take part in an identification line-up.

DID YOU KNOW?

Police can question a person (other than a child) who is already in prison or police jail about their involvement in an offence other than the one for which the person is being held. Police can only do so with the prisoner's informed consent, otherwise a court order is required.

Source: Crimes Amendment (Investigation Powers) Act 2013 (Vic.)

Fingerprints

Fingerprinting uses an ink and paper process to take an imprint of a person's fingerprints. **Finger scanning** uses an electronic process to obtain and store human fingerprints. The scanner uses special software to capture a digital image of the fingerprint. Ink fingerprints can be digitally photographed and uploaded to the fingerprint database. Fingerprint images can then be electronically analysed, compared and distributed.



Figure 3.5
Fingerprints can include finger, palm, toe and sole prints.

Table 3.1 Fingerprint laws

Police can take fingerprint or electronic finger scans from a person the police reasonably believe has committed an indictable offence or a summary offence punishable by a term of imprisonment. If the suspect refuses to cooperate then reasonable force can be used to take the prints. The process should be audio or video recorded, particularly if prints are taken using force from persons under 18. The law requires police to follow set procedures according to the suspect's age.

OFFENDER IS UNDER 10	OFFENDER IS 10–14 YEARS OF AGE	OFFENDER IS 15–17 YEARS OF AGE	OFFENDER IS 18 YEARS OF AGE OR OLDER
Police cannot take fingerprints	- Police can take fingerprints with both the parent and suspect's informed consent. - If consent is refused, police must apply for a Children's Court order before using reasonable force to take the prints. - A parent or guardian must be present when the fingerprints are taken.	- Police can take fingerprints with the suspect's informed consent. - If consent is refused, police can use reasonable force to take the prints. - A parent or an independent person must be present when the prints are taken.	- Police can take fingerprints with the suspect's informed consent. - If consent is refused, the police can use reasonable force to take the fingerprints.

Fingerprints must be destroyed after six months if the person has not been charged with the crime, or the charges are not proceeded with, or the person is found not guilty. The person must be informed when the prints are destroyed.

Forensic procedures

The police can take forensic samples from a person suspected of committing, or charged with, an indictable offence. These can be:

- non-intimate samples (hair, fingernail and toenail scrapings or external swabs)
- intimate samples (blood, saliva, pubic hair, mouth scrapings, dental impressions and swabs from a genital or anal area).

A qualified medical practitioner must undertake intimate procedures. An adult can give informed consent for a forensic sample to be taken. If a person refuses to give consent, a Magistrates' Court order can be obtained to compulsorily take the sample. For non-intimate samples, a senior police officer, not part of the investigation, can approve a sample being taken from suspects over 18 years of age who do not give consent.

Age restrictions for forensic samples include:

- a Children's Court order is required for forensic samples of any kind to be taken from suspects between 10 and 17 years of age
- forensic samples cannot be taken from suspects under 10 years of age.

Forensic samples are to be **destroyed within six months** if the person is not charged or found not guilty. Police can automatically keep samples from people over 18 years of age who are convicted of an indictable offence or those who are found guilty because of mental impairment. A court order is required to retain samples from children in similar circumstances.

To assist with the investigation of unsolved crimes, police can apply to a court for permission to take forensic samples from offenders who have already been found guilty of an indictable offence (or not guilty because of mental impairment) and are serving a term of imprisonment.



Figure 3.6 Police from Forensic Services



Figure 3.7 Forensic scientist holding a hair sample. A test on hair can detect the 31 most commonly abused drugs. Ingested drugs travel through the bloodstream into the hair as the hair grows. The drugs migrate into the hair from sweat glands, leaving detectable proof of drug taking.

WEE WAA

Wee Waa, a small town in New South Wales, made Australian legal history when, in 2000, most of the local men aged from 18 to 45, who were in the town on the night that a 91-year-old woman was bashed and raped, voluntarily gave saliva samples to police for DNA testing.

This was the first time that police had collected mass DNA samples to identify possible suspects. A week after the DNA samples were collected in the town, the perpetrator of the crime gave himself up to the police. The police considered the operation a resounding success.

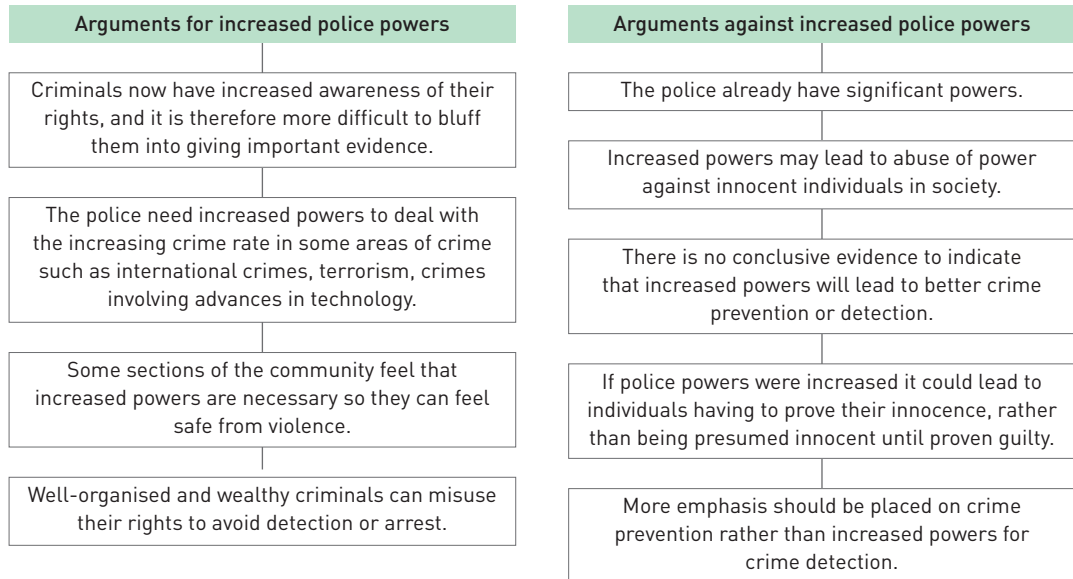
Possible police action

Victoria Police can take the following courses of action:

- **police discretion** – In dealing with summary offences, the police can sometimes exercise discretion. That is, the police can, where it is fair and appropriate to all persons involved, deal with the matter informally rather than formally charging the offender with a crime or issuing a fine.
- **release** – The police may initially have good grounds to believe that a person committed a crime; however, on further investigation the suspect is exonerated and released.
- **cautioning notice** – The police can choose not to charge a person but give a cautioning notice (formal warning). These are given on first offence for minor crimes. The offender must admit to the crime, co-offenders must be identified and the crime should involve no more than five incidents. The offender must behave for five years before any record of the offence is erased. If a further crime is committed, the offender goes to court and the caution note is treated as a prior conviction.
- **charge and bail** – The police can arrest and charge the person with a serious crime and then release them on bail.
- **charge and remand** – The police can arrest and charge the person with a serious crime and then apply to the court to remand them in custody. This means the person will remain in jail until their trial.
- **summons** – The police can tell a person they will be charged with the crime and provide the paperwork later. The police then give written details about the charge in a document called a summons. This is usually done for summary offences.

Arguments for and against increased police powers

The police have long argued that they need more powers to do their job. However, more police powers could mean less freedom for individuals and less protection from the police becoming overzealous in their endeavour to solve crimes.



LEARNING ACTIVITY 3.3

Detaining and questioning and police powers

- 1 Explain when a person can exercise their right to silence.
- 2 How long can a person be detained before he or she must be released or brought before a court?
- 3 What is the purpose of a police caution?
- 4 Who can a person detained for questioning by the police contact before questioning begins?
- 5 Explain three things a suspect can refuse to do when dealing with the police.
- 6 What is the difference between fingerprints and finger scans?
- 7 Under what conditions can a person aged 11 be fingerprinted by the police? Explain.
- 8 When is a court order required for the police to take non-intimate and intimate samples from a person suspected or charged with committing an indictable offence?
- 9 Read the case study *Bare v. Small* and answer the questions.
 - a Describe the incident which led to Mr Bare's complaint about the police.
 - b The police arrested Mr Bare without a warrant. On what grounds did they do this?
 - c Did the police also have a right to search Mr Bare while he was under arrest?
 - d Does Mr Bare have to answer police questions while under arrest? Explain.
 - e Would the police have been able to take fingerprints and DNA samples from Mr Bare following the arrest and under what conditions?
 - e List four rights Mr Bare had while in police custody.

- f Explain why Mr Bare believes that the police and the Office of Police Integrity disregarded his human rights.
- g Do you think the outcome in this case is fair? Give reasons.

Bare v. Small (2013) VSC 129

A young man of Ethiopian descent complained to the Office of Police Integrity (OPI)* about mistreatment by police. The OPI decided the complaint warranted investigation and referred the matter to the Victoria Police Ethical Standards Division for investigation rather than conducting its own investigation.

The incident occurred in 2009 when the man was 17 years of age. He alleges that police handcuffed him and kicked him, making him fall to the ground. He said that during the arrest a police officer commented, 'You black people think you can come to this country and steal cars'. He suffered a cut to his jaw and several chipped teeth as a result of a police officer repeatedly pushing his head into the gutter. He was also sprayed several times with capsicum spray while handcuffed.

The man asked the Supreme Court of Victoria to review the OPI's decision. He questioned the independence, fairness and effectiveness of a police investigation into his complaint. He believes he was subjected to 'cruel, inhumane or degrading treatment', which is contrary to S10(b) in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). He argued that the OPI's decision was also in breach of S38 of the Charter, which states, 'It is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.

The court dismissed the application on the grounds that:

- the OPI did not act unlawfully; it assessed the case according to established processes and had the jurisdictional authority to refer the matter to another investigative body
- S109 of the *Police Integrity Act 2008* (Vic.) gives the OPI broad immunity from both criminal and civil proceedings unless the OPI acts in bad faith. Therefore the court was prevented from determining whether the OPI's decision was contrary to S38 of the Charter
- S10(b) protects a person from cruel, inhumane or degrading treatment but does not provide the right to an effective investigation of such treatment.

The man will appeal this decision in the Victorian Court of Appeal. In August 2013, he was successful in his application to the Court of Appeal for a Protective Costs Order, which limits any order for costs to \$5000 should this appeal prove unsuccessful.

* The Independent Broad-based Anti-Corruption Commission (IBAC) now has oversight in relation to complaints about police misconduct.

CASE STUDY

10 What is meant by the term 'police discretion'?

11 Interview or specialist speaker

Organise an interview with a member of the police force or organise a police officer to attend your class. Make up a list of questions to ask the police officer. These could include:

- the role of the police
- the options available to the police force when detaining and arresting an offender
- police powers – what are they and should they be increased?
- how effective the officer thinks the police force is in protecting the community.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK ESSAY/CLASS DISCUSSION

Police powers

Read the information on police powers and individuals rights and the articles 'Random weapon searches' and 'New police powers threaten human rights'. Write an essay or hold a class discussion on the following topic:

'The balance between police powers and the suspect's rights is presently in favour of the suspect.'

Do you agree with this statement? Discuss, presenting both sides of the argument. In your discussion, comment on police powers and the rights of individuals and whether the police should be given more powers.

(20 marks)

Random weapon searches

The *Control of Weapons Act 1990* (Vic) gives police the power to randomly search people for weapons in places that are temporarily declared a designated search area. A high-ranking police officer can declare any public area a designated area for up to 12 hours, but only if police believe acts of violence or disorder involving weapons will occur in an area or are prevalent in the area and likely to recur.

Once a designated search area is declared, police can stop, detain and search any person in a public area within the designated zone. They can also search anything in the person's possession or control, any vehicle and anything in or on a vehicle for weapons. They can detain a person for as long as it is reasonably necessary to conduct a search. Any weapons found can be seized. It is an offence not to comply.

When a person or a person's vehicle is searched in a designated area they are given a notice explaining the process.

New police powers threaten human rights

Margarita Windisch, *Green Left Weekly*, 24 January 2010

On 16 December 2009, the Victorian state government passed the *Summary Offences and Control of Weapons Acts Amendment Act 2009*.

The amended legislation contravenes Victoria's *Charter of Human Rights and Responsibilities* and hands increased powers to the police to combat 'anti-social behaviour and violence'.

The new powers allow police to stop and search anybody, without a search warrant, in a designated 'weapons search area'. The new laws also give police the power to randomly search children and conduct strip searches.

Simply hanging out in public and refusing to 'move on' from a certain area could mean you get a \$500 fine under the new laws.

A stagger back home after a few hours at your local pub could also become a costly affair under the amended legislation. A new offence of disorderly conduct has been created, with a \$234 on-the-spot fine, which will apply in addition to the existing offences of 'drunk and disorderly' and 'drunk'.

Concerns have been raised that the new offence of disorderly conduct is not adequately defined, leaving it to the arbitrary judgement of individual police officers.

The new laws have been criticised by human rights, political, legal and welfare organisations as unnecessary and as potentially targeting vulnerable groups in society, such as the homeless, the mentally ill and young and Indigenous people.

The Victorian Equal Opportunity and Human Rights Commission said 'freedom of movement, freedom of expression, the right to privacy, liberty and security, equal treatment before the law, freedom from discrimination, and the protection of families and children' are under threat from the amended legislation.

The Homeless Persons' Legal Clinic (HPLC) of the Public Interest Law Clearing House (PILCH) said 'move-on' police powers do not reduce crime, but tend to shift people, mostly homeless, to other geographical locations. This could have other serious consequences.

PILCH also said the laws will affect the homeless more due to their lack of secure housing.

Ben Courtice, a long-term Footscray resident and Socialist Alliance candidate in the upcoming Victorian state election, is appalled by the new laws, calling them a 'step closer to turning Victoria into a complete police state'.

The new powers were first used on January 7 in Footscray, a multi-ethnic western Melbourne suburb, after the government announced the first planned designated area on New Year's Eve.

'Why start with Footscray? Is it really because there is more violence here? I have never felt threatened in Footscray, yet I would hesitate to hang around the CBD nightclub areas late at night', Courtice told *Green Left Weekly*.

'There are already laws to deal with criminal behaviour, and allowing police to treat everyone like criminals is unlikely to stop the few individuals who are actually going to commit a violent crime.'

The fatal stabbing of Indian student Nitin Garg in a Yarraville park on January 2 and other knife-related assaults have been used by police and the media to drum up public support for the new laws.

'Nitin Garg was stabbed in Yarraville, several kilometres away from central Footscray', Courtice said. 'There is no sense to the police targeting Footscray, unless they want to use the stigma attached to Footscray as a poor suburb that has drug dealing, in order to test their new powers of intimidation.

'And poor, young people are easy targets for harassment because they are less likely to know their rights or have ready access to a lawyer.'

James Farrell, manager and principal lawyer of PILCH (HPLC) is also concerned about the lack of transparency in how an area is designated for search.

Farrell observed the January 7 police operation in Footscray. He told GLW that the supposedly random searches were not random at all. 'Eighty-five per cent of people we saw searched were male, of which about 50 per cent were between 20 and 30 years of age. This demonstrates to us that the police are profiling particular demographic groups.'

Courtice said the police in Footscray had a history of profiling and targeting young males, especially from African and Muslim backgrounds.

He said: 'The new laws will increase the police harassment that vulnerable groups already face but will do nothing to address the underlying causes of some of the crimes these new laws are supposed to stop from occurring.'

Courtice said, a government serious about community safety would address issues of marginalisation, racist attitudes in society, lack of proper jobs, housing and education opportunities and not take away civil liberties.

Margarita Windisch was the Socialist Alliance candidate in the 13 February 2010 Altona by-election.

ASSESSMENT TASK VISUAL REPORT

Role of the police

Create a visual report showing:

- the role of the police
- police powers versus individual rights
- arguments for and against an increase in police powers.

Use pictures, diagrams and illustrations where possible.

(10 marks)

THE IMPACT OF CRIMINAL ACTIVITY ON INDIVIDUALS AND SOCIETY

Laws are created to make a safer environment for individuals and society as a whole. The law tells people what they can and cannot do. In this way, laws educate people about acceptable behaviour in society.

Impact on individuals

Criminal activity affects individuals directly and indirectly. People are affected directly if they are victims of crime.

Victims

Victims of crime can be affected financially, physically and mentally. Financial loss might include medical expenses, loss of property, damage to property or loss of income. Victims may be physically injured or emotionally traumatised and lose self-confidence as a result of the crime committed against them. Crimes can also have far-reaching effects.

Victims of crime can be compensated for the loss they have suffered through the **Victims of Crime Assistance Tribunal**. A person who has been a victim of a crime may be likely to take time off work to recover from the trauma; in this way crime also affects businesses because they then have to bear the cost of an employee being absent from work.

Offenders and their families

The offender is often affected by the crime that has been committed. He or she may be filled with guilt, especially if the crime has had a devastating effect on the victim. The families of offenders suffer the emotional strain of finding out that a family member has committed a crime.

Going to court is very stressful for offenders and their families, and very costly, unless they receive assistance with their legal fees.

Impact on society

In order to enjoy life, members of society must feel safe to walk the streets, without the fear of being attacked by criminals. It is the role of the police to protect members of the public and make homes

and streets safe. Rising crime rates affect society and how people conduct their lives. For example, if crime is prevalent in an area, it is likely that people will avoid that area for fear of becoming a victim of crime.

Criminal behaviour can affect the community in a number of ways, including:

- physical pain and suffering felt by victims of crime
- financial loss experienced by victims of crime
- cost of providing police to enforce the law
- cost of providing medical care for victims of crime
- cost to individuals of insurance premiums to cover claims which may be made for loss through crime
- extra cost placed on goods to cover loss or damage caused through crime
- lost workdays through people having time off work to recover from the effects of crime
- members of the community fearing to go about freely in case they become victims of similar crimes.

Maintaining an effective police force is a financial burden on society, but it is necessary to keep our society safe and deter people from committing a crime.

LEARNING ACTIVITY 3.4

Impact of criminal activity on individuals and society

- 1 Read the case study 'Maxine'. Imagine that Maxine is a friend and has asked you to assist her, and then answer the questions.
 - a How do you think the crime will have affected Maxine?
 - b To what extent do you think this crime will affect other individuals and society as a whole? Discuss.

Maxine

Maxine, a 22-year-old hairdresser, came home from a day's outing. She showered and dressed in her pyjamas. While reading a book, she fell asleep on the couch. An unknown man entered the flat and attacked her while she slept. She woke to find him kissing her and sexually assaulting her. She managed to get away from him.

She had not checked the door to see if it was locked. Having reported the incident to the police, Maxine went to the local hospital for a medical examination. The police later apprehended a suspect, who admitted to the charge.

CASE STUDY

- 2 Read the case study 'Jason and Mark' and discuss the consequences of their actions.

Jason and Mark

Jason and Mark lived in a country town. They had been drinking heavily one night. They both got into their cars and decided to have a drag race up the main street of the town. Both cars swerved and hit a car at an intersection. The driver of that car, Jack, was killed instantly. Jack's parents were heartbroken at the death of their son and blamed Jason and Mark for what had happened.

CASE STUDY

The parents of Jason and Mark were very upset because their sons had been responsible for killing another person, but also because they realised that the two boys had committed a crime that would affect their job prospects and lives in different ways for the rest of their lives. There was a lot of animosity against the two boys in the country town.

- 3 Select one of the case studies above and explain how society might be affected by the crime referred to in the case study.

Assistance for victims

Victims' Charter

The *Victims' Charter Act 2006* (Vic.) brings together, under one framework, the rights a victim has when dealing with the legal system. The *Victims' Charter* is a set of guiding principles outlining the minimum standard of treatment, support and services that victims can expect from the criminal justice system.

MINIMUM STANDARD OF TREATMENT OF VICTIMS ACCORDING TO THE VICTIMS' CHARTER

- Victims have the right to be treated fairly, with courtesy and respect.
- Victims should be given clear and timely information about their rights and available support services.
- Victims should be told about the progress of police investigations, when it will not hinder an investigation.
- Victims should be informed when an offender is charged or appears in court, and about the outcome of the case, including appeals lodged.
- Victims who are witnesses in a case should be informed about their role as prosecution witnesses, and about related court processes. They should be allowed to view proceedings where possible, not automatically excluded from the courtroom when a witness order is made.
- Victims should be spared unnecessary contact with the accused, their supporters or defence witnesses while in court.
- Victims can be told, on request, whether the accused has been given bail and any conditions of bail intended to protect the victims.
- Victims can have assistance to prepare a victim impact statement for the court to consider during the sentencing process.
- Victims can expect that personal property held during investigations or as evidence will be treated with respect and returned as soon as possible.
- Victims can expect that personal details will not be disclosed except in accordance with the *Information Privacy Act 2000* (Vic.).
- Victims can seek compensation from the offender or apply for financial assistance from the Victims of Crime Assistance Tribunal.
- Victims of violent crimes can register to have their views taken into account when the Parole Board is considering early release for the offender.
- Victims should have a victims' complaints process available to allow victims to report breaches of the *Victims' Charter*.

Victim Support Agency

The Victim Support Agency is a unit of the Victorian Department of Justice. Its role is to coordinate government services for victims of crime. The Victim Support Agency tries to develop partnerships between various government departments, the police and the courts to provide the best support for victims. The agency coordinates the work of the:

- **Victims of Crime Helpline** where trained operators offer victims free information and advice
- **Victim Assistance and Counselling Program** where social workers offer victims practical support
- **Victims' Charter Enquiries and Complaints Line** where victims can make a complaint about their treatment by a relevant legal organisation or individual. The person taking the call may try to mediate a solution or may advise the victim to take the matter to another complaints body.



Figure 3.8
Victim of a crime

Victim impact statements

A victim impact statement (VIS) is a written statement in the form of a statutory declaration that outlines the victim's physical injuries, financial losses and any psychological or emotional stress resulting from the crime.

A victim has the right to provide the court with a VIS. This voluntary statement is an opportunity for the victim or their family to tell the court how a crime has affected them. Victims should not include other information like details about the actual crime or a suggested punishment because the court may declare these parts of the statement inadmissible. The offender is also entitled to a copy of the statement. A victim can ask the prosecutor to read out the admissible parts of their VIS in open court. The judge or magistrate must consider the statement at the time of sentencing an offender who has been found guilty.

75-year-old woman bashed

An 18-year-old man pleaded guilty in the County Court to five charges, including aggravated burglary and intentionally causing serious injury. He broke into a flat in Traralgon and bashed a 75-year-old woman. The woman, who was badly injured, has had to move into a nursing home.

In a victim impact statement the woman said, 'My whole life has changed dramatically'. County Court Judge Parsons sentenced the accused to a two-year youth justice centre order, where he would have access to education and gain the skills to try to change his life.

CASE STUDY

Court Network Service

Over 400 trained volunteers of the Court Network Service provide information, support and referral services. They give support to:

- victims of crime
- people accused of crime
- families, adults and children who attend court and require support
- adults and children who have been violated or exploited by crime
- litigants who have little or no support.

The Court Network Service operates in the Melbourne Supreme Court, County Court, Coroner's Court, Family Court, Children's Court and Melbourne and district Magistrates' courts as well as the Commonwealth District and Supreme courts in Brisbane, Queensland.



Figure 3.9

Court Network Service
volunteers

Victim register

A primary victim of a violent crime can ask to be listed on the Victim's Register if the offender has been sentenced to a term of imprisonment. Once registered, the victim will be told if the prisoner:

- will serve any part of their sentence in the community
- will be eligible for parole or early release from prison. The victim can then contact the Adult Parole Board to express their views about this possible early release
- is due to be released on completion of their sentence.

The membership of the Sentencing Advisory Council has been extended to include a member of the victim of crime support or advocacy group, which gives victims of crime a voice in Victorian sentencing reforms.

Avenues of compensation for victims of crime

Victims of Crime Assistance Tribunal

The *Victims of Crime Assistance Act 1996* (Vic.) established the Victim of Crime Assistance Tribunal (VOCAT). It replaced the Crimes Compensation Tribunal which operated since 1973. VOCAT's purpose is to acknowledge and provide financial assistance to victims of violent crime committed in Victoria. These violent crimes usually involve a sexual offence, assault, injury to a person or death of a person which is punishable by imprisonment. Victims may be eligible for financial assistance if:

- the person is a primary victim or secondary victim or related victim (see table 3.2)
- the person has suffered an injury (or significant adverse effect) as a result of a violent crime committed in Victoria
- the crime is reported to police within a reasonable time
- the crime occurred within the past two years (an extension to this time is possible in some cases)
- the victim cannot receive compensation from another source (for example, private insurance schemes, Medicare, Workcover, the Transport Accident Commission or from the offender directly).

The *Victims of Crime Assistance Act 1996* (Vic.) defines **injury** as actual physical bodily harm, or mental illness or disorder, or an exacerbation of a mental illness or disorder, or pregnancy.

When determining eligibility, VOCAT can also consider the conduct and attitude of the applicant before, during and after the crime, their willingness to assist police, the victim's criminal history and

whether the offender might gain from any financial assistance given to the victim. Assistance will be provided even though an offender has not been identified, charged or convicted of the crime.

Primary and secondary victims can lodge their application for financial assistance with the registrar for VOCAT at their nearest Magistrate's Court, while related victim applications must be lodged at the Melbourne Magistrate's Court. Although victims should consult a solicitor when lodging an application, there is no application lodgement fee and VOCAT usually pays reasonable legal costs for successful applicants.

Simple applications for financial assistance may be determined administratively (without a hearing). More complex cases or where the applicant requests a tribunal hearing will be determined by a tribunal member, who is also a magistrate. Hearings are conducted in an informal manner. Dissatisfied applicants can appeal a VOCAT decision with the Victorian Civil and Administrative Tribunal (VCAT).



Figure 3.10
A VOCAT hearing

Table 3.2 Types of compensation available from VOCAT

PRIMARY VICTIM	SECONDARY VICTIM	RELATED VICTIM
A person who suffers injury or death as a direct result of: - being the victim of a violent crime - trying to help a victim of a violent crime - trying to prevent a violent crime - arresting a person reasonably believed to have committed a violent crime.	A person injured as a direct result of: - being at the scene and witnessing a violent crime - being made aware as a parent/guardian that their child (who is under 18) is the victim of a violent crime.	A person who at the time of the violent crime was either a family member, a dependent or had an intimate personal relationship with a deceased primary victim – for example, the victim's spouse, parent, guardian, step-parent, child, stepchild and siblings, or any other person who had an ongoing sexual relationship involving emotional, social and financial support or connections.
The scope of financial assistance available to each type of victim is specified in the <i>Victims of Crime Assistance Act 1996</i> (Vic.)		
Up to \$60000 for: - medical costs - counselling - loss of income up to \$20000 and within 2 years of the crime) - replacement of clothing worn at time of the attack - other tribunal-approved expenses. An additional payment of up to \$10000 may be awarded where the tribunal believes the victim has suffered a significant adverse effect (severe injuries or ongoing abuse) as a result of the crime.	Up to \$50000 for: - medical costs - counselling - loss of income (up to \$20000) in special cases only - other tribunal-approved expenses.	Up to \$50000 to any one related victim for: - medical costs - counselling - funeral costs - any loss of income from the death of the deceased. Note: the total amount for multiple related victims is capped at \$100000 unless it is a special case). Non-related persons who incur funeral costs for a deceased victim of crime may also make a claim.

Witness Assistance Service

The Witness Assistance Service established by the Office of Public Prosecutions (OPP) is available to all prosecution witnesses involved in cases handled by the Director of Public Prosecutions (DPP). Professionals experienced in the area of witness/victim support provide assistance, case progress reports and make witnesses aware of any legal processes they are likely to experience and their individual rights and legal obligations.

Compensation and restitution orders

Restitution order

A restitution order is applicable when an offender is found guilty of theft related offences. The offender may be ordered to return, replace or pay for the stolen goods.

Compensation order

A compensation order (as part of sentencing in a criminal court) applies to any offence and is used when an offender is found guilty. The offender may be asked to pay compensation to victims who suffered injury, loss or damage to property as a result of the crime. The compensation may be paid in instalments. Compensation may be awarded for medical or counselling costs, pain and suffering and to replace lost or damaged property.

Applications to the court for restitution or compensation orders can be made by the prosecutor on the victim's behalf or by the victim directly.

Compensation through civil court action

A victim may seek compensation from the offender through civil court action. In essence, the victim sues the offender for any injury or loss the offender's actions may have caused. Many victims choose not to pursue this option, as it can be a long and expensive process.

CASE STUDY

Couple jailed for kidnapping baby ordered to pay compensation

A three-week-old baby, Montana Barbaro, was abducted from the car park of a shopping centre in Deer Park. She was found two days later in a derelict house in North Melbourne.

The County Court sentenced Mark McEachran to nine years in prison and Cheryl McEachran to eight years in prison. In a separate hearing under the *Sentencing Act*, the kidnappers were ordered to pay \$20 000 in compensation. Mark McEachran must pay \$10 000 on his release from prison, from assets seized by authorities. Chief Judge Michael Rozenes ordered Cheryl McEachran to pay \$10 000 in \$500 monthly instalments.

LEARNING ACTIVITY 3.5

Assistance for victims and avenues for compensation for victims of crime

- 1 You have been asked to explain to a victim of a crime the types of assistance he or she can obtain. Prepare a poster or brochure outlining the types of non-monetary assistance available to victims.
- 2 Explain the aim of the Victims of Crime Assistance Tribunal (VOCAT).

- 3 What is the difference between a primary and a secondary victim?
- 4 What compensation was ordered in the case study of 'Couple jailed for kidnapping baby ordered to pay compensation'?
- 5 Read the case study 'Janine' and answer the questions.
 - a How does the family lodge an application for financial assistance with VOCAT? Check the VOCAT website for information on lodging an application.
 - b Are Janine, her father, her mother and her sister primary, secondary or related victims? Explain.
 - c What benefits are payable to each of them?
 - d What assistance is available to the family from other community organisations?

Janine

Janine, 17, arrived home to find her mother hysterical and her father unconscious with bruises to his head. Her mother managed to tell Janine she had dragged her father into the house after two men, armed with baseball bats, confronted him as he was getting out of his car. They took her father's briefcase, which contained the takings from the family business. Janine's little sister, who was playing in the front yard at the time, was not physically hurt. Janine called for an ambulance and contacted the police.

CASE STUDY

- 6 Read the case study 'VOCAT to compensate bullying victim' and answer the questions.
 - a Why did VOCAT refuse the victim compensation?
 - b Why was VOCAT's decision upheld by the Victorian Civil and Administrative Tribunal?
 - c What was the Supreme Court's ruling on the issue?
 - d Is the girl a primary, secondary or related victim?
 - e What compensation might be available in this case and for what type of injury or loss?
 - f What would you consider 'fair' compensation in this case?

VOCAT to compensate bullying victim

In 2010, the Victorian Supreme Court ruled that a victim of bullying should be awarded compensation from the Victims of Crime Assistance Tribunal (VOCAT). The tribunal had previously denied the girl compensation on the basis that her attackers were under 10 years of age and therefore too young to form the intent to commit a criminal offence.

The girl's claim was based on the fact that she was a victim of assault and threats to kill. A review of the decision was dismissed in the Victorian Civil and Administrative Tribunal (VCAT) on the basis that the threats made to the girl were 'hollow' and made without criminal intent.

The bullying began in grade two and continued for several years despite the parents reporting the matter to the school and the police. A group of students of the same age victimised the girl until her parents sent her to private school, at considerable cost to the family, when she was in grade six. Until then, the girl was punched, pinched, pushed, kicked, tripped, sworn at and spat at. The girl was also menaced with scissors and a broken bottle. One of the bullies threatened to have her uncles kill the girl. The court heard the victim was fearful, suffered nightmares and was reluctant to go to school, and a psychologist confirmed the girl's heightened state of anxiety.

CASE STUDY

The Supreme Court ruled that the legal principles that apply to young people are not relevant in Victims of Crime compensation cases. It was enough that the girl suffered assaults and threats to kill and that the attackers intended their actions.

SANCTIONS UNDER CRIMINAL LAW

Criminal law aims to protect society. In order that society can keep functioning, it is necessary for those who break the law to be dealt with through the courts. The government is responsible for maintaining an effective and efficient legal system that deals fairly and justly with individuals who have broken the law. Other countries may have a different view of what is an acceptable punishment for convicted criminals. For example, in other countries an offender may be subject to either capital punishment or corporal punishment, both of which are no longer acceptable punishments in Australia.

DID YOU KNOW?

- In China, Vietnam, Iran, Malaysia, Singapore, Thailand, United Arab Emirates, Egypt, Indonesia, Pakistan and Yemen, drug offences carry the death penalty. Some of these countries will reduce a death penalty to a life sentence.
- In Iran, stoning was the mandatory punishment for 'adultery while married' for both men and women. In 2013, the law was amended. If a court rules that stoning is not an appropriate sentence then another method of execution can be imposed.
- Malaysia and Singapore use judicial caning for serious offences like rape, robbery and drug trafficking. Singapore also uses it for less serious crimes like vandalism and illegal immigration.
- Amnesty International reports that punishment by amputation is enforced in Saudi Arabia for theft, for which the sentence is amputation of the right hand, and highway robbery, which is punishable by cross amputation (right hand and left foot).

In Australia, an offender has the right to be given a punishment appropriate to the crime committed. The victims or their families also have the right to see the offender punished for the harm they have done. However, it is possible that each person affected by the outcome will feel differently. An accused who has been found guilty but given a lenient sentence may feel that the outcome is just. The victim may disagree.

After hearing all the evidence in a case, and a decision of guilty has been reached, the judge or magistrate will decide on a suitable punishment for the accused. Criminal punishments provided by the courts are referred to as sanctions.

Aims of criminal sanctions

In sentencing offenders, judges and magistrates will consider the aims of criminal sanctions. The aims of criminal sanctions are shown below.

- **punish** – The law must punish offenders so that victims or their families can seek retribution without taking the law into their own hands. If individuals did take the law into their hands, crime would increase and society would deteriorate. Imprisonment and the deprivation of freedom is the ultimate punishment in our society. We no longer use capital punishment or corporal punishment, as these punishments are considered inhumane and unacceptable in the twenty-first century.

- **protect** – While imprisonment is seen as a punishment of last resort, a few offenders are given very long periods of imprisonment because the courts deem them to be a danger to society. The horrendous nature of the crime, the lack of remorse and the offender's callous attitude indicate that the person should be kept out of society for as long as possible.
- **denunciate** – When sentencing, the court may give a sentence that is harsh enough to show the disapproval of the court; that is, the court denounces the particular behaviour. This will give others in society the message that this type of criminal behaviour will not be tolerated.
- **deter** – The law aims to deter the offender and others in society from committing the same or similar offences in the future. A punishment imposed as a **general deterrent** is one that discourages people in general from committing the crime, whereas a **specific deterrent** is aimed at stopping the particular offender from repeating the offence. A **recidivist** is a person who continues to commit crimes despite being punished for them.
- **rehabilitate** – It is in society's interests to try to help offenders change their ways, otherwise crime rates and prison costs will escalate. In providing offenders with improved opportunities in the form of education, training, assistance and support (for example, counselling), the legal system hopes that offenders will grasp the chance of a better future and become law-abiding citizens.

Effectiveness of criminal sanctions

To be effective, criminal sanctions must be:

- appropriate to the severity of the crime committed
- appropriate for the offender, taking into consideration the financial, social, cultural and health circumstances of the offender
- acceptable to the community
- able to fulfil the aims of criminal sanctions.

Imprisonment fulfils the aim of protecting the community because when a person is in prison, he or she cannot harm the community. To some extent imprisonment deters individuals from committing crimes because the normal law-abiding citizen is likely to fear the possibility of being caught and imprisoned. However, a person who is a habitual offender is less likely to be deterred from committing a crime by the thought of possibly being caught and imprisoned.

To reduce recidivism and the incidence of crime in society, it is important to rehabilitate the offender. In prison, prisoners may undertake programs to help them lead useful lives when they leave prison. However, while in prison, they mix with known criminals and could become more entrenched in a criminal way of life. A prisoner may experience difficulties in finding employment on release from prison, and in getting back into society.

The majority of law-abiding citizens are deterred from committing offences because it is morally wrong, and if they get caught they will be punished. However, people intent on committing a crime are not likely to be deterred by the thought that they might get caught and punished. A person who has been to prison or been punished in some other way might feel determined not to suffer the same fate again, and will not reoffend. Others, however, will continue to reoffend for a variety of reasons.

To fulfil the aims of criminal sanctions, the sanction must punish the offender and be appropriate to the severity of the crime. A lenient sentence is likely to cause dissatisfaction in the community if the crime is seen as serious.

The courts will at times show their disapproval of a particular type of behaviour (denunciate the behaviour of the accused) and give a severe sanction. This is to try to educate the offender that their type of behaviour is not acceptable to society. It is also showing people that the type of behaviour will

not be tolerated. However, there can be circumstances that lead a person to commit crimes that may result in a lighter sentence. Also, if a person pleads guilty early, he or she is likely to receive a lighter sentence.

On a scale of severity, a community correction order sits between a jail sentence and a fine and can be described as a community-based sentence. It aims to deter individuals from committing further crimes. To some extent these orders also protect society in that the court may order the offender to repay society by doing supervised community work. Community correction orders also aim to rehabilitate offenders and keep them out of jail while undergoing drug or alcohol treatment.

A fine is an appropriate deterrent for minor offences such as traffic offences because it deters the general public from offending. However, it does not protect individual members of society and can result in extra financial pressure being put on the offender, which could result in further crimes being committed.

The suspension and cancellation of a driver's licence is an effective way of keeping traffic offenders off the roads. However, it could place considerable and inappropriate hardship on an individual depending on the type of work they have.

DID YOU KNOW?

The Victorian Sentencing Advisory Council gives advice to the Victorian attorney-general on the effectiveness of criminal sanctions and sentencing reform.

Guidelines for sentencing

The sentence given must be appropriate to the crime committed. In deciding the length of the sentence, the court will consider:

- the maximum penalty prescribed for the offence
- current sentencing practices
- the nature and gravity of the offence
- the degree of blame on the offender
- whether the offender pleaded guilty and at what stage in the proceedings
- whether the offender followed the requirements of the **directions hearings**
- the offender's previous character
- the presence of any aggravating circumstances (which made the crime worse) or mitigating factors (which gave some excuse for the crime)
- the impact of the crime on the victim.

Baseline sentences

The *Sentencing Amendment (Baseline Sentences) Bill 2014* (Vic.) aims to introduce baseline sentences for six serious crimes, being murder, culpable driving causing death, trafficking in a large commercial quantity of drugs, serious child sexual abuse, incest and sexual penetration of a child.

A baseline sentence will be the median sentence that should apply to each of the above crimes and act as a guide for the courts. When deciding on a sentence to be imposed, the courts will be required to consider the baseline sentence. It will also be expected that the court provides a reason for the sentence given.

The intention of the Bill is to increase the median sentences to better reflect community standards and expectations. For sentences of 20 years or greater, the non-parole period will be 70 per cent of the sentence given and 60 per cent for sentences of less than 20 years.

DIRECTIONS HEARINGS

Directions hearings are hearings that are held before the full trial so that the court can give directions to the parties about how the case should proceed. They can be heard from time to time at the instigation of the court, or on the application of a party. The purpose of a directions hearing is to make the whole process quicker, and therefore less expensive, and to reduce pressure on the court system.

LEARNING ACTIVITY 3.6

Aims and effectiveness of criminal sanctions

- 1 What is a sanction?
- 2 To what extent do you think imprisonment fulfils the aims of criminal sanctions? Discuss, referring to each of the aims of criminal sanctions.
- 3 Read the case study 'Nine months in youth detention' and answer the questions.
 - a What occurred in this case?
 - b Do you think this sentence is adequate, taking into consideration the age of the accused?
 - c Do you think this sentence fulfils all the aims of criminal sanctions? Discuss.

Nine months in youth detention

Daniel Frilay, 18, was sentenced to nine months in youth detention for seriously assaulting a man outside the Newmarket Hotel in October. Hayes received a single punch to his head from behind and was on life support for five days. He was later moved to a rehabilitation facility.

Bendigo magistrate Richard Wright said that alcohol-fuelled assaults will not be tolerated and warned that heavy drinking could not be used as an excuse.

When handing down his sentence, the magistrate said 'the nine-month sentence is intended to send a message that such assaults will not be tolerated'.

CASE STUDY

- 4 Read the case study 'Denunciation' and answer the questions.
 - a What is the crime referred to in the case study?
 - b What sentence was given by the County Court?
 - c In what way do you think this sentence may denunciate? Explain.
 - d To what extent does this sentence fulfil the other aims of criminal sanctions?

Denunciation

John Cabo was sentenced in the County Court to four years' jail on eight charges of incest. He will serve a minimum of two years. According to Judge Meagher during sentencing, the offences, which occurred over a five-year period, had caused Cabo's daughter, Mrs Jarman, severe emotional harm. He commented that the sentence had to punish, deter and express the denunciation of the court.

Jarman said that she did not feel as if she wanted revenge, but she did want her father to acknowledge his actions. As a teenager her anguish manifested itself in a range of antisocial

CASE STUDY

behaviours, including many attempts at suicide. She always wore black, painted her room black and failed at school, hoping someone would find out why she was being rebellious. A psychologist said that her pain and anguish had been immense and had a severe negative impact on Jarman's emotional, physical and psychological wellbeing.

- 5 Read the case study 'Chan gets 25 years in jail' and answer the questions.
 - a Does the sentence in this case serve to protect society? Discuss.
 - b Do you think the sentence was sufficient for the seriousness of the crime? Give reasons.
 - c When sentencing, the court must take into account the fact that the accused has pleaded guilty, and the stage in the proceedings at which the accused pleaded guilty. Do you think this was appropriate in this case? Discuss.
- 6 To what extent do you think criminal sanctions are effective? Discuss.

CASE STUDY

Chan gets 25 years in jail

Wei Yin Chan pleaded guilty to the murder of an eight-year-old, Kylie Gill. Mr Chan had previously had a sexual relationship with Kylie's mother. On the day of the murder he went to Kylie's home early in the morning. He offered Kylie \$5 to go with him. He took her to his house, where he sexually assaulted her in a shed. He had sexually assaulted her twice before.

Kylie was smothered and died as a result of Chan placing his hand over her mouth to stop her crying. Chan was sentenced to 25 years in prison with a minimum of 15 years. In sentencing Chan, Mr Justice Teague stated that he accepted that Chan had not intended to kill Kylie. He also took into account Chan's early guilty plea and his remorse.

Kylie's mother said the state government should think seriously about reintroducing the death penalty in such cases.

BELIEVE IT OR NOT!

The United States accounts for 25 per cent of the world's prison population while having only five per cent of the world's overall population.

Types of criminal sanctions

Imprisonment

Imprisonment is the most serious type of sanction and should be imposed as a last resort. For some serious offences, however, it is the only appropriate sanction. Victoria operates 14 prisons in metropolitan and country areas, including two privately owned prisons.



Figure 3.11 Barwon Prison

Table 3.3 Prisons of Victoria

PRISON	LOCATION	SECURITY LEVEL	APPROXIMATE CAPACITY
Barwon Prison	Lara	maximum	423
Beechworth Correctional Centre	Beechworth	minimum	160
Dame Phyllis Frost Centre	Deer Park	maximum – female prisoners	344
Dhurringile Prison	Tatura	minimum	268
Fulham Correctional Centre*	Sale	medium/minimum	845
Hopkins Correctional Centre	Ararat	medium	388
Judy Lazarus Transition Centre	West Melbourne	minimum – provides supervised pathway into society for selected prisoners nearing the end of their sentence	25
Langi Kal Kal Prison	Trawalla	minimum	219
Loddon Prison	Castlemaine	medium	409
Marnogneet Correctional Centre	Lara	medium	394
Melbourne Assessment Prison	West Melbourne	maximum	285
Metropolitan Remand Centre	St Albans	maximum security remand	723
Port Phillip Prison*	Laverton	maximum	934
Tarrengower Prison	Maldon	minimum – female prisoners	72

* Privately owned

Source: Department of Justice – Corrections, Prisons and Parole

The parliament has set a statutory maximum penalty for many offences. These are based on the penalty scale contained in section 109 of the *Sentencing Act 1991* (Vic.). This is a guideline for judges when sentencing an offender. The imprisonment penalty scale has nine levels. Level 1 is the most severe punishment and represents life imprisonment, while level 9 is the least severe representing six months' imprisonment. There is also a statutory maximum penalty scale for fines (see table 3.4). Maximum penalties reflect the seriousness of the offence and are a guideline for judges in sentencing. They are reserved for the worst examples of an offence, therefore it is rare for an offender to be given the maximum penalty.

Table 3.4 Imprisonment levels

LEVEL	MAXIMUM TERM OF IMPRISONMENT
1	Life
2	25 years
3	20 years
4	15 years
5	10 years
6	5 years
7	2 years
8	1 year
9	6 months

Source: *Sentencing Act 1991* (Vic.)**DID YOU KNOW?**

In January 2014, 50 shipping containers, previously used as accommodation at mining sites, were installed at the low-security Dhurringile Prison as housing for the growing number of people in Victorian prisons.

DID YOU KNOW?

The Victorian government has plans for a new prison facility by 2017. Ravenhall Prison will be built in the St Albans–Deer Park area and will hold 1000 male medium-security prisoners.

Parole

Parole is an early release from prison. A court may set a **non-parole period** when determining a sentence. This period is the time an offender must serve in prison before applying for parole. It is not automatic. The offender must prove to the **Parole Board** that they are worthy of serving the rest of their sentence in the community. Prisoners granted parole must comply with parole conditions, which may involve reporting to a parole officer on a regular basis, undergoing treatment, being subject to electronic monitoring and complying with curfews or restrictions on where to live. It is an offence punishable by up to three months' jail served cumulatively or a fine of 30 penalty units to breach parole conditions without reasonable excuse or to commit another offence while on parole. **Penalty units** provide the monetary value of a fine. The value of a penalty unit in July 2013 was \$144.36.

Under the *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013* (Vic.), the Adult Parole Board can decide to cancel parole or vary the conditions of parole if certain offences are committed while the offender is on parole. The *Corrections Amendment (Further Parole Reform) Bill 2014* (Vic.) intends to further strengthen parole reform by creating a Sex Offender or Serious Violent Offender division of the Adult Parole Board to deal particularly with these types of prisoners. Under this Bill, if parole is cancelled because of an offence being committed while on parole, the Board will not be able to grant parole again until half of the prisoner's remaining parole has lapsed.

DID YOU KNOW?

Courts can now impose a statutory minimum sentence of four years' imprisonment for adult offenders who intentionally or recklessly cause serious injury in circumstances of gross violence unless special circumstances exist. The maximum penalties for these offences are 20 years and 15 years respectively.

Gross acts of violence are gang attacks or planned attacks, or attacks where the offender deliberately carries and uses a weapon in the attack, or continues to attack even though the victim is incapacitated. Such attacks often result in severe injuries.

Concurrent and cumulative sentences

Most sentences are **concurrent sentences** (served at the same time). This means that if an accused was given, for example, three years for burglary, and one year for going equipped to steal, he would serve three years because the sentences are served at the same time.

The court has the discretion to impose **cumulative sentences** (served one after the other). However, there are some circumstances when cumulative sentences must be imposed. These include:

- in default of payment of a fine or sum of money
- when a prisoner commits a prison offence, an escape offence or a breach of parole offence
- when a serious sexual offender commits a sexual offence or a violent offence
- when a person commits a sexual offence or a violent offence during the parole period of a sentence imposed on him or her for a sexual offence or a violent offence.

Indefinite sentences

The court can sentence an adult offender to an **indefinite sentence** regardless of the maximum penalty for the offence when the court believes the offender is a serious danger to the community. The offender must have committed a very serious offence; for example, murder, manslaughter, kidnapping,

armed robbery or sexual offences. When deciding whether the offender is a danger to the community, the court must consider his or her character, past history, age, health or mental condition and the nature and gravity of the serious offence. A nominal sentence (equal to the length of a non-parole period) is fixed by the court, after which time the offender can apply to the court to have the indefinite sentence removed.

Deferred sentences

The Magistrates Court or County Court can defer a sentence for any offender up to 12 months. A deferred sentence allows the offender time to rehabilitate or to make amends for their behaviour. The court will sentence the person at the end of the deferral period taking into account any progress the person may have made during that time. The court may also ask that a pre-sentence report in respect of the offender be completed during the deferral period. The option to defer sentencing was first introduced for children in the Children's Court for periods of up to four months and has now been adopted by adult courts.

DID YOU KNOW?

Victoria abolished home detention in 2011. The home detention scheme required offenders to wear an electronic bracelet and they were confined to their home unless given permission to attend employment, education, counselling or unpaid community work.

In 2006, the Victorian Sentencing Advisory Council recommended the abolition of suspended sentences. A suspended sentence allows a non-violent offender, sentenced to no more than three years' jail, to partially or wholly serve their term of imprisonment in the community. Suspended sentences were being phased out gradually and were due to be totally abolished for offences committed after September 2014.

LEARNING ACTIVITY 3.7

Imprisonment

- 1 Read the case study '17 years for killing at the football field' and answer the questions.
 - a What occurred in this case?
 - b How do you think Smith's decision to go armed to the football led to catastrophic consequences? In the light of this case, what advice would you give people about carrying weapons?
 - c Do you think the right punishment was given in this case? Explain.

17 years for killing at the football field

Nathan Smith, 19, pleaded guilty to murder, intentionally causing serious injury and affray. Smith took two boning knives to a Diggers Rest football ground, where he stabbed a young man to death. He was sentenced to 22 years' jail and will serve a minimum of 17 years before he is eligible for parole.

He was among a group of young men who attended the football ground armed with machetes and baseball bats. The court heard that the deceased had accompanied his young brother Kyle to the football oval after the group of men had challenged Kyle to a fist fight.

Justice Paul Coghlan described the attack as 'unremitting, senseless and cowardly mob violence at its most extreme'. Smith's decision to go armed to the footy oval had led to catastrophic consequences. Eight other youths also pleaded not guilty to the murder and faced a separate trial.

CASE STUDY

- 2 Read the case study 'Meter man steals thousands in coins' and answer the questions.
 - a What is the difference between a concurrent and a cumulative jail sentence?
 - b Was the man in this case study sentenced concurrently or cumulatively?
 - c What is a non-parole period?
 - d What factors may the judge take into account when deciding on an appropriate sentence for this offender?

CASE STUDY

Meter man steals thousands in coins

A man who stole more than \$148 000 in coins from city parking meters was convicted of 85 charges of theft in the Victorian County Court and sentenced to four years' jail with a minimum non-parole period of two years. The man worked for a security company contracted to collect the coins from City of Melbourne parking meters. He was part of a gang who stole more than \$377 000 in coins from the machines before their criminal activity was detected in 2008.

Police said that large amounts of coins had been regularly deposited into the man's bank account over several years and a large amount of cash was also located in his home. In sentencing the offender, the judge said the man had betrayed his employer's trust in stealing the public's money. She was concerned that he had shown no remorse and ordered him to pay \$148 285 as compensation.

- 3 Read the case study 'Serial rapist jailed indefinitely' and answer the questions.
 - a What crimes were committed in this case?
 - b Under what circumstances does a court impose an indefinite sentence?
 - c What is a nominal sentence and how does it differ from a non-parole period?
 - d Do you think this sanction fulfils the aims of criminal sanctions? Explain.

CASE STUDY

Serial rapist jailed indefinitely

William Craig Forde was convicted in the County Court and given an indefinite sentence following his repeated rape at knife point of a young mother. Forde pleaded guilty to 11 counts of rape, two of indecent assault, and one of kidnap, unlawful imprisonment and armed robbery. Forde had three previous convictions for rape and had only recently been released from jail. The judge said Forde had a 'deplorable' record for offences 'of a gravity and extent rarely seen'. The judge set a 17-year nominal sentence.

The woman was abducted as she left the shop where she worked in Ballarat. Forde held a knife to her throat, tied her up and held her captive for close to 30 hours. He drove his victim 800 kilometres around Victoria, raped her repeatedly and told her that the only thing keeping her alive was her body. He eventually released her near her mother's home where she was found crying hysterically.

- 4 Read the case study 'Nine months' jail with three months suspended' and answer the questions.

- a What crimes were committed in this case?
- b Explain the difference between a deferred sentence and a suspended sentence.
- c What are the benefits of suspended sentences?
- d Do you agree with suspended sentences being phased out in Victoria? Discuss.

Nine months' jail with three months suspended

A man from Wendouree, near Ballarat, has been sentenced to nine months' jail, with three months to be served immediately and six months suspended for two years.

Steve Austin and his partner, Melissa Eden, who was a Dimmeys store manager, stole the company's takings, amounting to \$36 900. On 15 September 2008, administration staff discovered that Eden had not deposited any money into the business bank account.

When Austin was arrested in September 2008, he was found with a large amount of money.

Austin pleaded guilty in the Ballarat Magistrates' Court to seven charges, including two charges of theft, two charges of dealing with property suspected to be the proceeds of crime, and one charge each of obtaining property by deception, burglary and failing to answer bail.

Austin was ordered to pay \$23 387 compensation to Dimmeys.

CASE STUDY

5 Internet investigation

Visit the Victorian Department of Justice website (Corrections, Prisons & Parole) and use the information provided to complete the following activities.

- a Research Victoria's prison system. Write a report on your findings and include:
 - the name and location of each of Victoria's 14 prisons
 - the difference between maximum, medium and minimum security prisons
 - the following information about any two of Victoria's prisons:
 - location and opening date
 - name of operator
 - type of prisoners held
 - number of prisoners held
 - type of facilities in the prison.
 - b Design an information brochure or fact sheet about one or more of the following:
 - prison visits
 - prison work and recreational facilities
 - parole.
- 6 Decide whether you agree or disagree with the following statements. Give reasons. Your teacher may use this activity as the basis for class discussion or debate.
- a Home detention is a valid alternative to jail and should not have been abolished.
 - b Prisoners should be able to use the Higher Education Loan Program (HELP) to complete a university course while in jail.
 - c People serving a prison sentence should have the right to vote.
 - d Prisoners who tell police what they have learnt in prison about unsolved crimes should be eligible for a reward of up to \$1000 when they are released.
 - e Sex offenders should not be monitored once they have been released from prison.

BELIEVE IT OR NOT!

A court in Saudi Arabia considered paralysis from the waist down as retributive punishment for a man who had allegedly caused another person's paralysis by stabbing his victim in the back. The punishment would be carried out if the offender failed to pay the victim US\$270 000 in compensation.

Youth orders

Youth justice centre orders

A young person aged between 15 and 20 years who has been found guilty of very serious offences, or has appeared in court many times previously, may serve a period of detention in a **youth justice centre** (YJC). The maximum period of detention if sentenced in the Magistrate's Court or the Children's Court is two years while the maximum sentence that can be given in the County Court or Supreme Court is three years. The Youth Parole Board can give permission for an offender to be released early to serve the rest of their sentence in the community. A young person who behaves extremely badly under a youth justice centre order could be transferred to an adult prison. A youth justice centre order is used as a last resort after other sentencing options have been unsuccessful in rehabilitating the offender.

While in detention, the young people will be expected to participate in activities and programs such as:

- drug and alcohol counselling or anger management counselling
- TAFE courses
- sports activities
- YMCA programs
- outings organised by the YJC
- work release.



Figure 3.12 Malmsbury Youth Justice Precinct houses 8 to 21-year-old males sentenced to a Youth Justice Centre Order. Additional facilities will be built at the precinct in 2015.

Youth residential centre order

Younger offenders (10–14 years old) may be given a youth residential centre order, which requires them to be detained at a youth residential centre. While detained the young person attends school and participates in programs which try to address behavioural issues.

Youth attendance order

A youth attendance order is a community based sentence for young people over 15 years of age. It requires them to report to a youth justice unit for up to one year and for no more than 10 hours a week, where the young person is given the opportunity to work through behavioural issues and to make amends for offences by completing community work. Failure to comply will result in detention in a youth justice centre.

Youth supervision order

Alternatively, a youth supervision order requires a young person between 10 and 18 years of age to report to a youth justice unit up to 12 months (or 18 months for more serious offences). The young person attends for up to six hours a week to do supervised community work.

Probation order

A child found guilty of an offence can be subject to a probation order where the young person remains in the community but must report as required to a youth justice officer. The order may also impose other conditions such as regular school attendance or an undertaking not to reoffend.

LEARNING ACTIVITY 3.8

Youth orders

- 1 Explain the difference between a youth justice centre order and a youth residential centre order.
- 2 What is a youth attendance order?
- 3 What is required of a young person who has been issued with a probation order?
- 4 Read the newspaper article 'Ombudsman: children "bored" with youth justice transferred to adult prison system' and answer the questions.
 - a What prompted the ombudsman's investigation into Victorian children in adult prisons?
 - b Why were young people transferred from the youth justice system to adult prison?
 - c What other issues related to juvenile justice centres did the ombudsman's report expose?
 - d Do you think the violent young men mentioned in the report should be held in a youth justice centre or a prison? Discuss.

EXTRACT

Ombudsman: children 'bored' with youth justice transferred to adult prison system

Nino Bucci, *The Age*, 12 December 2013

Moving children from the youth justice system to adult prisons, sometimes because their birth certificates were not read correctly, breached the state's human rights act, the Victorian Ombudsman has found.

Children were placed in adult prisons 24 times in the past six years, on some occasions after they had assaulted staff or other detainees because they were 'bored' of the youth justice system and wanted to be transferred. Fifteen of these children were transferred from the youth justice system.

Ombudsman George Brouwer investigated children in custody after receiving a report in October 2012 about a 16-year-old Aboriginal boy who was transferred from the Parkville Youth Justice Precinct to Port Phillip Prison and held in solitary confinement for several months.

Mr Brouwer reported that transferring youths into adult prisons after they had been violent to achieve that outcome could encourage further attacks on staff and other detainees.

The *Investigation into children transferred from the youth justice system to the adult prison system* report focused on the transfer of five children into the adult corrections system after a request by the Department of Human Services.

The children were removed in July and August last year from Parkville and placed in Port Phillip Prison, where they were locked in their cells on their own for 23 hours a day.

Four children were removed after an attempt to escape from Parkville in July last year that involved them cutting a staff member on the neck with a makeshift weapon, physically restraining another staff member and stealing her keys, and barricading themselves in a room where they caused significant property damage.

The group demanded to be transferred to an adult prison during the three-hour standoff. The staff member who was cut required stitches, another was hospitalised and a third required medical treatment.

Three of the children then spent between 84 and 99 days in Port Phillip Prison, where they were in solitary confinement for 23 hours a day and spent the other hour on their own in an exercise yard while handcuffed.

Mr Brouwer found that the treatment of the children was 'inconsistent' with the Department's responsibilities under the Charter of Human Rights and that there were no circumstances that justified placing children in adult prisons.

'Victorian prisons are currently overcrowded, which increases the likelihood of a child in a mainstream unit sharing a cell with an adult. It is evident that the youth justice system is limited in its capacity to deal with a small, but increasing, cohort of young people exhibiting violent behaviours.'

Five children were accidentally sent to adult prisons when department staff failed to properly read birth certificates.

In March this year, it was discovered that one child had accidentally been placed in an adult prison despite his birth certificate showing he was 14.

The report also found:

- an increase in children involved in gang-related activity
- ice is causing more problems than any other illicit substance
- increased transfers to adult prison linked to a youth writing to friends 'do something wild, you'll get transferred to the youth unit at Port Phillip Prison, it's fantastic'
- not being able to smoke and better canteen options also made youths seek transfers to adult prison
- putting children into the mainstream adult prison population would see them subject to 'sexual standover'.

Mr Brouwer recommended that the Office of Correctional Services Review, which oversees the corrections system, be made independent from the Department of Justice. He also recommended that Minister for Community Services Mary Wooldridge consider removing the option to transfer children to the adult prison system once additional accommodation becomes available at the Malmsbury Youth Justice Centre in 2015, and ensure the birth date of detainees was checked.

Treatment orders

Drug treatment order

The Drug Court (a special Magistrates' Court) is the only court that can issue a drug treatment order. A drug treatment order requires the following conditions:

- the offender committed the crime (within the jurisdiction of the Magistrates' Court) as a result of drug or alcohol use

- the offender pleads guilty to the crime
- the crime does not involve a sexual offence or an assault causing bodily harm
- the offender agrees to a two-year (maximum) drug treatment order (instead of a prison sentence) that will require the offender to:
 - be of good behaviour
 - undergo treatment for drug or alcohol dependency – including periodic drug tests
 - report to and accept visits from members of the Drug Court
 - inform the court of a change of address
 - seek the court's permission to travel interstate.

The purpose of a drug treatment order is to help rehabilitate the offender by providing a judicially supervised drug or alcohol treatment program. The aim is to reduce the level of criminal activity associated with drug and alcohol dependency and reduce the offender's health risks associated with drug or alcohol dependency.

DETENTION AND TREATMENT ORDER

Under the *Severe Substance Dependence Treatment Act 2010* (Vic.) any person over 18 years of age can apply to the Magistrate's Court for a **detention and treatment order**. The order allows an adult person, who has a severe addiction to alcohol or other drugs, to be detained for up to 14 days and given treatment for their addiction which, as a matter of urgency, is necessary to prevent serious injury to their health or to preserve their life. The person's addiction must render them incapable of making decisions about their own health. A valid recommendation from a psychiatrist or doctor specialising in addiction who has personally examined the patient must accompany the application.

Restricted involuntary treatment orders

When a person with a mental illness is found guilty of an offence the court has the option of placing the offender on a **restricted involuntary treatment order** for up to two years instead of passing sentence. These orders are not used in serious offences involving violence or sexual assault. The order can be made if:

- the person appears to be suffering a mental illness requiring treatment
- treatment can be obtained from an approved mental health service
- the person must be detained for his or her own protection or for the protection of the public.

The person is taken to an approved mental health service. Once a psychiatrist has assessed the offender's condition, the person will either be admitted as an involuntary patient or placed on a restricted community treatment order, which allows the person to live in the community while being treated. These orders last until the restricted involuntary treatment order expires or it is revoked.

Under a residential treatment order a person with an intellectual disability may be detained for up to five years in a residential treatment facility to undergo appropriate treatment.

Hospital security orders

Mentally ill offenders who would otherwise be imprisoned can be given a hospital security order as their sentence. These orders cannot be imposed for more than the period of imprisonment that would have been given if the offender were not mentally ill. The person remains in the mental health facility or serves the remainder of the time in prison if treatment is no longer required.

LEARNING ACTIVITY 3.9

Treatment orders

- 1 Read the case study 'Drug treatment order' and answer the questions.
 - a What is a drug treatment order?
 - b Which court can sentence an offender to a drug treatment order?
 - c Why is a drug treatment order likely to be given?
 - d Explain some of the conditions that might be attached to a drug treatment order.
 - e Do you think James in this case study will benefit from a drug treatment order? Discuss.

CASE STUDY

Drug treatment order

James is 45. He has been a heavy alcohol and marijuana user since his teenage years, and has a long criminal record that includes serious driving offences, theft and shoplifting. He thinks that, compared to jail, the drug court program is not a soft option. For 10 years he has been in and out of jail. It was not really a deterrent for him. It was just part of his life.

Earlier this year James was before the courts again with a new set of charges. He opted into the drug court program and was given a drug treatment order. As part of his obligations under the order he must attend for a breath test for alcohol and a urine test for drugs twice a week, and must appear before the magistrate once a week. The magistrate discusses his progress. James also has to see the case worker, a clinician and a counsellor once a week.

This is the second time he has been in the drug court program. He was kicked off when he was on it the first time and had to serve his sentence in prison. He was still having a lot of problems then. Now he says it is going well, 'I've just decided that enough's enough. I've been going on this merry-go-round now for 20, 25 years. I've dealt with a lot of my issues and problems in my life now, and with the help of the counselling and everything else, and it's just made my life a lot easier and it's made it a lot easier to just give drugs up.'

- 2 What is the purpose of a detention and treatment order? How do you think it will help people who have become dependent on drugs?
- 3 Explain when a restricted involuntary treatment order is used.
- 4 What is a hospital security order? Do you think this would be a good outcome for a mentally ill offender? Explain.
- 5 **Investigation**
Investigate restricted involuntary treatment orders on the Internet and explain a person's rights under these orders.

Non-custodial sentences

Non-custodial sentences are sanctions that are carried out in the community and do not involve a prison sentence, although a community correction order can be combined with a prison sentence.

Community correction order

A community correction order is a sentencing option which allows the offender to remain in the community. They will be able to maintain their employment and draw on the assistance of family or

friends to take responsibility for their actions and avoid reoffending. A community correction order can be combined with either a fine or up to three months' imprisonment. When combined with a term of imprisonment, the order will commence on the offender's release from jail.

SENTENCING AMENDMENT

Under the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic.), a **community correction order** is a single order which replaces the **combined custody treatment order**, **intensive corrections order**, **intensive correction management order** and the **community-based order**, although previous orders currently being served by offenders remain in force.

The maximum period for an order set in the Magistrates' Court is two years. The maximum period for an order set in the County Court or Supreme Court is equal to the maximum term of imprisonment for the offence or two years, whichever is greater. The order must commence within three months of being made. Community correction orders can be used where an offender, who has been found guilty of an offence punishable by more than five penalty units, agrees to the order and the court has received (if required) a pre-sentence report.

Mandatory conditions attached to the order are that offenders will:

- not leave Victoria without permission or without formal authority to transfer and serve out the order interstate
- notify authorities of a change of address or employment
- not reoffend
- report to a community correction centre and comply with directions given by community corrections officers
- comply with any other optional conditions set by the courts.

The court must select one or more optional conditions so that the order can be tailored to suit the needs of the offender and the circumstances of the offence committed and may include:

- a sentence of up to three months' imprisonment in addition to the order
- a fine in addition to the order
- payment of a bond which will be forfeited if the offender does not comply with the order
- up to 600 hours of unpaid community work – a maximum of 20 hours (or 40 hours with the offender's consent) to be completed in seven days



Figure 3.13
Community work

- curfews between 2 to 12 hours a day for up to six months – for example, the offender is to remain at home between 9 pm and 6 am each day for three months
- no-go zones or restrictions on where the offender lives or who they contact
- making offenders who are given a curfew or area restriction wear an electronic monitoring device.
- a ban on entering and/or consuming alcohol on licensed premises
- offenders returning to court at intervals or for ongoing judicial monitoring
- supervision by Corrections Victoria
- treatment and rehabilitation programs (for example drug or alcohol treatment) – hours of treatment can be credited as hours of unpaid community work
- imposition of driving restrictions.

The court may also specify when each condition must be completed. For example, an offender may be required to complete one or more of their obligations under the order within the first six months.

For a serious breach of the order a court can impose three years' imprisonment or a fine of 30 penalty units. Corrections Victoria will handle less-serious breaches of the order using on-the-spot fines, up to two hours' extension on curfew times or up to 16 hours of additional unpaid community service.



Figure 3.14

Community correction officers undertake a wide range of duties to assist in the case management of offenders in the community.

Fine

A fine is a monetary penalty expressed in levels of **penalty units** that can be imposed with or without a conviction. Fines are expressed this way to make it easier to change fines across all offences. This can be done by increasing the value of a penalty unit.

When deciding on the level of a fine, the court will consider:

- the financial circumstances of the offender, their income and whether they have a job
- the responsibilities of the offender including dependants
- any loss or destruction of, or damage to, property suffered as a result of the offence
- the value of benefit received by the offender from the offence
- any forfeiture, compensation or restitution order imposed.

Options when a fine cannot be paid

Offenders who cannot pay a fine can apply to the court for:

- an **instalment order** or a **time to pay order**
- a **finer work order** (either a conversion order or a fine default unpaid community work order) where the offender works off the fine in unpaid community work. The offender can convert fines up to the value of 100 penalty units
- a **variation or cancellation** of these orders where there has been a substantial change in the offender's circumstances.

If a fine is not paid, a warrant to arrest can be issued. If a person is arrested for not paying a fine, they will be brought before a court. The court may:

- vary the order to allow payment by instalments or further time to pay
- order the offender to do community work up to the value of 100 penalty units. The offender will do one hour of work for each 0.2 unpaid penalty unit with a minimum of eight hours and a maximum of 500 hours
- order a warrant to seize property to sell and pay the fine
- order an offender without reasonable excuse for non-payment to be imprisoned for one day for each penalty unit or part penalty unit remaining unpaid to a maximum of 24 months where no other order is appropriate
- adjourn the hearing for up to six months on any terms it thinks fit.

Table 3.5 Penalty units – one penalty unit is \$144.36 (1 July 2013 to 30 June 2014). The rate is indexed annually.

LEVEL	MAXIMUM FINE
1	–
2	3000 penalty units
3	2400 penalty units
4	1800 penalty units
5	1200 penalty units
6	600 penalty units
7	240 penalty units
8	120 penalty units
9	60 penalty units
10	10 penalty units
11	5 penalty units
12	1 penalty unit

Source: *Sentencing Act 1991* (Vic.)

On-the-spot fines

On-the-spot fines can be given for a number of offences, most often traffic offences. An **infringement notice** is given stating the details of the offence and the amount that has to be paid. If it is not paid within 28 days, a courtesy letter will be sent. This incurs extra charges. If it is not paid at this time it will be put in the hands of the **Infringements Court**. This is a special section of the Magistrates' Court that deals with the enforcement of on-the-spot fines.

Adjournment with or without conviction

When an offender is found guilty of an offence, the court may decide to adjourn the case with a conviction recorded, or without a conviction recorded. If a conviction is recorded the offender will have a **criminal record**. If the court decides to give an adjournment without conviction, then the offender will not have a **criminal conviction** recorded against his or her name.

As criminal records for adults remain with them throughout their lives, it is better to have no criminal conviction recorded, although the police will hold a record that you have been found guilty of a crime. This will not be available to the public, but could be found if a police search is done as is customary when a person applies for some jobs.

When an adjournment with or without a conviction is given, the offender will be released on the undertaking that he or she will:

- appear in court at the end of the adjournment period, if called on to do so
- be of good behaviour during the period of adjournment, which can be up to five years
- follow any conditions imposed on them, such as paying money into the poor box.

An offender released on these conditions is said to be on a **good behaviour bond**. An offender who does not reoffend during the adjournment period will be discharged on the adjourned date and no further action will be taken.

CASE STUDY

A prank leads to a good behaviour bond

A barmaid pleaded guilty to one charge of reckless conduct endangering serious injury. As a joke she put Pine-O-Cleen in the drink of a young man at a nightclub. The man swallowed a bit less than half of it and immediately started vomiting.

The magistrate said that this was a prank not intended to cause any specific harm. The barmaid was sentenced, without conviction, to a good behaviour bond for 18 months and ordered to donate \$3000 to the Lighthouse Foundation, a charity that aims to reduce youth homelessness.

Discharge and dismissal

A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) dismiss the charge or the court may record a conviction and then discharge the offender.

Superannuation orders

A court can order that a government employee forfeit their superannuation employer contributions, or part thereof, if the person has been found guilty of an indictable offence that involves corruption or an abuse of their position. Corruption offences might involve stealing government property, taking bribes or the sexual assault of a person for whom the offender has some responsibility or duty of care.

Confiscation orders

In order to ensure that criminals do not profit from their crimes, the prosecution will try to prove that a criminal's assets are 'tainted' so that the court can confiscate assets that were used to commit a crime or acquired through illegal activity. These general forfeiture laws apply to indictable offences and a wide range of summary offences.

Automatic forfeiture laws also apply to drug trafficking, major fraud, extortion, robbery, theft and blackmail where it is assumed that all of a person's assets are proceeds from unlawful activity. These assets can be frozen at the time of arrest. If the offender is found guilty, it is their responsibility to prove that the assets were legally gained, otherwise the assets will be automatically seized and sold.

Suspension and cancellation of driver's licence

If a licence is suspended, the person is not allowed to drive for the period of the suspension. At the end of the suspension, the driver is allowed to drive again without having to obtain a new licence.

If a licence is cancelled, the licence is taken away from the offender and the driver is disqualified from driving during the period of the cancellation. At the end of the specified period, the offender has to apply for a new driver's licence before driving again.

DID YOU KNOW?

Under Victoria's hoon laws a driver can have their vehicle confiscated for 30 days on a first offence or for three months on a second offence. On a third offence the car will be confiscated permanently.

LEARNING ACTIVITY 3.10

Non-custodial sentences

- 1 What is a community correction order? To what extent does it rehabilitate an offender?
- 2 What is a penalty unit and how are they used to determine a fine?
- 3 What may happen if an offender fails to pay a fine?
- 4 What is an infringement notice? When are they used?
- 5 Read the case study 'A prank leads to a good behaviour bond' and answer the questions.
 - a What is a good behaviour bond?
 - b What occurred in this case?
 - c Do you agree with the magistrate's decision? Discuss.
- 6 Read the case study '10-year CCO for 18-year-old armed robber' and answer the questions.
 - a What are the mandatory conditions attached to a community correction order?
 - b What were the optional conditions the judge chose to include in the order?
 - c What was the judge's aim in sentencing this offender?
 - d Do you think a community correction order was appropriate in this case? Discuss. Consider in your answer the other optional conditions which were possible but not imposed in this case.

10-year CCO for 18-year-old armed robber

An 18-year-old was sentenced in the County Court to a 10-year community correction order (CCO) and fined \$4000 after pleading guilty to an armed robbery and an attempted armed robbery.

The youth and a 26-year-old friend were armed with a baseball bat and an axe when they robbed a milk bar. They later tried unsuccessfully to rob a service station. Both were drug affected at the time.

The conditions attached to the order included three years of intensive supervision, 200 hours of community work and the requirement to undergo a range of assessments and treatment programs.

In rejecting the prosecutor's argument for youth detention, the judge commented that rehabilitation, particularly of young offenders, was a legitimate aim in sentencing. He warned the youth that he would have to turn his life around as there will be no second chances during the next 10 years.

CASE STUDY

- 7 Read the case study 'A Big Mac and a fine' and answer the questions.
 - a Why was Mr Lethbridge fined?
 - b How effective do you think this fine would be in terms of the aims of criminal sanctions? Discuss.

A Big Mac and a fine

Ferdinand Lethbridge of Dandenong was fined \$135 for not wearing a seatbelt and another \$135 for not having his lights on. Police said he took his seatbelt off before entering the McDonald's drive-through in Prahran. He was intercepted as he was leaving the drive-through. Jon Gorr, defending, said Lethbridge removed his seatbelt to get his money out before going through the drive-through. Lethbridge was given an adjournment without a conviction.

CASE STUDY

- 8 What is the difference between an adjournment with a conviction and an adjournment without a conviction? What is the significance of this?
- 9 How may an offender be disadvantaged by receiving a driver's licence cancellation, as compared to a driver's licence suspension?

10 You be the judge

In each of the three situations below, the offender has been found guilty. Select one of the following types of sentences to impose in each case and give reasons for your decision:

- imprisonment
 - community correction order
 - hospital security order
 - restricted involuntary treatment order
 - fine
 - adjournment with or without a conviction.
- a Max killed his father because his father had always been extremely strict with him. Max's psychiatrist testified at the trial that he was suffering from chronic depression at the time of the killing. He was found guilty of murder.
- b John got drunk and abusive. He was charged with his third minor assault. All three incidents involved the use of alcohol. John's friends and employer testified that John is a fun-loving guy when he is not intoxicated.
- c Bruce was charged with being an accessory (after the fact) to a crime. The police believe he helped to cover up the fact that his wife killed their daughter. His wife, Lulu, was convicted of murder and sentenced to life in prison. The couple has two other children, both under the age of 10.
- 11 For each of the sanctions in the table, list which aims of criminal sanctions you think are fulfilled by that sanction and to what extent.

SANCTION		AIMS OF CRIMINAL SANCTIONS
a	Imprisonment	
b	Community correction order	
c	Fine	
d	Drug treatment order	

TRENDS IN CRIME

Crime statistics gauge the prevalence of crime in society and inform the government of the need to allocate more police resources or change the law to further discourage unacceptable behaviours. Crime statistics are also used to measure police effectiveness in resolving crime.

Clearance rates are often used to measure police efficiency in responding to crime. It is problematic to compare the effectiveness of different police forces using clearance rates alone as each police force may have a different way of recording when a crime is reported and different criteria for clearing crimes. A clearance rate is usually, but not always, calculated by dividing the number of crimes that are 'cleared' by the total number of crimes recorded.

In Victoria, **crime clearance** means police investigation of a reported offence revealed that:

- no offence was detected
- the complaint was withdrawn

- the offender was charged or a summons was completed
- the known offender could not be charged for legal reasons (underage or deceased).

Factors influencing crime rates

Crime rates can depend on a variety of factors. Some crimes may be more prevalent in cities than in rural areas, or vice versa.

Other factors that can influence crime rates are:

- different methods of recording statistics
- unemployment rates
- density of population
- age of the population
- stability of government
- strong police force or a change in law enforcement approaches
- new laws or sanctions that are likely to deter offenders
- racial tensions
- poverty
- lack of public amenities
- incidence of gangs
- alcohol consumption
- overly aggressive male culture
- mental health issues
- family breakdowns
- weather
- the level of reporting of crime by individuals
- season of the year.

Changes or difference in crime statistics can occur for any number of reasons. For example, studies have shown that perceptions of living with a stable government can lead to a lower crime rate. Different people perceive stability in government in different ways. According to US statistics, the crime rate in the United States dropped by 14.5 per cent after Barack Obama became president. However, some southern states, mainly Republican, showed an increase in crime. It is thought that people are less likely to commit crime if they feel more hopeful of what the future holds.

An increase in crime statistics is always alarming and should not be dismissed as it may indicate that a community is not safe. However, an increase in crime rates does not always mean that a crime is happening more than in the past. It may be that the rate of crime has remained constant but that victims are more willing to report the issue to police or that the police are better equipped to deal with certain crimes. New technologies such as anti-theft devices in cars, video surveillance in car parks, alarm systems in homes and teller-activated security screens in banks may play a part in deterring would-be criminals and could account for a decrease in some crimes.

Unreported crimes

Unreported crimes should be considered when looking at crime statistics. It is not possible to determine the exact figures for crime because of the unknowable numbers of crimes that go unreported.

Rape, in particular, is a crime that victims may choose not to report to police. The recurring question of why rape may not be reported is not a new one. Generations of women have had sexual crimes committed against them and not reported these crimes – possibly feeling themselves to be

partly to blame. The reasons for not reporting the crime could be:

- fear of not being believed
- fear of retaliation
- shame
- belief that it may have been their fault
- lack of understanding about what they should have to put up with
- a feeling of utter hopelessness
- a feeling that no-one will help
- sexual advertising that gives confusing messages.

A national crime victimisation survey for 2008–09, conducted by the Australian Bureau of Statistics, showed that most crimes go unreported. According to the survey, almost 70 per cent of sexual assaults, 61 per cent of robberies and 55 per cent of assaults did not come to the attention of police.

Victorian crime statistics

Victoria Police crime statistics indicate that in 2012–13 there were 406 497 offences recorded statewide. Total offences increased by 3.4 per cent and Victoria Police cleared 56.2 per cent of crimes reported.

In 2012–13, the crime rate in Victoria per 100 000 population was 7157, an increase of 1.6 per cent compared with the previous year. There was an overall increase in crimes against the person by 7.2 per cent, which is attributed to an increase in family violence related crime. Crimes against the person that did not involve family violence rose by 1.0 per cent. In comparison, offences against property decreased by 1.2 per cent compared to 2011–12.

The public's perception is that violence is increasing, but trends in violent crime reported to Victoria Police since the early 1990s reveal a mixed story. While statistics fluctuate from year to year, there has been an overall decrease in homicide by 9 per cent since 1990, and armed robbery by one-third since 2001. In 2012–13, there were 4.8 per cent fewer rapes per 100 000 population, with an 8 per cent increase in assaults including family-related assaults.

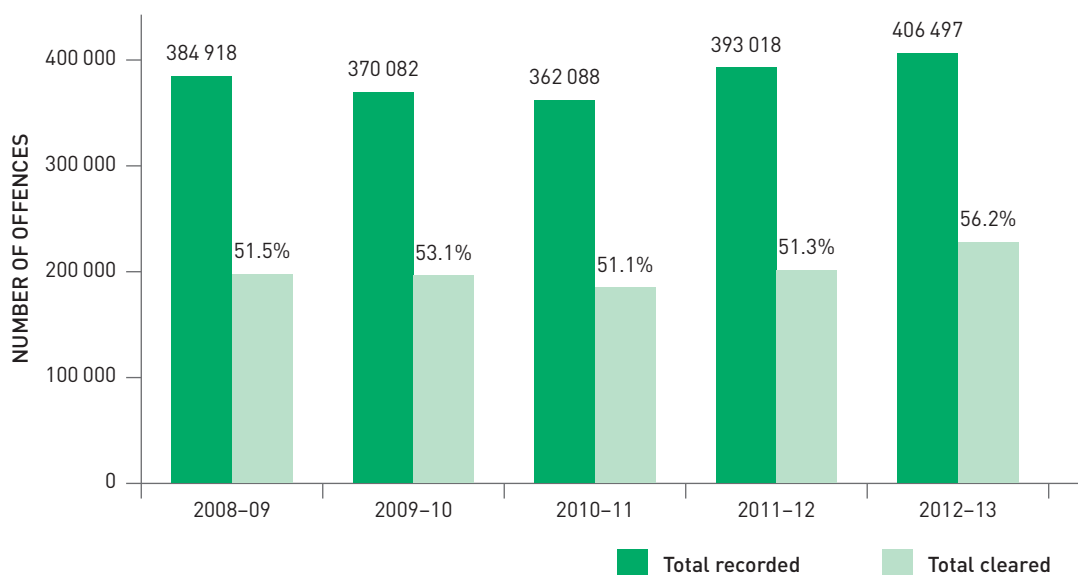


Figure 3.15 Recorded and cleared offences, 2008–09 to 2012–13

Note: All figures with decimal places in the above figure have been rounded to one decimal place.

Source: Victoria Police, *Crime Statistics 2012/2013*

Table 3.6 Summary of offences recorded and cleared, 2011–12 and 2012–13

	OFFENCES RECORDED			RATES PER 100 000			TOTAL CLEARANCES			
	NUMBER	NUMBER	% CHANGE FROM	RATE PER 100 000 POPULATION		% CHANGE FROM	SINGLE YEAR CLEARANCES	CLEARED FROM PREVIOUS YEARS	RATE (%) TOTAL CLEARED	TOTAL RATE DIFFERENCE FROM
	2011–12	2012–13	2011–12	2011–12	2012–13	2011–12	2012–13		2012–13	2011–12
Crimes against the person										
Homicide	167	178	6.6	3.0	3.1	4.7	125	50	98.3	4.3
Rape	2049	1985	-3.1	36.7	34.9	-4.8	1235	621	93.5	1.7
Sex (non rape)	6373	6526	2.4	114.2	114.9	0.6	4335	1536	90.0	-1.3
Robbery	3281	2815	-14.2	58.8	49.6	-15.7	1392	405	63.8	4.8
Assault	41 940	46 122	10.0	751.6	812.1	8.0	31 370	9 618	88.9	4.9
Abduction/kidnap	599	686	14.5	10.7	12.1	12.5	519	86	88.2	2.2
Subtotal	54 409	54 409	7.2	975.1	1 026.7	5.3	38 976	12 316	88.0	4.3
Crime against property										
Arson	3 091	3 312	7.1	55.4	58.3	5.3	645	163	24.4	2.2
Property damage	48 920	45 580	-6.8	876.7	802.5	-8.5	12 160	3 564	34.5	5.4
Burglary (aggravated)	2 500	2 716	8.6	44.8	47.8	6.7	1 130	259	51.1	4.1
Burglary (residential)	29 231	28 915	-1.1	523.8	509.1	-2.8	3 412	1 089	15.6	0.6
Burglary (other)	14 997	15 082	0.6	268.8	265.5	-1.2	2 537	848	22.4	0.0
Deception	23 337	26 177	12.2	418.2	460.9	10.2	16 706	4 196	79.8	-1.4
Handle stolen goods	7 433	8 174	10.0	133.2	143.9	8.0	7 615	643	101.0	5.0
Theft from motor vehicle	46 702	42 965	-8.0	836.9	756.5	-9.6	4 105	1 167	12.3	2.1
Theft (shopsteal)	19 861	20 673	4.1	355.9	364.0	2.3	13 390	1 955	74.2	-2.5
Theft of motor vehicle	15 647	14 671	-6.2	280.4	258.3	-7.9	3 129	1 207	29.6	5.3
Theft of bicycle	4 188	4 664	11.4	75.1	82.1	9.4	360	78	9.4	0.0
Theft (other)	50 964	50 648	-0.6	913.3	891.7	-2.4	12 571	3 925	32.6	4.6
Subtotal	266 871	263 577	-1.2	4 782.6	4 640.7	-3.0	77 760	12 091	36.7	3.6
Drug offences										
Drug (cultivation, manufacturing, trafficking)	4 829	5 263	9.0	86.5	92.7	7.1	4 822	354	98.3	0.3
Drug (possession, use)	14 009	16 206	15.7	251.1	285.3	13.7	14 981	1 121	99.4	1.8
Subtotal	18 838	21 469	14.0	337.6	378.0	12.0	19 803	1 475	99.1	1.4
Other crime										
Going equipped to steal	488	601	23.2	8.7	10.6	21.0	545	42	97.7	0.3
Justice procedures	25 582	30 795	20.4	458.5	542.2	18.3	25 365	3 876	95.0	0.5
Regulated public order	1 415	1 352	-4.5	25.4	23.8	-6.1	1 065	229	95.7	1.0
Weapons/explosives	8 739	11 376	30.2	156.6	200.3	27.9	10 326	829	98.1	-0.5
Harassment	3 819	4 875	27.7	68.4	85.8	25.4	3 289	548	78.7	-2.6
Behaviour in public	6 437	6 685	3.9	115.4	117.7	2.0	6 244	231	96.9	-2.6
Other	6 420	7 455	16.1	115.1	131.3	14.1	5 692	839	87.6	3.0
Subtotal	52 900	63 139	19.4	948.0	1 111.7	17.3	52 526	6 594	93.6	0.0
TOTAL	393 018	406 497	3.4	7 043.2	7 157.1	1.6	189 065	39 479	56.2	4.9

Source: Victoria Police, *Crime Statistics 2012/2013*

Table 3.7 Offences recorded by type of location, 2012–13

	RESIDENTIAL	RETAIL/FINANCIAL	STREET/LANE/ FOOTPATH	EDUC./HEALTH/ RELIGIOUS	PUBLIC TRANSPORT	OTHER TRANSPORT	SPORTS/RECREATION FACILITIES	LICENSED PREMISES	OPEN SPACE	OTHER COMMUNITY	OTHER *	TOTAL
Crime against the person												
Homicide	68	2	87	6	0	1	0	1	2	0	11	178
Rape	1420	24	125	64	11	48	23	18	96	1	155	1985
Sex (non rape)	3726	172	678	333	268	92	90	54	391	7	715	6526
Robbery	197	713	1179	22	248	107	42	59	151	0	97	2815
Assault	23610	2626	9867	1022	1311	947	440	1436	687	49	4127	46122
Abduction/kidnap	336	20	166	14	7	32	11	4	23	0	73	686
Subtotal	29357	3557	12102	1461	1845	1227	606	1572	1350	57	5178	58312
Crime against property												
Arson	975	116	639	175	28	280	93	1	676	7	322	3312
Property damage	21239	3806	8196	1857	1996	2272	667	337	978	197	4035	45580
Burglary (aggravated)	2570	67	10	5	0	0	4	9	3	0	48	2716
Burglary (residential)	28915	0	0	0	0	0	0	0	0	0	0	28915
Burglary (other)	0	5721	38	2160	25	116	1125	301	265	103	5228	15082
Deception	3278	11978	1382	241	142	170	255	298	48	6	8379	26177
Handle stolen goods	2308	593	2008	37	141	238	37	36	55	1	2720	8174
Theft from motor vehicle	16405	981	11396	328	774	4988	255	66	563	34	7175	42965
Theft (shopsteal)	23	19374	44	11	15	6	19	586	5	4	586	20673
Theft of motor vehicle	4133	733	6245	70	495	788	59	97	61	1	1989	14671
Theft of bicycle	2235	223	811	291	442	265	61	23	117	11	185	4664
Theft (other)	12521	15210	2435	4960	1264	796	1655	1961	1408	246	8192	50648
Subtotal	94602	58802	33204	10135	5322	9919	4230	3715	4179	610	38859	263577
Drug offences												
Drug (cultivation, manufacturing, trafficking)	2844	74	1241	23	21	247	21	45	72	0	675	5263
Drug (possession, use)	3745	482	5995	162	579	1953	261	120	446	2	2461	16206
Subtotal	6589	556	7236	185	600	2200	282	165	518	2	3136	21469
Other crime												
Going equipped to steal	33	71	227	9	19	32	4	2	4	0	200	601
Justice procedures	12341	625	2880	251	267	206	111	85	92	8	13929	30795
Regulated public order	535	39	249	70	28	20	13	38	132	0	228	1352
Weapons/explosives	3418	502	3931	92	426	616	69	97	244	5	1976	11376
Harassment	2559	219	369	63	48	12	27	10	64	1	1503	4875
Behaviour in public	318	415	3870	95	417	241	125	245	226	2	731	6685
Other	1960	547	1216	389	773	160	119	365	261	3	1662	7455
Subtotal	21164	2418	12742	969	1978	1287	468	842	1023	19	20229	63139
TOTAL	151712	65333	65284	12750	9745	14633	5586	6294	7070	688	67402	406497
Percentage	37.3%	16.1%	16.1%	3.1%	2.4%	3.6%	1.4%	1.5%	1.7%	0.2%	16.6%	100.0%

* Other includes justice, administrative/professional, wholesale, warehouse/storage, manufacturing, agricultural, other location and unspecified locations.

Crimes across regions of Victoria

In 2012–13, each Victorian police region (Western, Eastern, North West Metro and Southern Metro) recorded an increase in crime, which contributed to an overall increase in the crime rate by 3.4 per cent. Crimes against the person are also on the rise in each region, with a significant increase in harassment cases in the Eastern Region (39.3 per cent), the Western Region (45.7 per cent) and the North West Metro Region (66.4 per cent). Three regions also recorded an increase in weapons/explosive offences of 35–37 per cent compared to the previous year.

The largest decrease in crime rates occurred in property-related offences. The Eastern and North West Metro regions recorded a decrease (10.2 per cent and 13.9 per cent respectively) in the number of car thefts, while the Western Region had a decrease in other types of theft by 13.9 per cent.

A review of crime statistics in Victoria conducted by RACV Home Security has identified the top 10 suburbs/towns most at risk of burglary (see table 3.8). The burglary rate is calculated by the number of homes burgled in each region. For example, in Heidelberg West one in 27 homes is burgled each year, while in Sunshine the rate is one in 36 homes.

Table 3.8 Top 10 areas across Victoria with the highest home burglary rates

RANK	POSTCODE	SUBURB/TOWN	BURGLARY RATE
1	3081	Heidelberg West, Heidelberg Heights, Bellfield	One in 25 homes
2	3027	Williams Landing	26
3	3754	Mernda, Doreen	26
4	3022	Ardeer	27
5	3851	Seaspray, Montgomery, Darriman	30
6	3200	Frankston North	33
7	3059	Greenvale	33
8	3338	Melton South, Exford, Brookfield	33
9	3230	Anglesea	36
10	3020	Sunshine, Albion	36

Note: Based on Victoria Police Crime Statistics 2012–13, ABS Census data for number of occupied households and municipal council household data. Postcodes with less than 1000 occupied households have been excluded. Burglary rates are rounded to the nearest full number.

Source: RACV

Table 3.9 Offences per Australian state in 2011–12, per 100 000 population aged 10 years and over

STATE	ACTS INTENDED TO CAUSE INJURY	THEFT	ILLICIT DRUG OFFENCE	PUBLIC ORDER OFFENCE
Victoria	268	386	153	277
Queensland	248	318	403	476
South Australia	424	242	950	452
Western Australia	319	168	233	165
Tasmania	457	272	348	1077
Northern Territory	1253	148	562	1699
Australian Capital Territory	199	156	91	269

Source: ABS cat. no. 4519.0

LEARNING ACTIVITY 3.11

Trends in crime

- 1 Why do communities collect crime statistics and monitor crime rates?
- 2 What is a clearance rate? What data is used to calculate it?
- 3 Explain four factors that may impact on crime rates.
- 4 Discuss the problem of unreported crime. What do you think are the reasons for this? Are some crimes more likely to be reported than others? Explain.
- 5 What was the percentage of crimes cleared in 2012–13 in Victoria? How does this compare with previous years?
- 6 Consider table 3.6 and answer the questions.
 - a Which three crimes have increased by over 20 per cent from 2011–12 to 2012–13?
 - b Identify four crimes against the person or against property for which there have been over 40 000 reports. Why do you think these crimes are more prevalent in the community?
 - c Why do you think the following types of crimes have high single year clearance rates (90 per cent and above)?
 - i behaviour in public
 - ii handling stolen goods
 - iii going equipped to steal
 - iv drugs offences
 - d A man reports that, while his family was out, his house was burgled and various items stolen including his son's racing bike from the backyard. What do the statistics tell you about the likelihood of the offenders being caught or the items being recovered?
- 7 Consider table 3.7 and answer the questions.
 - a Fill in the table below.
 - b Which type of offence is more prevalent in residential premises?
 - c Which type of offence is more prevalent in the street, lane or footpath?

OFFENCE	APPROXIMATE NUMBER OF OFFENCES REPORTED IN 2012–13	LOCATION WHERE THIS OFFENCE IS MOST PREVALENT
Assault		
Burglary		
Theft		
Theft from motor vehicle		
Possess/Use drugs of dependence		
Property damage		
Public order offences		
Weapons offences		

- 8 Read the extract 'Jill's killer jailed' and answer the questions.
 - a Jill Meagher was taken from a street in Brunswick and raped. How many murders and rapes have taken place in streets in 2012–13?
 - b Do you agree with the sentence given in the case? Give reasons.

- c What is parole? How did the parole system fail Jill Meagher?
- d What changes in the law have been brought in as a result of the accused in this case being on parole when he murdered Jill Meagher? What further changes have been suggested?

EXTRACT

Jill's killer jailed

ABC *Lateline*, 19 June 2013

Adrian Bayley has been sentenced to 35 years in prison for the brutal rape and murder of ABC staffer Jill Meagher.

TONY JONES, PRESENTER: The husband of murdered Melbourne woman Jill Meagher says the justice system failed his wife. Adrian Ernest Bayley was today jailed for life for the rape and murder of the ABC staffer. Bayley pleaded guilty to the crimes and was set a non-parole period of 35 years. He murdered Jill Meagher while on parole for another series of rapes. Her husband Tom says she'd still be alive if Bayley had been kept off the streets. Victoria's parole laws, which have already been strengthened, are now being re-examined by a former High Court judge, Hamish Fitzsimmons reports.

HAMISH FITZSIMMONS, REPORTER: Today was a long time coming for those who knew and loved Jill Meagher.

GEORGE MEAGHER, JILL MEAGHER'S FATHER: Jill lived a life full of family, friends and her beloved Tom. Jill was brutally raped and murdered and is never coming back.

HAMISH FITZSIMMONS: Jill Meagher was grabbed off the street by Adrian Bayley as she walked from a night out with friends and ABC colleagues on 22nd September 2012. She was 500 metres from home and safety. No sentence can repair the damage done.

TOM MEAGHER, JILL MEAGHER'S HUSBAND: I obviously don't think it's enough, but I wasn't surprised today at all.

HAMISH FITZSIMMONS: Bayley dragged Jill Meagher down a laneway and raped and murdered her. He then took her body out to the country, burying her in a shallow grave. Almost a week later, Bayley was arrested and charged. On top of the life sentence for Jill Meagher's murder, Bayley was given 15 years for her rape.

TOM MEAGHER: 15 years is a disgrace, considering the maximum penalty for rape is 25. And I don't know what the maximum penalty is for if it's not for that man. I don't know who else could fit the bill of a maximum sentence for rape than Adrian Ernest Bayley.

HAMISH FITZSIMMONS: When he brutally killed Jill Meagher, Bayley was on parole after being convicted over 16 counts of rape. He'd also recently been convicted of a serious assault, but was freed on appeal. Now, troubling questions are being asked.

PHIL CLEARY, ANTI-VIOLENCE AGAINST WOMEN ADVOCATE: We have to reflect on what it is about our society that produces Adrian Bayleys.

HAMISH FITZSIMMONS: In his remarks sentencing Bayley to life imprisonment with a 35-year non-parole period, Justice Geoffrey Nettle told him the murder was savage, violent and among the worst kind conceivable. He said, '... As your criminal record reveals, you are a recidivist violent sexual offender who has had little compunction about sexual offending when the mood takes you, or about threatening and inflicting violence as part of the process.' Because he pleaded guilty, Bayley was given a non-parole period rather than an indefinite sentence, Justice Geoffrey Nettle suggesting while his hopes of rehabilitation were slim, Bayley should still be given an opportunity for reform.

The family are deeply grateful for the work of Victoria's police and courts.

GEORGE MEAGHER: Justice has now been done. Police and prosecutors, we thank you.

HAMISH FITZSIMMONS: Now that this case is over, it remains extremely difficult to make any sense of it at all. How does one make sense of the brutality of Jill Meagher's murder as she walked home after a night out with her colleagues and friends? How does one make sense of the many lives that have been shattered by a man who committed this crime when he was out on parole for a series of violent rapes committed in the past?

ARIE FREIBERG, CHAIRMAN, SENTENCING ADVISORY COUNCIL: Well it's a catastrophic result. We can only judge in hindsight what goes wrong, and in this case, given the nature of the crime and who the victim was, it is catastrophic for the family and the community. But there are other cases and there are cases in every jurisdiction where something goes terribly wrong. What we can try to do is fix the system.

HAMISH FITZSIMMONS: New laws passed just this year mean parolees who reoffend will automatically have their parole cancelled or reassessed. The chair of the state's Sentencing Advisory Council has welcomed the changes, but warns no system is foolproof.

ARIE FREIBERG: We believe that better communication within the parole board, more resources, both for the board itself and for those supervising parole, are important, tightening up the criteria for release, that's important, but once again, I must stress that we cannot guarantee once a person is released, even under supervision, that they will not breach their parole or commit a further offence.

HAMISH FITZSIMMONS: And further safeguards may not be far away.

ARIE FREIBERG: Well I think they will try to minimise the risk. Currently there's an inquiry underway we understand headed by ex-Justice Callinan of the High Court. They're looking at the current parole system.

HAMISH FITZSIMMONS: 42-year-old Adrian Bayley will be eligible for parole when he's 77 years old.



Figure 3.16

A community march in response to Jill Meagher's murder, 2012

TRENDS IN SENTENCING

Sentencing in Victorian courts

According to the Sentencing Advisory Council, accurate sentencing statistics are a crucial tool for working out current sentencing practices and for establishing the range of sentences for a particular offence.

Over 92 per cent of all criminal cases finalised in Victorian courts are heard in the Magistrates' Court. This court hears all summary (minor) offences. Fifty to sixty per cent of offenders appearing before this court receive a fine as part of their sentence, with approximately 12 per cent of offenders having their case adjourned conditional on their undertaking that they will not reoffend.

Table 3.10 Percentage of accused sentenced in the Magistrates' Court by each sentence type

	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12
Total number of people sentenced in the Magistrates' Court each year	71 656	80 619	82 452	82 399	77 126	80 900
PERCENTAGE RECEIVING EACH TYPE OF SENTENCE	%	%	%	%	%	%
Imprisonment	5.0	4.2	4.3	4.9	4.4	4.5
Drug treatment order	0.1	0.1	0.1	0.1	0.1	0.0
Intensive correction order	2.1	1.9	1.9	2.1	2.1	0.8
Wholly and partially suspended sentence	7.6	7.6	8.7	9.3	8.9	6.7
Youth training centre/youth residential centre	0.2	0.2	0.1	0.2	0.2	0.2
Community-based order/ community correction order	6.0	5.3	5.8	6.0	6.0	6.9
Fine	59.1	60.6	56.6	55.5	54.6	57.6
Adjourned undertaking	9.4	9.9	11.1	11.8	12.4	12.1
Criminal justice diversion plan	7.2	6.8	6.4	6.2	6.0	5.4
Discharge/dismissal	2.6	2.8	4.0	3.0	4.7	5.2
Commonwealth orders	0.7	0.7	1.0	0.9	0.7	0.5
Other orders	0.1	0.1	0.0	0.0	0.0	0.0

Source: Sentencing Advisory Council, Victoria, Sentencing Outcomes in the Magistrates' Court, 2004–2012

In the higher courts, 86 per cent of the accused who had been proved guilty in 2010–11 received a custodial order. These courts do not use fines and adjournments in sentencing to the same degree as the Magistrates' Court. This reflects the seriousness of the crimes heard in these courts. Intensive correction orders and suspended sentences (now abolished) were considered terms of imprisonment even though the offender served this time in the community.

Table 3.11 Sentencing outcomes in the higher courts

	2006–07	2007–08	2008–09	2009–10	2010–11
Total number of people sentenced in the higher courts	2097	2199	1958	1915	2006
PERCENTAGE RECEIVING EACH TYPE OF SENTENCE	% (NUMBER)	% (NUMBER)	% (NUMBER)	% (NUMBER)	% (NUMBER)
Imprisonment	45.7 (959)	45.3 (997)	47.9 (938)	53.5 (1025)	53.0 (1063)
Intensive correction order	3.2 (67)	2.8 (62)	1.8 (36)	1.5 (28)	1.3 (26)
Wholly and partially suspended sentence	27.3 (572)	29.6 (651)	31.9 (624)	28.7 (550)	28.0 (562)
Youth training centre/youth residential centre	2.7 (56)	2.1 (46)	2.3 (45)	2.8 (53)	3.3 (66)
Community-based/community corrections order	10.0 (209)	9.6 (212)	6.3 (124)	4.8 (92)	6.4 (128)
Fine	4.4 (92)	4.1 (91)	4.2 (82)	2.6 (50)	2.2 (44)
Adjourned undertaking	2.6 (54)	3.1 (69)	1.2 (24)	1.3 (25)	1.4 (29)
Discharge/dismissal	0.2 (5)	0.0 (0)	0.2 (3)	0.1 (1)	0.1 (2)
Commonwealth orders	2.6 (55)	2.3 (50)	3.3 (64)	3.5 (67)	3.3 (66)
Youth attendance order/youth supervision order	0.0 (1)	0.1 (2)	0.1 (2)	0.1 (1)	0.0 (0)
Other orders	1.3 (27)	0.9 (19)	0.8 (16)	1.2 (23)	1.0 (20)

Source: Sentencing Advisory Council, Victoria, Sentencing Outcomes in the Higher Courts, 2004–2011

Table 3.12 shows the number of prisoners held in custody according to the offence committed. The numbers for the most serious offences such as murder and serious assault are high in comparison with the less serious crimes such as driving offences. The reason for this is that the community would expect that serious offences, particularly those involving crimes against other people, would attract a custodial sentence.

There has been a gradual increase in the number of people imprisoned for serious offences, which may suggest that more people are offending and/or the courts are imposing tougher sentences. This increase could partly be due to the general increase in Victoria's population by 1.5 per cent (77 500) each year from 5.1 million in 2007 to 5.5 million in 2011. However, an increase in the number of prisoners per 100 000 people suggests otherwise. According to the Sentencing Advisory Council, between 2002 and 2012, the prisoner rate per 100 000 Victorians rose from 94.2 to 117, therefore the increase in the prison population cannot be totally attributed to a change in general population.

Table 3.12 All sentenced prisoners in Victoria by most serious offence; 2007–11

	30 JUNE 2007	30 JUNE 2008	30 JUNE 2009	30 JUNE 2010	30 JUNE 2011
Most serious offence					
Murder	269	268	282	286	292
Other homicide	153	160	158	156	172

Assault	281	393	410	434	464
Sex offences	502	572	625	644	662
Other offences against the person	66	57	55	57	62
Subtotal	1271	1450	1530	1577	1652
Robbery and extortion					
Robbery	265	264	269	282	285
Extortion	3	3	4	7	4
Subtotal	268	267	273	289	289
Property offences					
Unlawful entry with intent	419	407	379	452	442
Deception and related offences	119	108	123	109	119
Receiving and handling proceeds of crime	25	35	33	42	40
Theft (including motor vehicle)	285	160	182	208	209
Property damage and environmental offences	40	33	30	46	46
Subtotal	888	743	747	857	856
Offences against good order					
Government security/justice procedures offences	390	405	400	425	436
Unlawful possession of weapons	21	34	35	22	29
Other offences against good order	16	15	17	15	20
Subtotal	427	454	452	462	485
Drug offences					
Possession and/or use drugs	9	6	17	20	24
Deal/traffic (including import/export)	294	324	330	329	344
Manufacture/cultivate (including other illicit drug offences)	46	45	64	58	63
Subtotal	349	375	411	407	431
Motor vehicle, traffic and related offences					
Driving offences	44	45	43	58	47
Licence/registration offences	122	77	78	79	86
Other traffic offences	0	2	0	0	1
Subtotal	166	124	121	137	134
Other offences					
Other offences/unknown	6	0	1	4	14
Total – all offences	3375	3413	3535	3733	3861

Source: Department of Justice, Statistical Profile of the Victorian Prison System, 2006–07 to 2010–11

Murder is a serious offence which carries a maximum penalty of life imprisonment. This does not mean that every person who is found guilty of murder will receive a life sentence. The judge will set the sentence based on the circumstances of the case and will take into account the impact of the crime on the victim, the offender and the community. Non-parole periods are the minimum time a prisoner must serve before being eligible for parole.

Ninety-eight per cent of people convicted of murder and 94 per cent of people who are found guilty of culpable driving are imprisoned. There has been a gradual increase in the number of custodial sentences for culpable driving since 2005, which is reflective of the community's low tolerance for people who drive irresponsibly.

Table 3.13 Sentencing trends in the higher courts of Victoria for murder, 2007–08 to 2011–12

YEAR	AVERAGE TOTAL EFFECTIVE SENTENCE LENGTH FOR MURDER	AVERAGE NON-PAROLE PERIOD FOR MURDER
2007–08	22 years, 2 months	18 years, 2 months
2008–09	19 years, 1 months	16 years, 4 months
2009–10	19 years, 3 months	15 years, 9 months
2010–11	20 years, 6 months	17 years, 0 months
2011–12	20 years, 10 months	18 years, 6 months
Note: people given 'life' sentences are not included in these calculations because their length of imprisonment is not quantifiable – life sentences of imprisonment accounted for 11.8 per cent of all sentences for murder.		

Source: Sentencing Advisory Council, Victoria, *Snapshot 140*, May 2013

Table 3.14 Sentences in the higher courts for culpable driving causing death, 2005–06 to 2011–12

SENTENCE TYPE	2005–06	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12	TOTAL
Imprisonment	21 (75%)	14 (74%)	19 (76%)	15 (83%)	15 (100%)	8 (80%)	7 (78%)	99 (80%)
Youth justice centre order	6 (21%)	3 (16%)	3 (12%)	0 (–)	0 (–)	1 (10%)	1 (11%)	14 (11%)
Wholly suspended sentence	1 (4%)	1 (5%)	1 (4%)	2 (11%)	0 (–)	1 (10%)	1 (11%)	7 (5%)
Partially suspended sentence	0 (–)	0 (–)	1 (4%)	1 (6%)	0 (–)	0 (–)	0 (–)	2 (1%)
Non-custodial supervision order	0 (–)	1 (5%)	1 (4%)	0 (–)	0 (–)	0 (–)	0 (–)	2 (1%)
People sentenced	28	19	25	18	15	10	9	124

Source: Sentencing Advisory Council, Victoria, *Snapshot 114* (2011) and *142* (2013)

Comparison of prisoners by state

According to the Australian Bureau of Statistics, there were 30 775 prisoners in Australian prisons as at 30 June 2013. Over half of these (58 per cent) had served a previous sentence in prison before their current sentence. Five per cent of prisoners are serving life sentences. Imprisonment rates are on the rise, with 170 (sentenced and unsentenced) prisoners per 100 000 adult population in 2013 compared to 165 prisoners per 100 000 adult population in the previous year.

Ninety-two per cent of prisoners are male with a median age of 33.9 years. Females make up eight per cent of the prison population with a median age of 34.5 years. Seventy-seven per cent of all prisoners are between 20 and 44 years of age. Eighty-one per cent of prisoners are born in Australia with a quarter of the prison population being of Aboriginal or Torres Strait Islander descent.

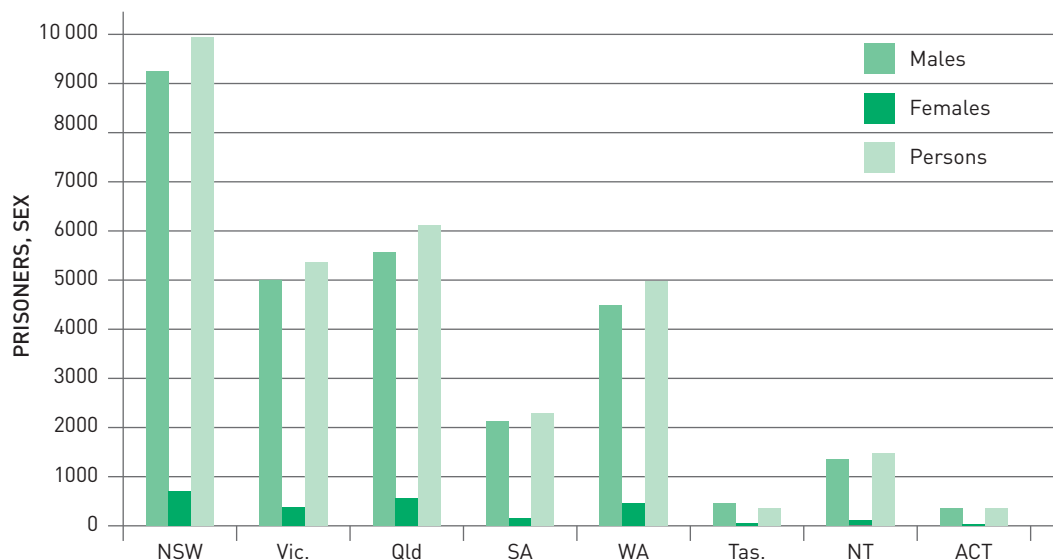


Figure 3.17
Prisoner population within each state and territory in Australia, 2013

Source: ABS
cat. no. 4517.0

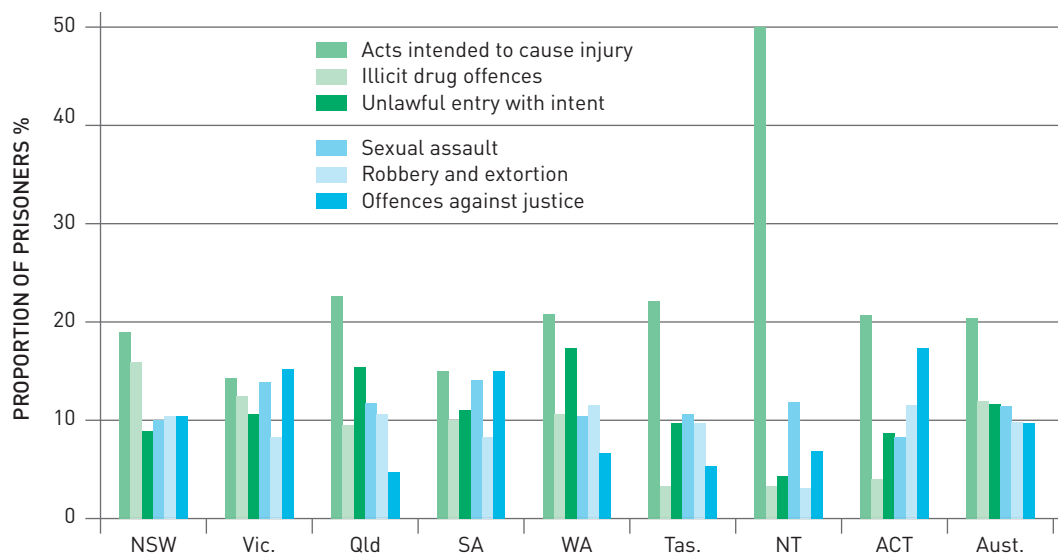


Figure 3.18
Proportion of prisoners, selected most serious offence/charge by state and territory, 2013

Source: ABS
cat. no. 4517.0

At 30 June 2013, acts intended to cause injury were the most prevalent crime for which people were imprisoned in most states. The Northern Territory had the highest proportion of its prisoner population with this offence type, at 50 per cent, more than double the national average of 20 per cent. Four states (New South Wales, Queensland, Tasmania and Western Australia) recorded figures close to the national average, while Victoria and South Australia had the lowest rates at approximately 14 per cent.

The percentage of prisoners incarcerated for sexual offences in most states is either under or close to the national average of 11.4 per cent, with higher figures recorded for Victoria (13.8 per cent) and South Australia (14 per cent).

The Australian prison population convicted of crimes related to illicit drugs is 11.8 per cent. New South Wales (15.9 per cent) and Victoria (12.3 per cent) have above national average figures in this

category. Figures for Queensland, South Australia and Western Australia fall just below the national average, with approximately 10 per cent of prisoners convicted of drug-related offences. Figures for Tasmania and the territories are well below the national average at around 3 per cent.

The number of prisoners convicted of property crimes is at its lowest in the Northern Territory, with only 4.2 per cent of the prison population jailed for unlawful entry with intent and 3 per cent jailed for robbery and extortion. The highest percentages for prisoners who had committed these categories of crimes were recorded in Western Australia (17.4 per cent) for unlawful entry, which is more than five per cent above the national average, and Western Australia and the Australian Capital Territory (11.5 per cent) for robbery and extortion, which is slightly above the national average of 9.8 per cent.

Comparison of prisoners across the world

There are more than 10.2 million people held in prison throughout the world. The majority of these prisoners have not been convicted and are awaiting trial. The United States has the highest population rate for prisoners in the world with 716 per 100 000. More than half the countries and territories have rates below 150 per 100 000. According to the United Nations, the world population at the beginning of 2013 was approximately 7.1 billion. The prison population in all five continents is growing, with an increase of between 25 and 30 per cent in 15 years.

Table 3.15 World prison population (selected countries), 2012–13

PRISON POPULATION RATE PER 100 000 PEOPLE					
USA	716	England & Wales	149	Italy	105
Cuba	510	Argentina	147	Ireland	102
Russian Federation	475	Spain	146	Philippines	111
Thailand	398	Scotland	146	France	100
South Africa	294	Vietnam	145	Uganda	97
Ukraine	288	Malta	145	Germany	77
Chile	259	Zimbabwe	143	Denmark	73
Colombia	248	Malaysia	133	Sweden	67
Singapore	230	Australia	130	Indonesia	62
Azerbaijan	226	Myanmar (Burma)	123	Japan	51
Israel	225	China	121	Pakistan	41
New Zealand	192	Canada	118	India	30
Turkey	184	Greece	111		
Algeria	162	Lebanon	108		

Source: International Centre for Prison Studies, *World Prison Population List*, 10th edition

LEARNING ACTIVITY 3.12

Trends in sentencing

- 1 Why do you think the use of sentencing statistics is important for the courts?

- 2 Look at table 3.10. What types of sentences are mostly used in the Magistrates' Court? Give reasons for this trend.
- 3 Look at table 3.11. What trend is evident in the percentage of offenders imprisoned and the percentage receiving suspended sentences? What do you think has caused this trend? Explain.
- 4 Consider table 3.12. Select one offence for which the number of prisoners has increased and one offence for which the number of prisoners has decreased. For each offence explain at least one factor that may have influenced this trend.
- 5 Looking at table 3.13, what might a person pleading guilty to murder expect as a maximum and minimum sentence? How does this compare with 2007–08? Do you think the courts are fair and consistent in sentencing? Give your reasons.
- 6 Look at the information in table 3.14. What information can you gain from these figures?
- 7 List at least three Australian prisoner characteristics.
- 8 Compare the types of offences committed by Victorian prisoners with prisoners in other states and then answer the questions.
 - a Which type of crime is most prevalent among Australian prisoners?
 - b Which types of offences do Victorian prisoners commit less frequently than the national average? Which type do they commit more?
 - c Which states had well below the average for prisoners charged with the serious offence of illicit drugs and which states had above the average?
- 9 Compare Australia's imprisonment rate (per 100 000 population) with that of the United States and Denmark. Can you suggest reasons for any differences?

TRENDS IN RECIDIVISM

A recidivist is a person who continually commits crimes despite being punished for them. Criminal punishments are designed to try to reduce recidivism through rehabilitation and deterrence. Some types of punishments, such as community correction orders and drug treatment orders, are particularly aimed at helping the accused change their ways.

A 2013 Victorian Sentencing Advisory Council report on the likelihood of recidivism following sentencing in the Magistrates' Court concluded that:

- having previous sentences or having previously been sentenced to prison increases a person's chance of reoffending
- people under 25 are more likely to reoffend than older people
- men reoffend more than women
- people who commit crimes against property are more likely to reoffend than people sentenced for other crimes
- people who were imprisoned are more likely to reoffend than people who received a fine or a suspended sentence
- people who participated in a Criminal Justice Diversion Program were least likely to reoffend compared to people who were fined.

Statistics provided by the Victorian Department of Corrections show that:

- 35.1 per cent of Victorian prisoners released in 2009–10 returned to prison within two years
- there were 8969 offenders on community correction orders in June 2012, and 14.3 per cent of offenders who had completed a community correction order in 2009–10 had returned to complete another order within two years.

An Australian Bureau of Statistics report which analyses the type of prisoners in Australia (2013) shows that:

- 58 per cent of people currently in Australian prisons had been in an adult prison before
- 63 per cent of prisoners sentenced within the last 12 months had been in prison before
- 85 per cent of current prisoners convicted of offences against the justice system, 78 per cent of prisoners convicted of unlawful entry with intent and 74 per cent of prisoners convicted of traffic offences had been in prison before
- a person of Aboriginal and Torres Strait Islander descent is 15 times more likely to be imprisoned than a non-Indigenous person – 77 per cent of prisoners with an Aboriginal and Torres Strait Islander background had been in prison before.

Table 3.16 Proportion of prisoners returning to prison within two years of release by age

AGE	NUMBER OF PRISONERS	PERCENTAGE RETURNING TO PRISON
17 to 20 years	83	55.7
21 to 24 years	289	44.7
25 to 29 years	345	42.2
30 to 34 years	244	34.6
35 to 39 years	114	28.6
40 to 44 years	53	19.0
45 to 49 years	26	15.8
50 years and over	8	4.2

Source: Sentencing Advisory Council, Victoria

Table 3.17 Proportion of prisoners returning to prison within two years of release by most serious offence

OFFENCE	NUMBER OF PRISONERS	PERCENTAGE RETURNING TO PRISON
Homicide, assault and other offences against the person	86	22.8
Sex offences	8	6.1
Robbery	72	30.9
Burglary	215	49.2
Other property	436	44.8
Justice procedure and good order	192	35.2
Drug	66	23.2
Driving and traffic	62	23.4
Other	25	23.6

Source: Sentencing Advisory Council, Victoria

Corrections Victoria recognises the need to prepare prisoners for reintegration into society. This preparation gives prisoners the best opportunity to positively re-establish themselves and reduces the risk of reoffending.

The Pre-Release Planning Process begins six to eight weeks before the discharge date. This process involves the prisoner sitting down with a nominated officer to address such issues as employment and accommodation.

VACRO (Victorian Association for the Care and Resettlement of Offenders) is a non-government, non-denominational organisation, which was established in 1872. VACRO's mission is to provide support and information for individuals charged with a criminal offence, offenders, prisoners and their families; as well as leadership, education, training and research on the Justice System for the Community.

LEARNING ACTIVITY 3.13

Trends in recidivism

- 1 What is a recidivist?
- 2 Why do you think younger people rather than older people are more likely to return to prison?
- 3 Develop a profile of someone who you think would be at a high risk of recidivism. Consider:
 - age
 - gender
 - type of crime
 - length of prison sentence served
 - number of previous terms of imprisonment.
- 4 How effective do you think prisons are in deterring would be offenders? Explain.
- 5 How does Corrections Victoria help prisoners who are about to be released?
- 6 What is VACRO and how does it help released prisoners?

PRACTICE EXAM QUESTIONS

- 1 Read the case study 'Man sentenced to 24 years for murder' and answer the questions. Refer to the case study where appropriate.
 - a Differentiate between bail and remand. *(4 marks)*
 - b 'The balance between police powers and individual rights favours the police.' Discuss this statement commenting on police powers and the power of the individual during police questioning. *(10 marks)*
 - c Discuss the advantages and disadvantages of the right to silence. *(4 marks)*
 - d Explain one avenue of assistance available to the victim of a crime. *(2 marks)*
- 2
 - a Discuss the extent to which the aims of criminal sanctions are fulfilled. Refer to three types of sentences in your discussion. *(10 marks)*
 - b Explain two aspects of trends in crime, sanctioning or recidivism. *(4 marks)*
 - c Explain the impact of crime on individuals and society. *(6 marks)*

Man sentenced to 24 years for murder

A man was found guilty of the murder of his stepdaughter by the Supreme Court. The young woman had previously accused her stepfather of sexual abuse and had told her boyfriend that she lived in terror of him.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK FOLIO AND REPORT

Crimes

To continue with your folio and report, you should complete the following tasks.

- 1 Collect newspaper articles or information from a textbook or journal relating to a criminal case (other than murder). You can use articles from your newspaper file. Describe the legal principles that relate to the case and discuss the case in relation to the legal principles. *(3 marks)*
- 2 Discuss the sanction given, or suggest a possible sanction. In your discussion, comment on the appropriateness of the sanction given, or suggested sanction, in relation to the aims of criminal sanctions. At the end of the folio, after all pieces have been collected and reports have been written, write 100 words on your rights and responsibilities under criminal law. In your explanation, comment on your right to defend yourself, right to trial and so on, your responsibility to obey the law and the responsibility of the law to protect members of society. *(12 marks)*

(Total 15 marks)

ASSESSMENT TASK CASE STUDIES

The impact of crime and sentencing

Read the two case studies 'Teacher jailed for six months' and 'Teacher guilty of affair with student' and answer the questions.

- 1 Discuss the similarities and differences between the two cases. In your response refer to the following aspects of the cases. *(12 marks)*
 - the type of crime committed
 - the role of the police
 - the courts involved and the people responsible for determining the outcome
 - the impact of the crime on those involved – victim, offender, others
 - the impact of the crime on society
 - the sentence given.
- 2 To what extent do you think the inconsistency in the sentences given in these cases is due to gender bias? Use the facts of the cases provided to illustrate your answer. *(3 marks)*

(Total 15 marks)

Teacher jailed for six months

A 37-year-old female physical education teacher pleaded guilty to having sex with a 15-year-old male student while her husband was away. The boy's mother reported the six-week relationship to police after she saw the couple together. The boy gave evidence that he initiated the affair and that the incident had not affected his life. The teacher admitted that her reputation was in ruins and that she had no-one but herself to blame. She pleaded guilty to all six charges of sexual penetration with a child under 16 and was given a 22-month jail term suspended for three years on the condition that she does not reoffend.

The director of public prosecutions appealed the lenient sentence. The Victorian Court of Appeal later sentenced the teacher to two years and eight months' jail. The court ordered that she serve six months in jail and the remainder as a suspended sentence. She may also be subject to a sex offender registration or monitoring order on release.

Teacher guilty of affair with student

A male tennis coach was sentenced to three and a half years' imprisonment after a woman in her 30s revealed that she had a sexual relationship with him when she was a student and he was a teacher at a private school. The affair began when the woman was 14. She attended a tennis class run by the teacher, who was 28 years of age at the time.

The woman gave evidence that, as a young girl, she was flattered by the teacher's attention and took up his invitations to visit his office. While the pair had a number of sexual encounters over a two-year period, she alleged that he controlled the relationship and even encouraged her to date another man to avoid drawing attention to the affair. The woman believes that the tennis coach took advantage of her and ruined her childhood. The tennis coach denied all charges, and pleaded not guilty to eight charges of gross indecency and three charges of indecent assault.

ASSESSMENT TASK CASE STUDY

Capital punishment

Arguments in favour of capital punishment

- It acts as a deterrent.
- The offender is permanently removed from society.
- The state should not be spending money on caring for a person who deserves to die.
- People who have committed a horrific crime have lost their right to live.

Arguments against capital punishment

- The right to life cannot be taken away by the state.
- There is a genuine possibility that innocent people will be executed.
- It is traumatic for the innocent family and friends of the offender.
- There is no humane way of putting people to death.
- Executions may have brutalising effects on society.
- There is no chance for rehabilitation.
- There is little evidence to support that its use acts as a deterrent – countries with no capital punishment often have very low levels of homicide, whereas some of those countries that still use capital punishment have high rates of homicide.
- Many countries have signed the *International Covenant on Civil and Political Rights*, which makes the abolition of capital punishment mandatory.

Australia

Capital punishment is the lawful infliction of death. Australia abolished capital punishment for Commonwealth offences in 1973 and Victoria officially abolished capital punishment in 1975. Australia has signed the Second Optional Protocol to the *International Covenant on Civil and Political Rights*, which commits Australia to the abolition of the death penalty. In 2007, Australia voted for the UN General Assembly's resolution calling for a global moratorium on the death penalty. Australia annually co-sponsors a resolution of the UN Human Rights Commission that calls for all nations to abolish the death penalty.

The last man hanged in Australia was Ronald Ryan. He was found guilty of the shooting of a prison officer while escaping from Victoria's Pentridge Prison (now closed). There has been considerable controversy surrounding the conviction of Ryan. The evidence presented at the trial was inconsistent and uncertain (for example, was there one shot fired, did the shot come from the prison watchtower, rather than on the ground from Ryan's position). Ryan was convicted on unsubstantiated evidence and a verbal confession he denies ever making. He was executed at Pentridge Prison in 1967.

Amnesty International has classified countries into four categories:

- 58 maintain the death penalty in both law and practice (including the Palestinian Authority)
- 97 have abolished it
- 8 retain it for crimes committed in exceptional circumstances (such as in time of war)
- 35 permit its use for ordinary crimes, but have not used it for at least 10 years and are believed to have a policy or established practice of not carrying out executions, or it is under a moratorium.

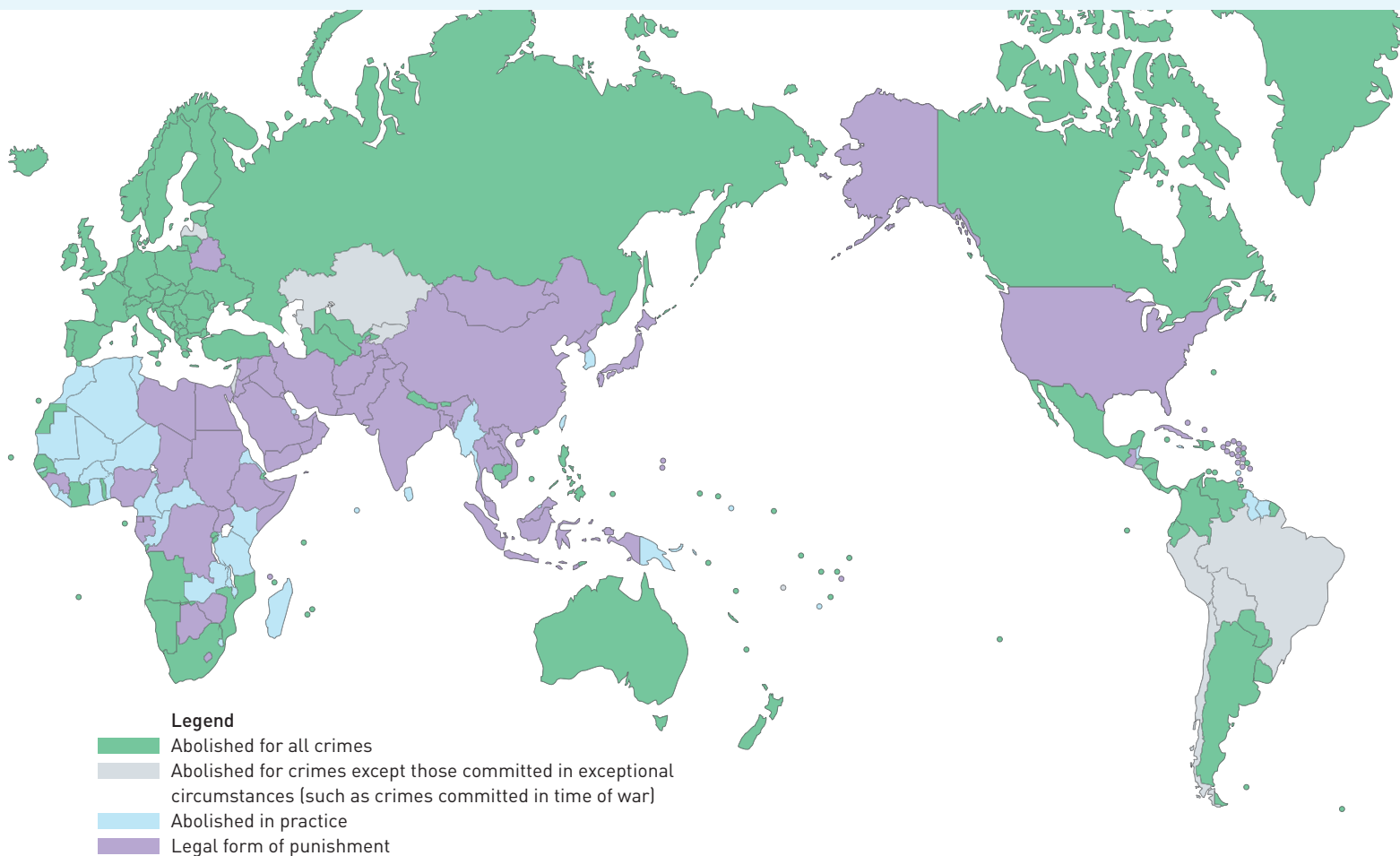


Figure 3.19
Use of capital punishment in the world

United States

The United States has used capital punishment since 1608. Between 1976 and 2013, there have been 1359 executions. The death penalty can be imposed in 32 states by the US government and the US military. The number of death sentences imposed each year has steadily reduced since 1996 [315] to 2012 [78].

In 2013, there were 3108 death row prisoners across the United States. The states with the most inmates on death row are California (731), Florida (412), Texas (298), Pennsylvania (198) and Alabama (197). The US Death Penalty Information Center, reports a total of 143 death row inmates have been exonerated of their alleged crime post-conviction.

Both men and women can be sentenced to the death penalty. Approximately two per cent of death row inmates are women. In 2002, the Supreme Court ruled that it was unconstitutional to execute a prisoner with an intellectual disability. In 2005, the Supreme Court banned the use of the death penalty for juvenile offenders. Twenty-two juveniles had been executed in the United States before this decision.

Table 3.18 Number of executions in the United States

US STATE	SINCE 1976	2013	US STATE	SINCE 1976	2013
Texas	508	16	Nevada	12	0
Virginia	110	1	Utah	7	0
Oklahoma	108	6	Tennessee	6	0
Florida	81	7	Maryland	5	0
Missouri	70	2	Washington	5	0
Alabama	56	1	Nebraska	3	0
Georgia	53	1	Pennsylvania	3	0
Ohio	52	3	Kentucky	3	0
North Carolina	43	0	Montana	3	0
South Carolina	43	0	<i>US Government</i>	3	0
Arizona	36	2	Idaho	3	0
Louisiana	28	0	South Dakota	3	0
Arkansas	27	0	Oregon	2	0
Mississippi	21	0	New Mexico	1	0
Indiana	20	0	Colorado	1	0
Delaware	16	0	Wyoming	1	0
California	13	0	Connecticut	1	0
Illinois	12	0			

Source: Death Penalty Information Center, USA



Figure 3.20

The Huntsville Unit in Huntsville, Texas, is the location of the execution chamber of the state of Texas.

No credible evidence on whether death penalty deters

Michael Booth, *Denver Post*, 6 March 2013

Go ahead and stake out your opinion on whether a state's death-penalty law will deter future murderers.

But don't pretend that opinion is based on any remotely credible evidence, according to a consensus of criminologists, economists and other academics who have reviewed deterrence studies from both sides and officially declared them useless.

The National Academy of Sciences picked apart decades of deterrence research last year and recommended 'that these studies not be used to inform deliberations' on capital punishment. In a blunt report, the academy's National Research Council noted it had made a similar survey 30 years before and was 'disappointed' to learn each study since was equally futile.

Such pessimism, and accompanying admonitions to move on to other death-penalty topics, has not stopped statisticians from attempting proofs and rejections of deterrence.

The Death Penalty Information Center points to higher murder rates in states that have the death penalty as proof the sentencing threat does not deter crime. The gap grew in the 1990s, these opponents of executions say, to the point where death-penalty states currently have 35 per cent more murders per capita than those who have abolished it.

If deterrence worked, how could Texas, which executes a dozen inmates a year, have a higher murder rate than Colorado, which has executed one murderer in more than four decades?

'There's no credible evidence of deterrence' concludes John Blume, a law professor with the Cornell Death Penalty Project.

Death-penalty proponents have all sorts of problems with that comparison. Maybe those states instituted the death penalty because they know they have more murders and want to stop them. How high would the murder rate have gone in those states if they didn't have executions?

'I can assure you, anyone in Texas who might kill somebody knows there is a death penalty in Texas' said John McAdams, a Marquette University political science professor who has reviewed deterrence studies.

'If the death penalty has a deterrent effect, and we fail to execute murderers, then we are allowing the murders of innocent victims' McAdams said. 'If we do conduct the death penalty and it doesn't have a deterrent effect, all we are doing is killing murderers.'

Indonesia

Capital punishment is used in Indonesia for murder, drug-trafficking and treason. According to the Law of the Republic of Indonesia, No. 22 of 1997 on Narcotics, Article 82(1)(a) punishes anyone who 'imports, exports, offers for sale, traffics, sells, purchases, offers up, accepts, or acts as an intermediary in the sale, purchase or exchange of a Category I narcotic' with death, life in prison, or up to 20 years in jail and a fine of up to one billion rupiah.

Figure 3.21 Myuran Sukumaran is on death row in Indonesia.



According to an Internet publication titled *Hands Off Cain*, there were 10 executions in Indonesia in 2008. In November 2008, Imam Samudra, Amrozi Nurhasyim and Mukhlas Ghufron were executed by firing squad for their role in the Bali bombing.

Indonesia resumed executions in March 2013 after a four-year moratorium. Two of the original Bali Nine, who were arrested for attempting to smuggle eight kilograms of heroin from Bali to Australia in 2005, remain on death row: Andrew Chan and Myuran Sukumaran.

- 1 What is capital punishment? (2 marks)
- 2 When was capital punishment abolished in Victoria and Australia as a whole? (2 marks)
- 3 Why do you think capital punishment is no longer used in Australia? (4 marks)
- 4 Discuss the hanging of Ronald Ryan. How can this case be used as an argument against capital punishment? (4 marks)
- 5 Name three countries that have abolished capital punishment for all crimes and three countries that still use capital punishment for ordinary crimes. (3 marks)
- 6 Investigate the use of capital punishment in the United States and answer the following questions:
 - a How many incidences of capital punishment took place in 2013 (or a more recent year if data is available)? (2 marks)
 - b Across the whole of the US, the recidivism rate for prisoners released from prison within one year is 44.1 per cent. This number rises to 67.5 per cent within three years of being released from prison. Compare these figures with Australia's crime rates and recidivism rates. What conclusions can you draw from these statistics about capital punishment being a deterrent? (6 marks)
- 7 Investigate the use of capital punishment in Indonesia.
 - a For what crimes is capital punishment used in Indonesia? (1 mark)
 - b How many executions occurred in Indonesia in 2008? Do an Internet search to find how many executions have occurred since. (4 marks)
 - c Investigate the Bali Nine. Give details of the crime committed and the sentences for each of the Bali Nine. (4 marks)
 - d What sentence was Schapelle Corby, another Australian convicted drug-trafficker in Indonesia, given? (2 marks)
- 8 To what extent do you think capital punishment would fulfil the aims of criminal punishment? (6 marks)
- 9 'The death penalty is a pointless and cruel extinction of life with little social purpose.' To what extent do you agree with this statement? In your response refer to:
 - the aim of capital punishment as a criminal sanction
 - the conflicting views relating to capital punishment
 - examples or capital punishment cases which support your point of view. (10 marks)

(Total 50 marks)



CHAPTER 4

THE COURTROOM

OUTCOME

On completion of this unit you should be able to describe the processes for the resolution of criminal cases, and discuss the capacity of these processes to achieve justice.

KEY KNOWLEDGE

This chapter is designed to help you to understand the key knowledge of:

- distinction between summary offences and indictable offences
- reasons for a formal court hierarchy
- an overview of the criminal jurisdiction of the courts in the Victorian court hierarchy
- bail, remand and committal hearings
- features of a fair trial and rights in criminal proceedings guaranteed by the *Victorian Charter of Human Rights and Responsibilities*
- overview of the adversarial nature of a criminal trial
- role of court personnel
- advice and assistance available through legal aid
- role and operation of a criminal jury.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- apply legal principles to relevant issues in criminal cases
- explain the need for a court hierarchy
- explain the nature of the criminal courtroom.

KEY LEGAL TERMINOLOGY

accused Person defending a criminal case.

barrister Person who is briefed (given all the information about a case) by a solicitor and who will appear in court on behalf of the client.

coroner Person who investigates sudden or suspicious deaths, deaths as a result of an anaesthetic, deaths in custody or psychiatric institutions and deaths where a doctor has been unable to pinpoint the cause of death; also investigates fires that involve death.

court hierarchy The ranking of courts according to the seriousness of the matters they deal with.

challenge for cause A challenge of a prospective juror with a legitimate reason for the challenge.

jurisdiction The extent of the power of a court; may also refer to the region in which the court holds power.

peremptory challenge A challenge of a prospective juror without giving a reason for the challenge.

prima facie case On the face of it; there is sufficient evidence to suggest that the accused has committed a crime.

propensity evidence Evidence about a person's propensity to commit a crime; may include prior convictions.

prosecutor Person who brings the case for the Crown against the accused.

solicitor Legal professional who can offer assistance to people with legal problems.

DIFFERENCE BETWEEN SUMMARY OFFENCES AND INDICTABLE OFFENCES

Minor criminal offences are referred to as summary offences and are heard in the Magistrate's Court. More serious offences are referred to as indictable offences and may be heard in either the County Court or Supreme Court before a judge and jury. Some indictable offences can be heard in the Magistrates' Court as if they were summary offences. How an offence is classified and whether an offence can be tried summarily is determined by statute.

Criminal offences	
Summary offences	Summary offences are minor crimes that are heard in the Magistrates' Court before a magistrate. They include any offence under a subordinate law or local law. As a general rule, offences listed in the <i>Crimes Act 1958</i> (Vic.) and the <i>Wrongs Act 1958</i> (Vic.) are indictable offences unless these Acts state that an offence is a summary offence. Offences listed in all other Acts of parliament are summary offences unless an Act declares them to be indictable offences.
Indictable offences	Indictable offences are more serious offences that must be heard by a judge and jury. They include common-law offences and all offences described in the <i>Crimes Act 1958</i> and the <i>Wrongs Act 1958</i> unless these Acts declare an offence to be a summary offence.
Indictable offences heard summarily	Some indictable offences can be heard as if they were summary offences. The <i>Criminal Procedures Act 2009</i> (Vic.) states that the following crimes can be tried summarily: - indictable offences punishable by 10 years' or less imprisonment or a fine of \$120 000 or less (or both). - any crime listed in Schedule 2 of the <i>Criminal Procedures Act</i>. Schedule 2 lists a range of offences under 30 Acts of parliament which can be tried summarily. In addition, an indictable offence may not be heard summarily unless the court determines it is appropriate and the accused agrees. Offenders will usually choose to have the offence heard summarily as it is quicker and cheaper to have the matter heard in the Magistrates' Court and the maximum penalty is less. A magistrate can give a prison sentence of no more than two years for one offence (or five years for multiple offences).

Table 4.1 Types of offences

EXAMPLES OF SUMMARY OFFENCES	EXAMPLES OF INDICTABLE OFFENCES THAT CAN BE HEARD SUMMARILY	EXAMPLES OF INDICTABLE OFFENCES
• traffic offences • offensive behaviour or language in a public place • wilful damage to property (under \$5000) • bill posting • being drunk in a public place • passing valueless cheques • setting off fireworks in a public place without permission	• theft under \$100 000 or theft of any motor vehicle • burglary involving theft where stolen property is valued at less than \$100 000 • handling stolen goods valued at less than \$100 000 • recklessly causing serious injury • possessing, trafficking or cultivating illegal drugs (less than commercial quantities) • extortion with threats to kill • prohibited persons possessing, carrying and/or using an unregistered firearm	• theft-related offences over \$100 000 • rape • kidnapping • blackmail • intentionally causing serious injury • trafficking or cultivating drugs (in commercial or large commercial quantities) • murder and manslaughter

LEARNING ACTIVITY 4.1

Summary and indictable offences

- 1 Explain the difference between summary offences and indictable offences.
- 2 Where would you find out if an indictable offence can be heard summarily?
- 3 Read the following situations and decide whether they are summary offences, indictable offences or indictable offences that can be heard summarily.
 - a Jessica has been charged with recklessly damaging property worth \$1000.
 - b Two brothers have been charged with the murder of their parents.
 - c Qui has been charged with kidnapping and raping a young woman.
 - d Gina has been found passing valueless cheques.
 - e Antonio has been charged with stealing 50 computers worth \$800 each.

COURT HIERARCHY

The law provides individuals in society with guidelines for acceptable behaviour. Most people grow up with an understanding that in order for people to live in harmony, they must obey the law. In any society, however, there are people who break the law and infringe other people's rights.

The court system provides a means of resolving disputes and enforcing the law peacefully without resorting to violence. It includes a variety of courts that have different areas of expertise and are suitable for different types of disputes.

The courts in the Australian court system are ranked in a hierarchy with the **higher courts hearing the more serious and complicated cases**, and the lower courts dealing with the everyday issues.

There are state courts and federal courts. The state courts deal with issues that arise under state law. The federal courts deal with disputes that arise under federal law.

Reasons for a court hierarchy

The court hierarchy allows for **specialisation**, with the courts developing **expertise** in dealing with the types of cases that come before them.

The court hierarchy also enables the parties to a court case to **appeal to a higher court** if they are not satisfied with the decision in a lower court.

The court hierarchy is a necessary part of the **doctrine of precedent** (law-making through courts) because the process of law-making through courts depends on a decision being made in a higher court which is binding on lower courts. This enables individuals and lawyers to predict the likely outcome of a case. Judges and magistrates can be guided by the wisdom of the more experienced judges in the higher courts.

Court hierarchy – criminal jurisdiction

Jurisdiction refers to the right or power of a court to apply the law and deal with particular cases. Most courts have the jurisdiction to hear both civil and criminal cases. A civil case relates to disputes between individuals, in which one person is claiming that his or her rights have been infringed. A criminal case relates to an offence against society, such as stealing, and is a dispute between the state and an individual. Table 4.2 shows the criminal jurisdiction of the Victorian court hierarchy.

The courts have original and appellate jurisdiction. When a court is hearing a dispute for the first time it is said to be operating in its **original jurisdiction** (area of power). When a court is hearing an appeal it is said to be operating in its **appellate jurisdiction**. An appeal allows an individual to take the matter to a higher court to review the original decision. If it is thought necessary, the appellate court (the court hearing the appeal) can reverse the original decision.

The Victorian hierarchy extends from the Magistrates' Court (the lowest state court) to the Court of Appeal (the highest state court). The High Court, which is a federal court, also forms part of the Victorian hierarchy. The High Court hears appeals from the Victorian Court of Appeal. In fact, the High Court can hear appeals from courts in every Australian state.

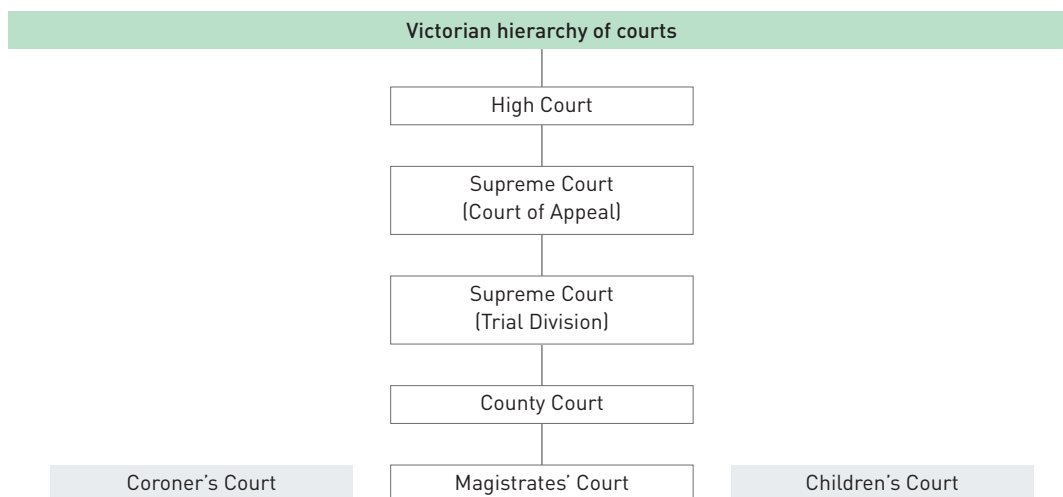


Table 4.2 The criminal jurisdiction of the Victorian court hierarchy

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court (1 magistrate)	- summary offences - indictable offences heard summarily - committal proceedings - bail applications - issuing warrants	no appellate jurisdiction
Children's Court	children between 10 and 18	no appellate jurisdiction
Coroner's Court	investigation of deaths and fires	no appellate jurisdiction
County Court	indictable offences, except murder and attempted murder, certain conspiracies, corporate offences (1 judge with a jury of 12 when the plea is 'not guilty')	from the Magistrates' Court against a conviction or sentence (1 judge)
Supreme Court (Trial Division)	serious indictable offences – mainly murder cases (1 justice with a jury of 12 when the plea is 'not guilty')	on points of law from the Magistrates' Court (1 justice)
Supreme Court (Court of Appeal) (3–5 justices)		with leave – on a point of law, conviction, severity or leniency of sanction, from a single judge of the County Court or Supreme Court
High Court A federal court but the highest court of appeal for the states (1 justice)	federal law matters	
Full Court of the High Court (not less than 2 justices)	special leave for appeal applications	- appeals against the decisions of the supreme courts of states and territories and the Federal Court of Australia - appeals from the High Court in its original jurisdiction
Full Bench of the High Court (5–7 justices)	cases where the court may be invited to depart from one of its previous decisions, or where the court considers the principle of law to be of major importance	

LEARNING ACTIVITY 4.2

Court hierarchy

- 1 Explain three reasons for a court hierarchy.
- 2 What is the meaning of jurisdiction?
- 3 Explain the difference between original jurisdiction and appellate jurisdiction.

- 4 Identify three courts that cannot hear appeals.
- 5 Which court hears criminal appeals from the Magistrates' Court?
- 6 Read the examples below about Janine, Maxine and Gino. Nominate the court that will hear each case. Explain why this is the case. Which court would hear appeals in these situations?
 - a Janine had just left a store when a loss prevention officer stopped her and asked her to accompany the officer to the store manager's office. Janine had stolen three CDs worth \$68. The police were called. She was taken to the police station and charged.
 - b Maxine and her next-door neighbour had a very serious argument. Maxine became violent, and deliberately slashed and stabbed her neighbour with a knife. The police arrived and arrested her. Her neighbour had serious wounds to her legs, arms and abdomen, and was treated in the intensive care unit of the local hospital.
 - c Gino took a gun out of his pocket during a tutorial at university and he shot and killed two of his fellow students.

JURISDICTION AND FUNCTIONS OF COURTS

Magistrates' Court – criminal jurisdiction

The Magistrates' Court is the lowest court in the hierarchy. It is able to **hear summary offences and indictable offences heard summarily**. It also holds **committal proceedings** for indictable offences that will be heard in either the County Court or Supreme Court.

If the police have charged a suspect, the suspect may have to attend the Magistrates' Court to find out if he or she will be released on **bail**. The Magistrates' Court also issues **warrants for search and seizure or arrest**.

ACCUSED TERRORIST APPEARS IN MELBOURNE MAGISTRATES' COURT

It was alleged that the 22-year-old man went to Somalia and trained with a terrorist organisation. He was one of five Melbourne men charged with terrorism offences. He and two of his co-accused were applying for bail.



Figure 4.1
Melbourne
Magistrates' Court

Committal proceeding

A committal proceeding is conducted in the Magistrates' Court. It is used to check the strength of the evidence against the accused in an indictable offence, before the case being tried by judge and jury in the County Court or Supreme Court. As part of the committal proceeding, a **committal hearing** is held to determine whether the prosecution's evidence is of **sufficient weight to support a conviction by a jury at trial**. If the magistrate decides that there is sufficient evidence against the accused, the case proceeds to trial. If not, the accused is released until such time as the police find additional evidence.

Specialist divisions of the Magistrates' Court

The Magistrates' Court has established specialist divisions to streamline processes and to use the expertise of court personnel or support staff. The specialist divisions are generally less formal and more flexible than traditional courts and are designed to make participants feel more comfortable.

Koori Court

The Koori Court, a division of the Magistrates' Court, operates in Bairnsdale, Broadmeadows, Latrobe Valley, Mildura, Shepparton, Swan Hill and Warrnambool. There is also a Children's Koori Court at the Melbourne and Mildura Children's Court. These courts are only available to Indigenous accused who:

- live or have committed a crime within the geographical area of a Koori Court
- plead guilty
- consent to their case being dealt with by the court.

The court hears criminal cases (within the jurisdiction of the Magistrates' Court) except those involving sexual offences, family violence or a breach of an intervention order.

The court is less formal than the Magistrates' Court. All court participants sit around a table. The magistrate sits opposite the accused, who may have the support of a lawyer, a family member, an Indigenous elder and an Indigenous justice worker. The magistrate can take advice from Aboriginal elders on cultural issues and appropriate sentencing. However, the magistrate is the ultimate decision-maker and uses the same sentencing options as available in the Magistrates' Court.

An Indigenous justice worker, community corrections officer, special police prosecutor and lawyer for the accused assist the magistrate with case management. An independent university study concluded that Koori Courts reduce recidivism with an average of 14 per cent of accused reoffending compared to the general recidivism rate of 29 per cent. This has led to the program being extended into the Children's Court and the County Court.



Figure 4.2 Koori courts – in addition to the courts shown, there is the Melbourne Children's Koori Court.



Figure 4.3 Aboriginal elders 'Uncle' Colin Walker and 'Aunty' Merle Bamblett with magistrate John Murphy in the court

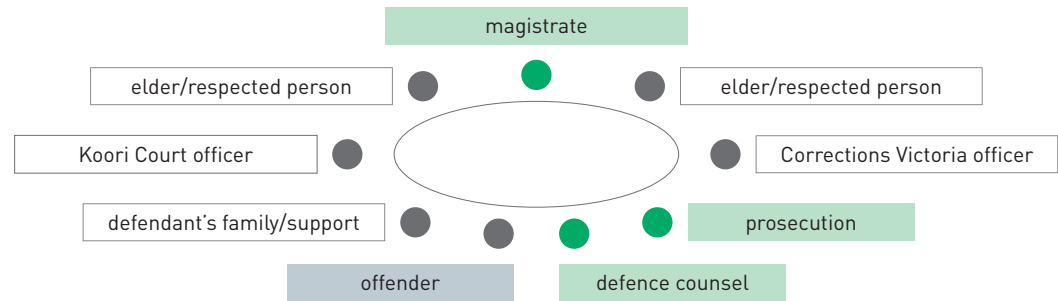


Figure 4.4

This diagram explains where everyone will sit in the Koori Court.

Drug Court

The Drug Court, a division of the Magistrates' Court, deals with offenders who have a drug problem. A magistrate deals with each case with the assistance of a case manager, community corrections officer, special police prosecutor, clinical adviser and lawyer for the accused. The aim of the Drug Court is to rehabilitate the offender.

The court deals with offenders who commit crimes while under the influence of drugs or to support a drug habit. The person must plead guilty to a crime normally within the jurisdiction of the Magistrates' Court and must be facing immediate imprisonment. The crime must not involve a sexual offence or an assault causing bodily harm.

The Drug Court has the power to use a special custodial order. A two-year maximum **drug treatment order** can be used instead of a term of imprisonment. It requires the offender to comply with supervision and treatment requirements. Under the order the offender must:

- be of good behaviour
- undergo treatment for drug or alcohol dependency
- report to and accept visits from members of the Drug Court team
- inform the court of a change of address and not leave the state without the court's permission.

The court can also impose additional conditions such as drug and alcohol testing. The offender can be imprisoned for a breach of a drug treatment order.

DID YOU KNOW?

The Drug Court is located at the Dandenong Magistrates' Court. The accused must reside within specified postcode areas in the east and south-east of Melbourne.

Family Violence Court

The Family Violence Court is a special division of the Magistrates' Court operating in Heidelberg and Ballarat. It aims to provide better access to the legal system for family members and children affected by family violence. The court uses specialist magistrates, registrars and trained support staff to provide an integrated support service for family violence victims. The court allows witnesses to give evidence by closed-circuit television or with a person beside them as support. The court can also order a person to leave the court while a witness gives evidence. Children can only attend proceedings at the court's discretion.

The court hears all family violence matters within the jurisdiction of the Magistrates' Court such as intervention order applications, intervention order breaches, committal hearings, summary offences, child contact and support issues, civil damages claims and crimes compensation applications. The court can also order accused to participate in counselling to change violent behaviour.

The Specialist Family Violence Service operates at the Melbourne, Frankston, Sunshine and Werribee Magistrates' Court and is limited to dealing with applications for family violence intervention orders. Again, the service uses dedicated magistrates, registrars, police prosecutors and support staff to deal with these applications.

Sexual Offences List

The Sexual Offences List of the Magistrates' Court deals sensitively and fairly with victims of sexual offences and reduces delays to ensure the matter is dealt with quickly.

Assessment and Referral Court List

The Assessment and Referral Court List of the Magistrates' Court is designed to meet the particular needs of offenders who experience mental illness and cognitive impairment and aims to assist courts to appropriately address the issues associated with offending behaviour.

Neighbourhood Justice Centre

Neighbourhood Justice Centres (NJs) have been established in the City of Yarra (around Collingwood, Richmond, Fitzroy, Carlton North) and Moorabbin (Kingston, Glen Eira, Bayside). The centres provide multi-jurisdictional courts that work in partnership with the local community to resolve legal issues and provide support services. They draw on the work of volunteers and mediators from the local area.

The NJC combines jurisdictions of the criminal and civil divisions of the Magistrates' Court, Family Violence Court, Family Court, Children's Court and Koori Court. They can also act as Residential Tenancies, Civil Claims and Guardianship Lists of the Victorian Civil and Administrative Tribunal (VCAT). Other areas they can deal with include matters that would be otherwise dealt with by the Victims of Crime Assistance Tribunal (VOCAT), Community Corrections and the Sheriff and Police Prosecutions Unit.

The NJC courts do not deal with committal hearings or serious sexual offences.

Community representatives help to select magistrates who not only preside over the courts but also meet regularly with the community to keep abreast of local safety concerns or legal issues. The NJC is a one-stop court facility providing a range of services. Their trained staff can assist people who need drug, alcohol, mental health, housing, employment, financial, legal and interpreter services.



Figure 4.5

The courtroom at the Neighbourhood Justice Centre in Collingwood, with Magistrate David Fanning on the left

LEARNING ACTIVITY 4.3

The Magistrates' Court

- 1 Read the case study 'Vicious attack injures woman and football legend' and answer the questions.
 - a Explain the criminal jurisdiction of the Magistrates' Court.
 - b What type of hearing was held in the Magistrates' Court and what was its purpose?
 - c What does 'released on bail' mean?
 - d In which court did the offender stand trial?
 - e Who determined whether the offender was guilty or innocent?
 - f Who determines the sentence?

- g What is a non-parole period in sentencing?
- h Calculate the time taken by the legal system to process this case from the date of the offence to the appeal.

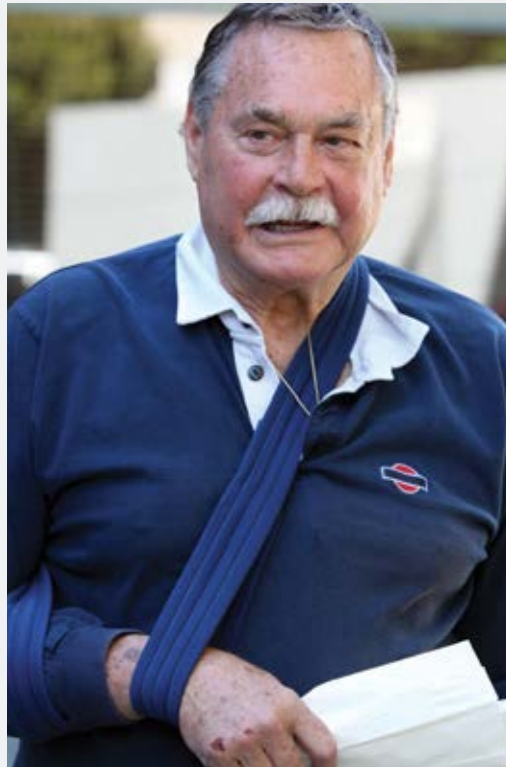
Vicious attack injures woman and football legend

The Melbourne Magistrates' Court ordered Travis Bowling, 29, to stand trial for allegedly assaulting Tessa Green and 74-year-old football legend Ron Barassi following an argument which occurred six months earlier. Bowling pleaded not guilty to assault charges. He was released on bail and ordered to appear in the County Court.

On the day of the assault, Ron Barassi was dining out with family and friends when he saw Bowling king-hit Tessa Green following a traffic dispute. She suffered a fractured eye socket and cheekbone. Barassi chased and tackled the man to the ground but was overpowered. He was then kicked and punched while on the ground. He was left with numerous bruises and damaged shoulder tendons.

Eighteen months later, Bowling pleaded not guilty in the County Court to intentionally causing serious injury to Tessa Green and Ron Barassi. He argued he was wrongly accused and failed to convince a jury that he was the victim of mistaken identity. The jury found Bowling guilty and the judge sentenced him to a maximum of six years' jail with a non-parole period of four years.

Within nine months of this decision, a successful appeal to the Court of Appeal resulted in a reduction in Bowling's sentence on the basis that he should only have been charged with the lesser offence of intentionally causing injury as Mr Barassi's injuries were not as serious as first thought. Bowling was re-sentenced to four years and four months' jail with a non-parole period of two years and three months.



CASE STUDY

Figure 4.6

Ron Barassi, four days after suffering injury in a New Year's Day assault

2 Read the case study 'Groom hits bride on wedding day' and complete the following activities.

- a Section 17 of the *Crimes Act 1958* (Vic.) defines the offence of causing serious injury recklessly. Is this a summary or indictable offence? Explain.
- b **Investigation**
Go to Legislation at www.parliament.vic.gov.au (click on Legislation & Bills, Current Acts, Acts, 'C' to find the *Crimes Act*).
 - i Find the maximum penalty for this offence (S17 *Crimes Act*).
 - ii Does this crime appear in the list of indictable offences that can be tried summarily as listed in schedule 2 of the *Criminal Procedures Act 2009* (Vic.)?
- c Explain who needs to give permission before an indictable case is heard summarily.

CASE STUDY

Groom hits bride on wedding day

A drunken groom who bashed his bride on their Australian wedding day was sentenced in the County Court to a maximum term of two years and six months' jail with a non-parole period of 15 months. The couple met and married in Macedonia and were in the middle of a second wedding celebration in Australia at the time of the attack.

The man pleaded guilty to recklessly causing serious injury. The court heard he gave his wife a 'flogging', bit her on the cheek and grabbed her in a headlock while travelling to their wedding reception in a Hummer limousine. He also fought off a groomsman who tried to stop him during the attack.

The bride believes the assault occurred because the groom claimed she was not beautiful enough. She was left black and blue and taken to hospital with injuries to her head, face, neck and arms. The man blames the attack on his bipolar condition exacerbated by his high anxiety and drunken state at the time.

- 3 Read the Drug Court case studies 'Don' and 'Lindy' and answer the questions.
 - a Explain the jurisdiction of the Drug Court.
 - b What is a drug treatment order? Explain some of the conditions that may be imposed on someone who has been given a drug treatment order.
 - c Why do you think this type of punishment can help the offender to get back on track?

CASE STUDIES

Drug Court

Don

Don is 40. He has used alcohol and marijuana since he was a teenager and has several prior convictions for driving offences and theft. He is on a drug treatment order. He says the Drug Court program is not a soft option. He believes it is actually harder because 'your time most days is taken up with the drug court program and you can't really do anything else'. Don is in the early phase of his drug treatment program. He is drug tested every day and appears before the magistrate on a weekly basis. He sees a case worker and a counsellor once a week and is undergoing drug treatment. Don feels the program is beneficial for two reasons. Participants get lots of help and support to turn their life around and they still have their freedom.

Lindy

Lindy is 31. She is a single mother. She consumed alcohol daily and was a regular user of cannabis and amphetamines for over 15 years. She has several drink-driving, drug use and drug possession convictions. She opted for a two-year drug treatment order rather than serve a two-year jail sentence. While on the Drug Court program, she was jailed for a month for failing to pass regular drug and alcohol tests, and this proved to be her reality check. Lindy says she found it hard to give up a long-term habit and could not have done it without the support of the Drug Court. She attributes her success in the program to the fact that the court's personnel treat her with dignity, explain everything in detail and genuinely want to help. She successfully completed a detox program. She now attends court fortnightly and submits to random drug tests.

- 4 Read the case study 'Neighbourhood Justice Centre' and answer the questions.
 - a Explain the role of the Neighbourhood Justice Centre.
 - b How does the Neighbourhood Justice Centre differ from other divisions of the Magistrates' Court?
 - c Critics of the Neighbourhood Justice Centre have described it as 'an expensive, soft-on-crime folly providing one type of justice for the residents of one area of Melbourne and another for everyone else'. Evaluate the validity of this statement.

Neighbourhood Justice Centre

Mandy's life was spiralling out of control until she attended the Neighbourhood Justice Centre. She was sentenced to a community correction order which included an intensive program to address the underlying reasons for her criminal behaviour. At her hearing, Mandy was represented by the Neighbourhood Justice Centre's Legal Aid lawyer and later received assistance from a range of agencies to overcome her financial, housing and alcohol problems. She attends the Neighbourhood Justice Centre each month and meets with the magistrate to review her progress. Mandy says the best thing about the Neighbourhood Justice Centre is the respectful treatment she receives. She has learnt to think before she acts, and to seek assistance from the Neighbourhood Justice Centre when she has a problem.

CASE STUDY

DID YOU KNOW?

An independent report has found that:

- Neighbourhood Justice Centre offenders are 14 per cent less likely to reoffend compared with similar offenders who appear in other courts
- recidivism rates in the Neighbourhood Justice Centre area have decreased by 7 per cent
- offenders completed an average of 105 hours of unpaid community service, which is well over the statewide average of 68 hours
- 75 per cent of Neighbourhood Justice Centre offenders complete their community-based orders (now community correction orders). The statewide average is 65 per cent.

Source: Evaluating the Neighbourhood Justice Centre in Yarra, 2007–2009

The Children's Court

The Children's Court is a state court. It has two divisions:

- **Family Division** – Hears applications for accommodation orders, protection orders and permanent care orders for children under 17 who are in need of care and protection. Children are not required to attend protection hearings unless the child wants to do so or the court deems it necessary. It also hears applications for intervention orders in cases of family violence or stalking where one of the parties is under 18.
- **Criminal Division** – Hears cases against children who commit a crime between the ages of 10 and 18 at the time the offence is committed. The matter must be dealt with before a person turns 19 otherwise the case goes to the Magistrates' Court. The criminal division hears:
 - all charges against children for summary offences

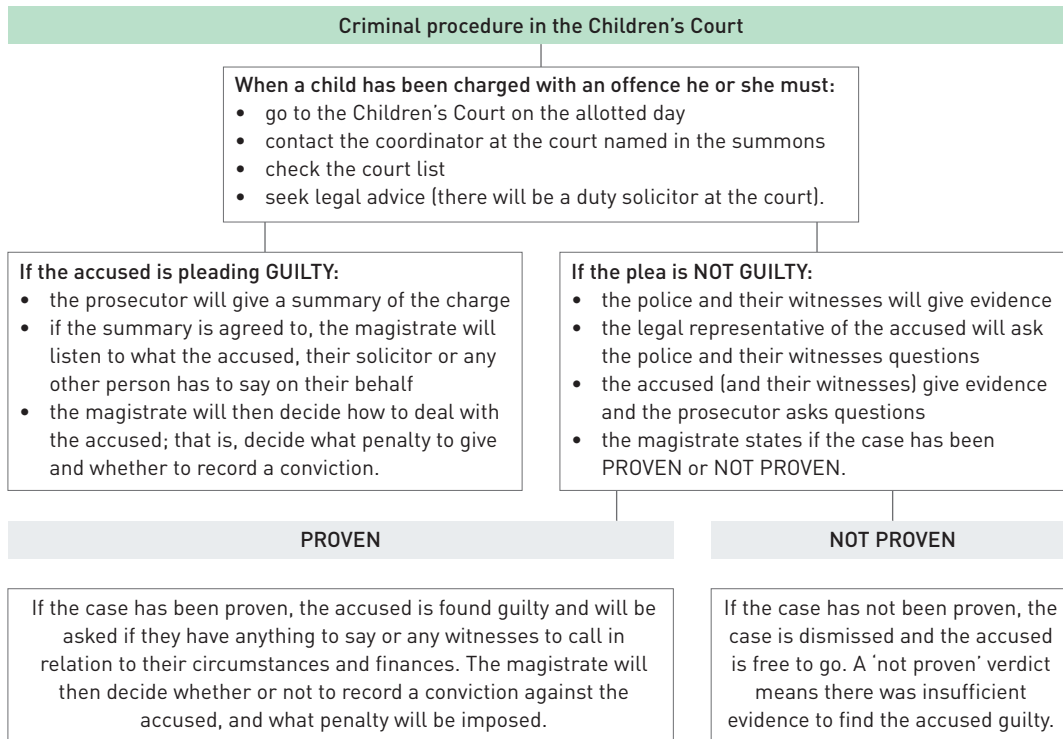
- all charges against children for indictable offences other than murder, attempted murder, manslaughter, arson causing death and culpable driving causing death
- committal hearings into all charges against children for indictable offences
- applications for bail.

The Criminal Division can order a group conference where the offender meets with members of the community (victims, police, family and legal representatives) to discuss the impact of the offender’s actions on both the victim and the community, and to negotiate a plan where offenders agree to try to make good the harm they have caused.



Figure 4.7
Children’s Court

Children’s Court support services	
Youth Justice	At Melbourne Children’s Court and many other Children’s Courts, the Youth Justice service of the Department of Human Services has an officer in attendance to provide support and practical assistance (which may include assistance in arranging accommodation) for young people accused of a crime. The officer also coordinates arrangements between regional offices of the department and young people who have had their sentence deferred. The department provides programs and resources to assist these young people to develop the knowledge, skills and attitudes to manage their lives effectively without further offending.
Court network	Volunteers provide support information and referral to appropriate services for court users.
Interpreters	Interpreters will be made available if the court is given prior notice.
Victoria Legal Aid	Duty lawyers are available on a daily basis to give free legal advice or representation to children.
Salvation Army	Volunteers provide support, accommodation, counselling and referral to alcohol and drug treatment facilities.
Children’s Court Clinic	The Children’s Court Clinic is an independent organisation that provides advice to the Children’s Court of Victoria. A magistrate may seek the clinic’s advice before making a decision in either a criminal or protection order matter. A psychiatrist or psychologist interviews the young person and/or their family and provides the court with a report about the child’s special needs.



Children's Koori Court

The Children's Koori Court operates in the same manner as the adult Koori Court. It hears criminal offences by Indigenous children, other than sexual offences. Indigenous juveniles who plead guilty to a crime can opt to have their case heard before specialist legal personnel and Aboriginal elders in a more informal setting.

In 2012–13, there were 6329 young people aged 10 and older under youth justice supervision in Australia, due to their involvement or alleged involvement in crime. Indigenous young people were 17 times more likely to be under youth supervision than non-Indigenous youth. The Koori Court aims to increase Indigenous youth's respect for the law through the Indigenous community's participation in its processes.

There was an overall drop in the number and rate of young people under youth justice supervision between 2008–09 and 2012–13. The number under supervision peaked at 7332 in 2010–11 and has dropped by 14 per cent to 6329 in 2012–13.

Coroner's Court

The Coroner's Court of Victoria performs the special function of investigating any death that is considered unexpected, sudden or suspicious, including deaths by accident. The coroner will investigate a death as a result of an anaesthetic, deaths in custody or psychiatric institutions and deaths where a doctor has been unable to identify the cause of death. The coroner will also investigate fires that involve death, serious injury or significant damage to property.

In investigating a death, the coroner may ask the Victorian Institute of Forensic Medicine to perform an **autopsy** or **post-mortem** medical examination. The coroner may also decide to hold a public hearing known as an **inquest**. An inquest is conducted by the coroner and held at the Coroner's Court at the Coronial Services Centre. The coroner may call and question any witness who is able to assist in the investigation.

The coroner tries to identify the deceased, find the cause and manner of death, and make recommendations on how such deaths can be avoided in the future. The coroner does not deal with any criminal charges related to the death, as this is the responsibility of the police and the Director of Public Prosecutions.



Figure 4.8
The Coronial Services
Centre

LEARNING ACTIVITY 4.4

Children's Court and Coroner's Court

- 1 Explain the criminal jurisdiction of the Criminal Division of the Children's Court.
- 2 You have been asked for help by a young friend who has been charged with an offence and summoned to appear in the Children's Court. Describe three services that your friend can go to for support.
- 3 Describe the criminal procedure when a crime has been committed by a person under 18 years old.
- 4 What is the meaning of a 'not proven' verdict?
- 5 What is the role of the Children's Koori Court?
- 6 Read the case study 'Boy, 14, on manslaughter charge' and answer the questions.
 - a What type of hearing was initially held in the Children's Court?
 - b What are the conditions of bail set in this case?
 - c At what age/s do offenders appear before the Criminal Division of the Children's Court?
 - d In which court would the committal hearing have been held? Give reasons.
 - e Why was his trial for manslaughter held in the Supreme Court?

CASE STUDY

Boy, 14, on manslaughter charge

A 14-year-old boy faced the Children's Court charged with manslaughter. He was with a group of youths who, as part of a minor dispute, threw eggs at the victim's home and then ran off. However, it turned to tragedy when the woman, her husband and their daughter pursued the group of youths. The woman caught up with the 14-year-old boy, got into a scuffle and was stabbed as a result. The boy had no prior convictions and was released on bail. The court ordered he surrender his passport and report to police on a weekly basis.

A committal hearing held three months later found he had a case to answer. The teenager appeared in the Supreme Court within a year of the committal hearing and pleaded guilty to manslaughter. He was imprisoned for five years and six months. He will serve his sentence in a youth detention centre and will be eligible for parole after three years.



Figure 4.9

The coroner investigates fatal rail crashes.

- 7 Explain the role of the coroner. Use the example of a fatal crash in your explanation.
- 8 Read the case study 'Woman cleared by coroner of killing her baby sister' and answer the questions.
 - a Why was the coroner required to investigate this case?
 - b Ann Kramer was two years and nine months old at the time of her sister's death. She was not charged with murder. Explain why you think this was the case.
 - c Why do you think a second coroner's inquest was held?
 - d What was the final outcome of this case?

Woman cleared by coroner of killing her baby sister

A coroner at the Coroner's Court cleared Ann Kramer (50) of killing her baby sister when the woman was two. The coroner found that Kramer's mentally ill mother was responsible for the death of her six-month-old baby.

Kramer grew up thinking she had killed her sister, Margaret Loomes, who died in March 1961.

In an inquest into the baby's death the same year, Coroner Harry Pascoe found that Kramer had accidentally suffocated her sister while playing with her in her crib in their Clayton home.

The girls' mother, Phyllis Loomes, told police she went into the rear bedroom to get Margaret ready for a bath and found Kramer, two years and nine months, kneeling on the bed with her arms across her little sister in the crib. She said Margaret's head was covered by a blanket and plastic bag, and she was not moving.

CASE STUDY

Figure 4.10

Ann Kramer (centre) leaves the Melbourne Coroner's Court yesterday hand-in-hand with her aunt, Joan Keating, and flanked by lawyer Steve Schembri.



Confessions by Mrs Loomes before her death in 1983 led to a Supreme Court judge overturning the original finding. At the new inquest, coroner John Olle found that Mrs Loomes had killed baby Margaret.

In a statement to police, Kramer said: 'I grew up thinking I had killed my little sister. As I grew older I had terrible guilt and thought that I must have been jealous of my little sister.'

Police reopened the investigation into Margaret's death after Ann wrote to the State Coroner to challenge the official version.

The Coroner praised Kramer for her courage and determination to bring out the truth.

County Court

The County Court hears most serious indictable offences except murder, attempted murder and certain conspiracies and corporate offences.

The more common offences heard in the County Court are manslaughter, armed robbery, kidnapping, rape and intentionally causing serious injury.

Criminal appeals can be heard from the Magistrates' Court against a conviction or sentence. This means that people can appeal to the County Court if they think they have been wrongly convicted and no reasonable (even-handed) jury would have convicted them on the facts presented in the case.

People who have been found guilty in the Magistrates' Court can also appeal to the County Court if they feel their sentence was too harsh.

The Director of Public Prosecutions can appeal on the basis of the sentence being too lenient. An appeal against a conviction or sentence is also known as an appeal on a question of fact.

The Koori County Court hears serious cases (except sexual offences) involving Indigenous offenders who plead guilty and consent to the court dealing with their case. The Koori County Court operates in the Latrobe Valley and Melbourne. It is essentially a sentencing court where Koori community elders counsel and encourage the offender to reflect on the impact of their behaviour before the judge sentences the accused.

**Figure 4.11** County Court, Melbourne

Supreme Court

The Supreme Court has two divisions: the **Trial Division** and the **Court of Appeal**. The Trial Division (with one justice) hears serious indictable offences such as murder, attempted murder and other major criminal matters involving treason, serious terrorism or very serious drug charges.

The Trial Division can also hear criminal and civil appeals from the Magistrates' Court that are based on a point of law and appeals from various tribunals. An **appeal on a point of law** occurs when the application of the law in the case is in question; for example, if a person thinks that the judge wrongly instructed the jury on the law and how to apply it.



Figure 4.12 Supreme Court Melbourne

The Court of Appeal

The Court of Appeal consists of permanently appointed judges including a president and the chief justice of the Supreme Court. The chief justice of the Supreme Court is the state's most senior judge.

The Court of Appeal has no original jurisdiction. It hears appeals from the County Court and Supreme Court, which are usually determined by a panel of three justices. These appeals may question a conviction, the severity or leniency of a sentence or a point of law. On rare occasions the Full Bench will convene to hear an appeal of legal significance consisting of five justices.

DID YOU KNOW?

Juries are not used in appeal cases. A single judge or a panel of judges will decide these cases.

DID YOU KNOW?

Court Services Victoria (CSV) is an independent statutory body responsible for providing administrative support to the courts and the Victorian Civil and Administrative Tribunal (VCAT). CSV is accountable to the parliament and is governed by the Courts Council, which is chaired by the chief justice and comprises the head of each court jurisdiction. It has been established to provide the judiciary with greater independence, self-management and control over decisions about the administration of justice.

LEARNING ACTIVITY 4.5

County Court, Supreme Court and Court of Appeal

- 1 Read the case study 'Man convicted of rape in the County Court' and answer the questions.
 - a Explain the criminal jurisdiction of the County Court.
 - b What was the offence committed and what sentence was imposed?
 - c In which court would the committal proceedings for this case be heard?
 - d What is the purpose of committal proceedings?

CASE STUDY

Man convicted of rape in the County Court

A 41-year-old man was sentenced to a minimum of three years' jail. The jury found him guilty of rape, false imprisonment and assault. The Melbourne County Court heard that the offence had taken place at the man's home 18 months earlier.

The man took his 16-year-old victim to his home before suggesting the two should have a spa, to which the victim 'reluctantly' agreed.

He said the teenager felt pressured by him to drink alcohol and discreetly emptied four pre-mixed alcoholic drinks into the garden. He and the victim moved to the house, where he gave the teenager a massage. He 'effectively pinned' the victim to the couch. The victim was crying and screaming for him to stop.

The victim tried to leave the house and was prevented from leaving for between 30 minutes and two hours. In sentencing him, Judge Parsons said the incident was 'most serious'.

- 2 Read the case study 'Mexican beer shipment with a drug twist' and answer the questions.
 - a Explain the criminal jurisdiction of the trial division of the Supreme Court.
 - b Highlight the circumstances that made this drug case serious enough to be heard in the Supreme Court.
 - c Which court would hear an appeal in this case?

CASE STUDY

Mexican beer shipment with a drug twist

In the case *The Queen v. Erol Ramazanoglu* (2013), a Supreme Court judge found a 29-year-old Yarraville man guilty of possessing and trafficking commercial quantities of illegal drugs. He imposed a prison sentence of eight years and six months, with a non-parole period of four years and six months.

The man was part of a drug gang. He knowingly took possession of a shipment of beer from Mexico which he thought contained methamphetamines and cocaine. Without the gang's knowledge, the police had intercepted the shipment at the Port of Melbourne, substituted its contents and released it for delivery, while keeping it under surveillance. Police raided the man's property once they discovered that he was opening the bottles.

Forensic analysis of the original shipment showed that the mixture in the bottles contained 133 kilograms of pure methamphetamine and 14 kilograms of cocaine. The police later discovered approximately five kilograms of methamphetamine in a fridge in another property frequented by the gang.

In an earlier trial, the gang member responsible for importing the drugs received a 17-year jail sentence with a non-parole period of 13 years. Another gang member fled and is yet to be found.

- 3 Read the case study 'Loving husband charged with attempted murder' and answer the questions.
 - a In which court was this case heard and why?
 - b Do you think an attempted murder charge was warranted in this case?
 - c Do you agree with the court's decision? Discuss.

CASE STUDY

Loving husband charged with attempted murder

A 73-year-old man pleaded guilty to attempted murder for trying to kill his terminally ill 84-year-old wife who was unresponsive and in need of full-time palliative care. She suffered from dementia and Parkinson's disease, and her condition had deteriorated over time.

He refused to admit her to a nursing home. He was a loving husband who cared for his wife as best he could. His intention was that they would die together. He attached a plastic hose to the exhaust of his car directing carbon monoxide fumes through the window in his wife's room. He gave her a sleeping tablet, took several tablets himself and then lay down beside her. His plan failed when the plastic hose melted allowing the carbon monoxide to escape. A visiting nurse found the couple the next morning.

In sentencing the man, the judge commented that the case warranted a degree of mercy and that there was little benefit in sending him to jail. He was placed on an 18-month community correction order. An intervention order prohibits him from seeing his wife who is now in care.

- 4 Read the case study 'Appeal against lenient sentence' and answer the questions.
 - a What occurred in this case?
 - b What was the sentence given by the County Court?
 - c Which court can an accused or the prosecution appeal to from the County Court?
 - d On what grounds can an appeal be made?
 - e Do you agree with the sentence given in the original trial in the County Court? Discuss.
 - f Who appealed against the sentence and why?

CASE STUDY

Appeal against lenient sentence

The Director of Public Prosecutions lodged an appeal in the Court of Appeal against the 'manifestly inadequate' nine-year jail term given to the notorious 'night stalker' rapist, Avci.

The 21-year-old serial rapist attacked six women over four months. He pleaded guilty to 13 charges, including four oral and two digital rapes, two indecent assaults and three robberies.

In the original trial, the County Court heard that Avci tricked one woman into allowing him to use her mobile phone before getting into her car and sexually assaulting her. He threatened to stab his victims in four other attacks. The maximum penalty for rape is 25 years' jail, aggravated burglary 25 years, robbery 15 years and indecent assault 10 years.

The County Court handed down a sentence of 16 years with a minimum non-parole period of nine years.

High Court

The High Court is a federal court. In its original jurisdiction, a single justice may deal with disputes between the states, disputes involving a range of federal law matters and disputes where the Commonwealth Parliament is a party. Cases which are considered of major importance like those that require the interpretation of the Constitution or require the High Court to depart from a previous decision may be determined by the Full Bench of the High Court comprising all seven justices.

The High Court is the highest court of appeal for all Australian states. The Full Court of the High Court, which consists of not less than two justices, hears appeals against the decisions of the supreme courts of states and territories, the Family Court and the Federal Court of Australia. There is no right of appeal to the High Court. A person must seek leave to appeal. Leave is only granted if the appeal is based on a question of law, there is an obvious injustice or the issue is particularly important to the wider community. Decisions of the High Court on appeal are final and are binding on all Australian courts.



Figure 4.13 High Court of Australia

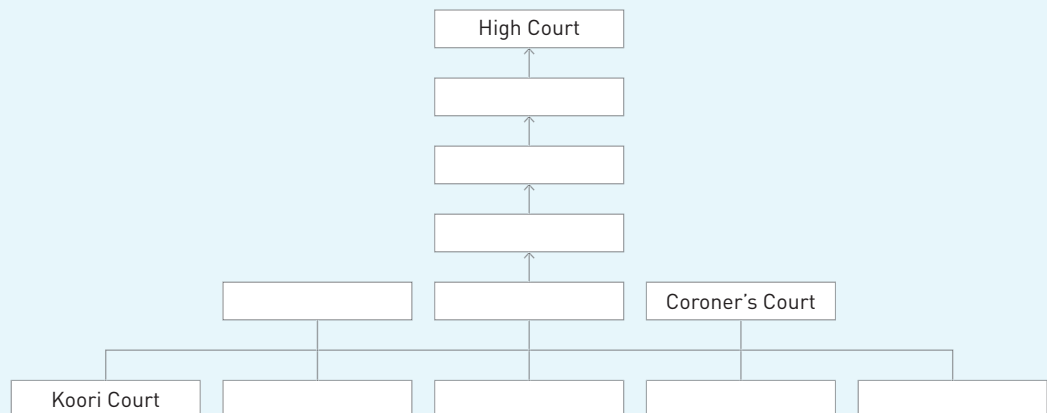
Figure 4.14 This photo was taken in Courtroom 1 of the High Court in Canberra at the beginning of the hearing of the WorkChoices case (*State of New South Wales v. Commonwealth of Australia, State of Western Australia v. Commonwealth of Australia, State of South Australia v. Commonwealth of Australia, State of Queensland v. Commonwealth of Australia, Australian Workers Union & Another v. Commonwealth of Australia, Unions NSW & Others v. Commonwealth of Australia, State of Victoria v. Commonwealth of Australia*) on Thursday, 4 May 2006. It is noteworthy in that it involved the highest number of counsel (39) ever to appear before the High Court in a case.



LEARNING ACTIVITY 4.6

The High Court and other courts

- 1 Explain the original jurisdiction of the High Court.
- 2 What is the Full Court of the High Court and what type of cases does it hear?
- 3 What is the Full Bench of the High Court and what type of cases does it hear?
- 4 Copy and complete the diagram below by labelling each court in the hierarchy of courts.



- 5 Read the following case studies and state which court you think they would have been heard in. Give your reasons.

a Accountant jailed for \$1.6m theft

Brian Norman Hoskin, an accountant who lost more than \$1.6 million of his clients' money in his failed private business interests, was yesterday jailed for eight years. Judge Lazarus said that Hoskin had complete disregard for the welfare of his clients in his pursuit of his personal interests. Hoskin pleaded guilty to 10 charges of theft, six charges of obtaining a financial advantage by deception, four charges of obtaining property by deception and one charge each of false accounting and attempted theft. He was ordered to serve a minimum of five-and-a-half years in prison.

b Granny hit at wedding

Nando, a guest at his friend's wedding, was involved in a scuffle outside the reception centre. The groom's grandmother was encouraging the newlyweds to get into the bridal car while Nando and other guests, who were all intoxicated, were insisting that they stay at the reception centre. The grandmother then tried to encourage the crowd to move indoors. In a scuffle, Nando punched her and she fell to the ground. He has been charged with recklessly causing injury.

c Mother bashed her son against wall

A mother was charged with murdering her six-year-old son. She repeatedly bashed the youngster's head against the bathroom tiles after making him have a cold shower. She also allegedly kicked him in the ribs after he fell to the ground like 'jelly'. She hit him four times in the face with her boots while he was on the ground. The mother and her boyfriend were both charged with murdering the six-year-old boy.



USEFUL WEBSITES

High Court www.hcourt.gov.au

Supreme Court www.supremecourt.vic.gov.au

County Court www.countycourt.vic.gov.au

Magistrates' Court www.magistratescourt.vic.gov.au

PRE-TRIAL PROCEDURES

Bail

Bail is the release of an accused person from legal custody on the understanding that he or she will appear at their hearing or trial. Bail may be granted at various stages of the criminal process – at the time of arrest, during the trial and while awaiting sentencing or an appeal.

Bail can be granted by a senior police officer, a bail justice or a court. A **bail justice** works in a voluntary capacity and is a person who has been appointed to deal with bail applications. They are required to undergo training, abide by a code of conduct and apply for reappointment every five years.

When a person has been arrested and charged with a serious criminal offence, the police can release the person on bail until the case goes to court or the person can be refused bail and **remanded in custody**. A remanded person has the right to make a bail application to a court – usually the Magistrates' Court. A bail justice determines bail applications outside normal court hours. The bail justice will attend the police station and make a decision. If the bail justice determines the person

does not meet the criteria for bail, then the person remains in police custody but must be taken before the next available court sitting.

Bail is usually granted because people should always be treated as innocent until proven guilty. The police and the courts are therefore reluctant to retain a person in custody unless absolutely necessary. According to S4 of the *Bail Act 1977* (Vic.), as amended by the *Criminal Procedure Act 2009* (Vic.), bail may be refused where the accused is:

- charged with murder or treason (although bail is given in some exceptional circumstances)
- charged with drug trafficking under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic.) or the *Customs Act 1901* (Cth) (unless there are exceptional circumstances or the amount of the drug is less than the prescribed amount)
- already in custody for another crime
- considered to pose an unacceptable risk to society or is likely to:
 - abscond
 - commit an offence while on bail
 - endanger the safety or welfare of members of the public
 - interfere with witnesses or otherwise obstruct the course of justice in relation to themselves or to others.

The accused's past history, character, home environment, possible hardships that might be caused, the seriousness of the crime and the strength of evidence against the accused are examined when considering whether granting bail to a person is an unacceptable risk to society.

AN UNACCEPTABLE RISK

A member of Hells Angels, charged with the assault of a German tourist, was denied bail because the court thought he posed an unacceptable risk of fleeing.

In addition, a court will refuse bail if the accused is charged with the following crimes, unless the accused can show a reason why their detention in custody is not justified:

- an indictable offence that is alleged to have been committed while he or she was at large awaiting trial for another indictable offence
- a stalking or family violence offence and the accused has been convicted of a similar offence in the previous 10 years, or the court is satisfied that the accused used or threatened to use violence against the victim in the current case
- aggravated burglary, or another indictable offence in which it is alleged that the accused used a firearm, offensive weapon or explosive
- arson causing death
- drug offences.

Surety

Most accused are granted bail and released on their own undertaking (a promise to appear in court when required). Alternatively the accused may be released if a **surety** (a family member or friend) promises to pay a sum of money if the accused fails to attend court.

Conditions of bail

Conditions may be attached when bail is granted, whether a surety has promised to pay a sum of money or on the undertaking of the accused. Bail conditions are tailored to suit the accused and may require him or her to make a deposit of money, live at a particular address, report to a police station

on a regular basis, stay away from a victim or witnesses, abstain from alcohol or drug use, surrender his or her passport, comply with a curfew and/or attend support services.

It is a further offence (punishable by a fine of 30 penalty units or three months' imprisonment) for a person on bail to commit an indictable offence or to contravene a bail condition without reasonable excuse, other than those conditions that require attendance and participation in bail support services. An arrest warrant is issued if the person does not appear for their court date.

Remand

Remand is the holding of a suspect in custody until the case comes to trial, or until bail is granted. The purpose of remand is to protect the community from someone who may reoffend and to ensure that the suspect appears in court for trial.

If bail is refused, or the person cannot meet the requirements of bail, the person will be held in custody until the case is ready for trial. If the person is convicted and imprisoned at their trial, then the time spent in remand will count towards the sentence served.

In 2013, the Australian Bureau of Statistics (ABS) found that Australia had 7375 remand prisoners, representing 24 per cent of all prisoners. According to a Victorian Sentencing Advisory Council report, there has been an increase in remand prisoners as a proportion of the total number of prisoners in Victoria, from 16.3 per cent in 2002 to 20.4 per cent in 2012.

An increase in remand prisoners can be caused by a range of factors. It may indicate that the crime committed was so serious that the police or courts refused bail. Alternatively, it could mean that more accused are unwilling or unable to meet strict bail conditions, or that the prison system is able to house more remand prisoners.

Table 4.3 Prisoners on remand in Australia, 2013

OFFENCE	INDIGENOUS PRISONERS		NON-INDIGENOUS PRISONERS	
	MEAN (MONTHS)	NUMBER OF PRISONERS	MEAN (MONTHS)	NUMBER OF PRISONERS
Homicide and related offences	11	93	11.7	401
Acts intended to cause injury	3	961	4.1	1302
Sexual assaults and related offences	5.3	130	6.3	418
Robbery, extortion and related offences	5	210	5.5	536
Unlawful entry with intent (burglary)	2.9	268	3.2	511
Theft and related offences	1.9	65	2.9	239
Fraud, deception and related offences	1.8	13	4.3	118
Illicit drug offences	6.1	58	6.7	938

Source: ABS, cat. no. 4517.0

Male remand prisoners are held at the Melbourne Remand Centre. This is a 723-bed facility. Remand prisoners may also be housed in facilities (away from sentenced prisoners) at the Melbourne Assessment Centre, and Port Phillip and Barwon prisons. Women are remanded in the Dame Phyllis Frost Centre.

Children may be remanded in either a Youth Residential Centre (all females and males 10–14 years of age) or a Youth Justice Centre (males 15–17).



Figure 4.15
Dame Phyllis Frost
Centre

Table 4.4 Victorian prisoners' time on remand, 2011–13

TIME ON REMAND	NUMBER AND PROPORTIONS OF PRISONERS					
	2011		2012		2013	
Under 1 month	204	(23.3%)	237	(23.8%)	200	(21.0%)
1 and under 3 months	248	(28.3%)	306	(30.7%)	302	(31.7%)
3 and under 6 months	206	(23.5%)	188	(18.9%)	204	(21.4%)
6 and under 12 months	122	(13.9%)	143	(14.4%)	168	(17.6%)
1 year and over	96	(11.0%)	122	(12.2%)	80	(8.4%)
Total	876	(100%)	996	(100%)	954	(100%)

Source: ABS, cat. no. 4517.0

LEARNING ACTIVITY 4.7

Bail or remand

- 1 Read the case study 'Man absconds while on bail' and answer the questions.
 - a What is bail and why are suspected criminals allowed to apply for bail?
 - b What is the alternative to bail?
 - c At what stage/s of the criminal process can bail be granted?
 - d Why was Mokbel granted bail between 2002 and 2006?
 - e What conditions could be imposed on someone who is granted bail?
 - f What is a bail surety? Use an example from the case to illustrate your answer.
 - g What will a court do when a person absconds while on bail?
 - h Why were Mokbel's assets frozen and sold?
 - i Is it possible for Mokbel to launch a further appeal? Explain.

CASE
STUDY

Man absconds while on bail

In 2005, Tony Mokbel was already on bail on drug-related charges when he was arrested for allegedly encouraging others to import chemicals used in the manufacture of illegal drugs. The police opposed a third bail application but Mokbel's lawyer argued that Mokbel had been on bail since 2002, had always complied with set bail conditions and would not abscond. The judge granted bail with a set curfew on the condition that Mokbel did not reoffend.

In 2006, Mokbel appeared before the Supreme Court and pleaded not guilty to drug charges. Close to the end of the trial, the prosecution asked the court to revoke Mokbel's bail because all the evidence had been presented. However, Mokbel's lawyer argued that bail should be revoked at the end of the barristers' closing addresses in anticipation of the jury's verdict, as is the usual practice.

The judge agreed. Mokbel later skipped bail, failing to appear in court for the last days of his trial. A warrant was issued for his arrest. Police believe that Mokbel fled overseas on a false passport to avoid falling victim to a rumoured gangland killing.

Mokbel was found guilty in his absence and sentenced to 12 years' jail. Mokbel's sister-in-law was ordered to pay the \$1 million she had promised as Mokbel's surety or she would be imprisoned for two years. The court found she was never a genuine surety and did little to ensure that Mokbel complied with his bail conditions. Tony Mokbel's assets were frozen and many were subsequently sold to pay creditors, with the remaining money transferred to the Assets Confiscation Office.

In March 2007, Mokbel's sister-in-law was charged with perverting the course of justice and perjury in relation to her role as surety for Tony Mokbel and was sent to prison. Another woman who bought Mokbel two mobile phones, put his Greek apartment in her name and delivered a suitcase to him in 2007 was later jailed for four years for attempting to pervert the course of justice. Others were also prosecuted for aiding his escape.

Tony Mokbel was captured in Greece in June 2007. Mokbel was brought back to Melbourne under an extradition order in May 2008, to serve his 12-year jail sentence for importing cocaine and to face two murder charges. He was later found not guilty of murdering Lewis Moran, and the other charge of murdering Michael Ronald Marshall was dropped in April 2009.

In 2011, Mokbel pleaded guilty to three further drug charges, but then asked the court to reverse his guilty plea when it was revealed that police used incorrect procedures in swearing warrants to search for or gain evidence in his case. The court refused to allow his application and the Victorian Parliament rushed through legislation declaring valid any evidence police gained from warrants applied for and executed in good faith.

In 2012, Mokbel was convicted of the drug charges and sentenced to 30 years' imprisonment with a non-parole period of 22 years. In 2013, Mokbel launched an appeal against this sentence on the basis of ill health (he had a heart attack in prison) and on the basis that he had agreed to plead guilty on the Director of Public Prosecutions' suggestion that he could expect to be sentenced to between 20 and 23 years of imprisonment. The Court of Appeal dismissed the appeal.



Figure 4.16
Tony Mokbel

- 2 Read the case study 'Robber uses sawn-off shotgun to threaten victims' and answer the questions.
 - a List the offences this man has committed.
 - b At what stage of the criminal process was the man remanded in custody? Explain.
 - c Give two possible reasons why this man may have been remanded in custody.
 - d Estimate the time this man spent on remand. How does the time he has served on remand affect his term of imprisonment?

CASE STUDY

Robber uses sawn-off shotgun to threaten victims

A 28-year-old Melbourne man pleaded guilty in the Magistrates' Court to carjacking and attempted robbery. The man gave himself up to police 12 days after the alleged offences, saying that he could not remember committing the crimes because he was high on the drug 'ice' at the time.

Six months earlier, the man used a sawn-off shotgun to threaten people and hijack their car. He later abandoned the car and stole money from a bag left in the car. On the same day, he also used the weapon in an attempted robbery on a post office.

He was remanded in custody until his case was heard in the County Court. Within three months, the Koori County Court had sentenced the man to four years' imprisonment with a non-parole period of two years.

Committal proceeding

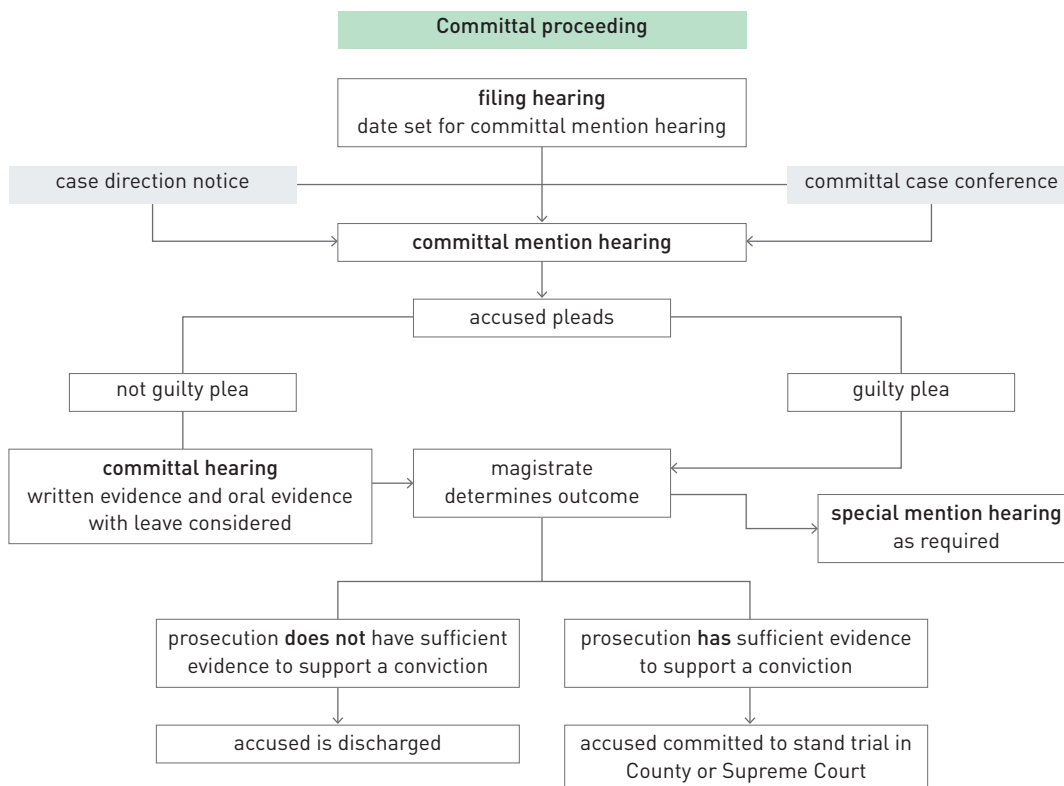
A committal proceeding is used for indictable offences that will go to trial in the County Court or Supreme Court. It may involve different types of hearings in the Magistrates' Court, which determine whether a case is ready for trial. The hearings that may be held in a committal proceeding are:

- **a filing hearing** – A filing hearing is the first step in a committal proceeding for any indictable offence that must go to trial or cases where the accused or magistrate prefers to have the matter determined in a superior court. At this hearing the Magistrates' Court fixes a date for a **committal mention hearing**, fixes a time for the service of a **hand-up brief** and makes any other determination in relation to the progress of the case.
- **a compulsory examination hearing** – The prosecution can request a special hearing to compel reluctant witnesses to provide evidence. The witnesses' oral evidence is recorded by way of an examination-in-chief and is not cross-examined at this time. This step assists the prosecution to provide all witness statements to the accused in the hand-up brief.
- **a committal mention hearing** – The prosecution and the accused must attend this hearing, unless excused. This is the management phase of a committal proceeding. At this hearing the court considers whether:
 - the accused has taken reasonable steps to obtain legal representation
 - witnesses will give oral evidence
 - the case should be heard summarily
 - other orders or directions are required.

Before the committal mention hearing, the parties are required to discuss the case and prepare a joint **case directions notice** which outlines the outcome of the discussions. In addition, the court may direct the parties to appear at a **committal case conference** where informal discussions are held with a magistrate in an attempt to resolve issues and eliminate lengthy delays.

As a result of these discussions, the accused may decide to plead guilty at the committal mention hearing. The magistrate will then conduct **the committal hearing** and the early guilty plea will become a consideration in sentencing at the trial. If the accused pleads not guilty, the magistrate will fix a date for a committal hearing and determine any objections to the disclosure of material.

- **a committal hearing** – The committal hearing relies heavily on the material contained in the hand-up-brief, which is served on the accused before the hearing. However, if leave has been granted for witnesses to be cross-examined, selected witnesses will attend court to give oral evidence. The prosecution and the accused's counsel present evidence, make their submissions in written form and question the witnesses. The witnesses are examined-in-chief, cross-examined and re-examined. Following this, the court determines whether the police **evidence is of sufficient weight to support a conviction by a jury at trial**. If it is decided that the evidence is of sufficient weight, a **prima facie** case exists to send the accused to trial. The accused will either be held on remand or released on bail until the date of trial. If the court finds the evidence will not support a conviction at trial, the accused is released subject to the discovery of additional evidence.
- **a special mention hearing** – Special mention hearings are to be conducted as required. The Magistrates' Court may use a special mention hearing to make any order or give any direction as part of its case management processes including the immediate determination of a committal proceeding. Either party can also request a special mention hearing to alert the court to an issue that affects compliance with orders or directions.



Hand-up brief

The use of a **hand-up brief** in a committal proceeding has largely eliminated the need for oral evidence. Instead, written statements are taken from witnesses unless the parties request that a

witness gives oral evidence. A hand-up brief contains the date of the committal mention hearing, information relating to the importance of obtaining legal representation, a copy of the charge sheet, copies of documents the prosecution intends to produce as evidence, copies of witness statements, interview transcripts, photographs and a list of exhibits. It also informs the accused of future hearing dates and their purposes. The accused is entitled to the hand-up brief at least 42 days before the committal mention hearing unless the court states otherwise or the accused consents to different arrangements.

Alternatively, the prosecution may provide a **plea brief** instead of a hand-up brief where the accused consents and indicates their intention to plead guilty.

LEARNING ACTIVITY 4.8

Committal proceeding

- 1 In what types of cases is a committal proceeding used?
- 2 What is the purpose of a committal proceeding?
- 3 What type of evidence is normally used in a committal proceeding? What is the special name given to this collection of evidence?
- 4 Read the case study 'Firebug pleads not guilty' and answer the questions.
 - a Why does this case require a committal proceeding?
 - b In which court will the committal proceeding take place?
 - c What hearing would have preceded the committal mention hearing?
 - d What other processes may have been conducted before the committal mention hearing?
 - e What is the purpose of the committal mention hearing?
 - f Why has this case proceeded to a committal hearing?
 - g What will occur if it is decided at the committal hearing that
 - i a prima facie case exists
 - ii a prima facie case does not exist?

CASE STUDY

Firebug pleads not guilty

A Mount Evelyn man faced a committal mention hearing in the Melbourne Magistrates' Court. He was accused of 23 counts of deliberately lighting a bushfire and 23 counts of conduct endangering life. Following his arrest, police opposed bail on the grounds that he was an unacceptable risk, because the man admitted to having an alcohol problem and found it difficult to control his behaviour while under the influence. The committal hearing was to be conducted within six months. Police estimate the committal hearing will be heard over two and a half weeks to accommodate all witnesses.

- 5 Read the case study 'Committal hearing for alleged fraudster' and answer the questions.
 - a Is the accused pleading guilty or not guilty to the alleged charges?
 - b Why do you think the accused's lack of legal representation was a point of discussion at the committal mention hearing?
 - c What is a hand-up brief?
 - d What is the statutory test a magistrate uses to determine whether or not to commit the accused to trial at the end of a committal hearing?

CASE
STUDY

Committal hearing for alleged fraudster

A suspended lawyer fighting fraud charges appeared unrepresented at his committal mention hearing in the Magistrates' Court. He told the magistrate he had not had enough time to prepare his case and was intending to represent himself against a \$1.2 million fraud charge.

The magistrate warned that he should seriously consider obtaining legal assistance as the evidence in the hand-up brief was strong. The magistrate agreed to extend his bail until the committal hearing date but refused to alter the bail condition that he report to police on a regular basis.

SUMMARY HEARINGS

Charge and summons

Police file a charge with the courts once they have sufficient evidence that a person has committed an offence. For summary offences an accused is not usually arrested and so the charge is served by summons. A **summons** directs a person to attend at the Magistrates' Court to answer the allegations in the charge. If the accused has been arrested, then the charge is given following arrest or when the accused is bailed or remanded. If the accused fails to appear once summoned or bailed, then an arrest warrant is issued.

Mention court procedure

For summary offences or indictable offences tried summarily the accused initially appears before a **mention court** in the Magistrates' Court. A criminal procedure in the Magistrates' Court is called a hearing. Before the hearing, the prosecutor will usually give the accused a **preliminary brief**, which includes a copy of the charge sheet, information about the importance of obtaining legal representation, a summary of the case against the accused and the accused's prior convictions so that the accused can make a decision on how to proceed. If the accused **pleads guilty** at the mention court, then the case will be dealt with immediately and the magistrate will pass sentence. However, if the accused **pleads not guilty** the case is deferred. At this point the court may schedule either of the following processes before a **summary hearing** in an effort to streamline procedures.

- **a summary case conference** – This requires the prosecution and the accused, with the assistance of legal representation, to exchange targeted documentation and discuss issues in dispute including a change in charges laid. Following this conference, the accused may decide to plead guilty. If the accused decides to plead guilty, the case will be rescheduled in the mention court. If the parties cannot agree, the accused can request a **full brief** from the prosecution in preparation for the summary hearing.
- **a contest mention hearing** – These hearings are not scheduled in all cases but are designed as a planning tool for cases that will proceed to a summary hearing. The purpose of this hearing is to estimate the time required to hear the case. The court will check the accused has sought legal representation, the number of witnesses involved, the required documentation, the issues in dispute and whether these can be resolved. On the accused's request, the prosecution must provide a full brief at least 14 days before this hearing.

A **summary hearing** will take place if the accused pleads not guilty. At this hearing, the accused will enter a plea, both the prosecution and the defence present their opening address followed by the case for the prosecution and then the case for the accused. The parties present their evidence and cross-examine the witnesses of the opposing side. The magistrate will then determine whether the accused is guilty or not guilty of the alleged offence. If the accused is found guilty then the magistrate will pass sentence.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK CASE STUDY

Jaidyn Leskie

Read the case study 'Jaidyn Leskie' and answer the questions.

- 1 Explain the main facts of the case. You may wish to look up articles in newspaper files or on the Internet to find more information. *(3 marks)*
- 2 Describe what you think is the most important evidence for the prosecution and the most important evidence provided on behalf of the accused. *(4 marks)*
- 3 Explain the role of the police in relation to this case. *(3 marks)*
- 4 Why do you think bail was not granted in this case? *(2 marks)*
- 5 On which party did the onus of proof rest in this case? *(1 mark)*
- 6 Explain the process of a committal proceeding. In which court is a committal proceeding held? *(4 marks)*
- 7 In which court was the trial held? What is the criminal jurisdiction of this court? *(2 marks)*
- 8 What is the role of the coroner in a criminal investigation? Why do you think there were three coronial enquiries in this case? *(2 marks)*
- 9 Do you think Greg Domaszewicz should have been allowed to remain silent at the trial? Explain. *(2 marks)*
- 10 The double jeopardy rule has recently been abolished in limited circumstances. Do you think it should be abolished? Discuss. *(2 marks)*

(Total 25 marks)

Jaidyn Leskie

Jaidyn Leskie, who was one year old, disappeared while in the care of Greg Domaszewicz on the night of 14 June 1997. Domaszewicz said that Jaidyn went missing after being left asleep at his house while he went out to pick up the child's mother.

On the night of Jaidyn's disappearance a pig's head and rocks were thrown through the windows of Domaszewicz's house. Senior Constable Evans said he could find no evidence that anyone entered the windows. He said he looked for evidence such as material or hair fibres to indicate entry, but found nothing. He also could not find traces of dirt, vegetation or shoe impressions inside or outside the house.

A teenage boy discovered the boy's body on 1 January 1998 at the Blue Rock Dam. A small sleeping bag with a crowbar tied to it and a plastic bag containing baby's clothes, a bib, elastic-sided boots, a baby's bottle and an apple were found in the dam.

Dr Shelly Robertson, a senior forensic pathologist who performed an autopsy on Jaidyn, said that the boy probably died from a direct blow to the head while he was in extreme pain from a fractured left arm.

The coroner held an investigation (not a full inquest) but did not make any findings about the cause of Jaidyn's death. The Director of Public Prosecutions decided to pursue the case. In the process, Domaszewicz was refused bail on four occasions.

Case for the prosecution

14 June

- Greg Domaszewicz collects Jaidyn from his mother Bilynda Murphy early in the afternoon.
- Murphy calls Domaszewicz at his house about 4 pm and is told Jaidyn is about to be showered.
- Between 5.30 and 7.40 pm telephone calls to Domaszewicz's home are not answered.

15 June

- At 12.30 am neighbours who live opposite Murphy allege they see Domaszewicz's car stop outside their house.
- At 2 am Murphy calls Domaszewicz and asks him to collect her from Ryan's Hotel in Morwell.
- Around 2 am a severed pig's head and stones are thrown at Domaszewicz's house.
- Between 2.20 and 2.40 am Domaszewicz picks Murphy up in his car and they drive to his house. On the way he says Jaidyn is in hospital with burns.
- At 3.20 am Domaszewicz drops Murphy at her home.
- At 3.35 am Domaszewicz is breath-tested by police and says nothing about an abducted child.
- At 5 am Domaszewicz drives to Murphy's home and tells her Jaidyn has been abducted.

At the committal proceeding Mr Bill Moran-Payler, for the prosecution, suggested Domaszewicz's actions were part of a plan to have Jaidyn's mother, Murphy, discover the child's body on the morning of 15 June. Mr Moran-Payler went on to suggest that when Domaszewicz went to pick up Murphy he knew she was drunk and he took a bottle of Jim Beam bourbon so that he could further intoxicate her, but when he saw the pig's head he decided to report that Jaidyn had been abducted.

Case for the accused

- The lawyer for the accused said that the case for the prosecution was weak. They had not managed to establish the time, place, manner or reason for the death of Jaidyn. Mr John Lee, the lawyer for the accused, said at the committal proceeding that 'There's simply not sufficient evidence on which a jury, properly instructed, could convict'.
- Jaidyn's body was found on New Year's Day 1998, in a sleeping bag weighted down by a crowbar, almost six months after Jaidyn's disappearance. DNA testing of the sleeping bag suggested that it was in the dam for no more than two months.
- Lee said that Jaidyn's mother testified that the hair on Jaidyn's body was longer than it was when he disappeared.
- According to senior accused counsel at the trial, Mr Colin Lovitt QC, there was insufficient time for Domaszewicz to take Jaidyn's body to the Blue Rock Dam where he was found, and return in time to inform Murphy of the disappearance. Yet, the police maintained that Domaszewicz had fallen in the water when he dumped the body, which explained his wet wallet and money found by the police. If this were the case, he would have had to return home and change his clothes before going to Murphy's home.
- A photograph taken after the boy's disappearance at Domaszewicz's house showed what looked like a crowbar. Police maintained that it was a shovel.

- Jaidyn's blood was not found in Domaszewicz's house or car.
- A concern to the police was Domaszewicz's statement to Jaidyn's mother that Jaidyn was in the hospital. Domaszewicz claimed that this was a joke. Lovitt said that he was known for his practical joking.

During over 10 hours of police questioning, Domaszewicz answered 4060 questions. At the trial he elected to remain silent. It is common practice for an accused person to remain silent during the trial. In this case Domaszewicz was accused of killing a child who had been in his care. It is not surprising that he would be overanxious during questioning. The jury may have interpreted his body language, quivering voice and so on as a sign of guilt.

On 4 December 1998, a Supreme Court jury found Domaszewicz not guilty of the murder or manslaughter of Jaidyn Leskie. The jury was made up of eight men and four women. The jurors cannot be identified, but their occupations represented a cross-section of the community, and their ages ranged from early 20s to late 60s.

The investigation into the death of Jaidyn Leskie was reopened in 2003 for a full coronial hearing after a relentless campaign for justice by Jaidyn's mother. Domaszewicz appealed to the Supreme Court to stop the inquest on the basis that the coroner did not have the jurisdiction to hold a second investigation as this contravened the double jeopardy law. This case sparked calls to abolish the double jeopardy rule, which would allow Domaszewicz to be tried again. Under the double jeopardy rule, if a person has been acquitted of a crime, they cannot be tried again for the same crime or the same set of facts. The rule was abolished in the United Kingdom in 2005 allowing British courts to quash an acquittal on the discovery of substantially new evidence. In Victoria, the double jeopardy law has since been abolished in limited circumstances.

In 2004, the Supreme Court ruled that the coroner had used the wrong section of the Coroner's Act to authorise the inquest in this case and that the coroner would need to start the inquest afresh.

In 2005, the coroner began a third inquest. The coroner could not determine who killed Jaidyn or whether the death was accidental or deliberate. However, the coroner did find that Domaszewicz contributed to Jaidyn's death and disposed of the body in the dam.

ASSESSMENT TASK CASE STUDY

Summary hearings

Read the case study 'Blackmailer faces court' and answer the questions.

- 1 What offence is alleged in this case? Is it a summary or indictable offence? (2 marks)
- 2 This is an example of a contest mention hearing. What is its purpose? Draw examples from the case to illustrate your answer. (3 marks)
- 3 Draw a flow chart of the mention court procedure used in the Magistrates' Court. (3 marks)
- 4 What is the main aim or benefit of this mention court procedure? (1 mark)
- 5 Explain what happens at a summary hearing including who will preside over the hearing. (4 marks)
- 6 Which court has jurisdiction to hear an appeal in this case? (2 marks)

(Total 15 marks)

Blackmailer faces court

A 32-year-old man accused of trying to blackmail the Campbell Soup Company appeared in Warrnambool Magistrates' Court for a contest mention hearing. He has been charged with making a false report to the police and making false statements about product contamination. The man intends to plead not guilty. Police allege the man falsely claimed he found a syringe in a freshly opened can of pumpkin soup. He contacted media outlets and Campbell Soup's head office in the

United States in a bid to secure compensation. His actions prompted health official and police investigations. At the contest mention hearing, the police prosecutor indicated that the case will involve 23 witnesses from both the United States and Australia. The case was adjourned to a four-day summary hearing to be heard in the Melbourne Magistrates' Court within four months.

CRIMINAL TRIAL PROCEDURES

Criminal procedures in the County Court and Supreme Court are known as trials. Before a matter goes to trial in the County Court or Supreme Court, a committal proceeding has usually taken place. In such cases, indictable proceedings are seen as one, continuous process. Therefore, the filing of an indictment after a committal proceeding no longer signifies the start of the trial process. The trial begins when the accused pleads not guilty in the presence of the **jury panel** (potential jurors in the courtroom). An **indictment** is a formal written document which accuses a person of a serious crime and orders them to stand trial.

On rare occasions the **Director of Public Prosecutions** may issue a **direct indictment** if:

- a committal proceeding was not held
- the magistrate in a committal proceeding declined to commit the accused to trial
- an accused is acquitted and an exemption to the double jeopardy rule applies.

The trial will be held at a court location closest to where the offence took place, unless a court determines this would put a fair trial at risk or cause undue hardship to participants.

A case management process known as a **directions hearing** will take place before the trial. At a directions hearing the court may:

- require the accused to indicate whether he or she has legal representation
- require the parties to estimate the number of witnesses or the need for interpreters
- resolve disputes about the disclosure of documents or the exchange of information
- determine applications for sentence indications so the offender can make an informed plea
- clarify legal or procedural issues
- set timelines
- make orders, which ensure the fair and efficient conduct of the trial.

Parties must also comply with **disclosure** requirements, which is a pre-trial exchange of information between the parties. Both parties exchange a summary of their cases and information about the witnesses or evidence, essentially adding to the information disclosed during the committal proceeding.

DID YOU KNOW?

In some instances a judge or magistrate will give an indication of the sentence to be given (a **sentence indication**). This assists an accused to decide whether or not to plead guilty as they have some idea of a likely sentence. An early guilty plea reduces the delays in the legal system and spares the victims undue stress. An early plea may also lead to a discount in the sentence for the offender.

The procedure used in the County Court or Supreme Court to determine a criminal matter differs according to whether the accused pleads guilty or not guilty. If the accused **pleads guilty** no jury is required as the accused has admitted guilt. The prosecution presents a summary of the evidence, prior convictions are read out and the judge decides on a sentence.

If the accused **pleads not guilty**, then the procedure explained below takes place. The legal representative (barrister) appearing in court for the accused is referred to as the **accused's counsel**. The **prosecutor** is a barrister acting on behalf of the Office of Public Prosecutions.

- **The case is called and appearances are entered.** The **prosecutor** announces that he or she appears on behalf of the Crown. The **accused's counsel** announces that he or she appears on behalf of the accused.
- **The accused is arraigned (arraignment).** The accused is named and the charges in the indictment are read out. The accused is asked to plead guilty or not guilty. If the accused pleads **not guilty** the jury is selected.
- **A jury is empanelled.** The jury is chosen from a panel of jurors whose suitability is scrutinised during the empanelment process. In criminal cases there are 12 jurors, although up to 15 jurors may be empanelled 'for any reason that appears to the court to be good and sufficient'. This allows the trial to proceed if jurors become ill or die (a trial can continue if a jury is reduced to 10; any lower, and a retrial must be ordered).
- **The trial judge usually addresses the jury.** The judge provides basic information to help jurors understand points of law and procedure, the trial process and its participants. The judge can also do this at any stage of the trial.
- **Opening addresses are made.** The **prosecutor** gives an opening address telling the jurors what the case is about, and refers to important witnesses and evidence. The **accused's counsel** responds to the prosecutor's opening address. The accused's counsel has the right to reply to the opening speech of the prosecutor to outline issues in the trial and indicate briefly the facts, and the inferences which can be made from those facts, that are not contested.
- **The prosecutor calls the crown witnesses.** Each witness is sworn in (this involves the witness swearing an oath, or making an affirmation if the witness does not hold religious beliefs), examined-in-chief (by the prosecutor), cross-examined (by the accused's counsel) and re-examined (by the prosecutor).
- **A no-case submission may be made.** If the accused's counsel feels that the prosecution has not proved the guilt of the accused, he or she can submit to the court that there is no case to answer. If this is accepted by the court, the charge is dismissed; if not, the case proceeds.
- **The accused's counsel calls witnesses.** Each witness is sworn in, examined-in-chief (by the accused's counsel), cross-examined (by the prosecutor) and re-examined (by the accused's counsel). The accused can choose to give sworn evidence and be cross-examined, or remain silent.
- **Requests for particular jury directions may be made.** The accused's counsel and the prosecution are required to highlight any **issue in dispute** relating to the alleged offence or any defence applicable in the case and ask the judge to give (or not give) a specific jury direction on matters relevant to each of their cases. The judge must give a requested jury direction, unless there is good reason for not doing so.
- **Closing addresses are made.** The prosecutor and the accused's counsel address the court with closing speeches. The prosecutor addresses the court first. Both counsels explain to the jury the important parts of the evidence that support their case.
- **The judge sums up and directs the jury.** The judge will give the jury information about the burden and the standard of proof, and will review the roles of the jury, judge and legal counsel. The judge decides which **issues in dispute** (identified by legal counsel) are real issues and explains these issues, and any relevant law, to the jury. The judge is required to give a broad and fair overview of how the prosecution and the accused's counsel argued their case but is not required to summarise all the evidence. The judge need only explain as much of the evidence as is relevant

to the issues in dispute. If the trial judge believes that there is insufficient evidence against the accused for a jury to return a guilty verdict, he or she can **direct the jury to acquit the accused**. The jury does not have to follow this direction (although in practice the jury does follow it). The judge cannot direct the jury to find a verdict of guilty.

- **The jury retires to consider its verdict.** The jurors go into the jury room. They may request copies of various documents to assist them in their deliberations. The jury must:
 - discuss all the evidence
 - decide on questions of fact; that is, whether they believe the accused is ‘guilty’ or ‘not guilty’ according to the evidence
 - apply the law
 - reach a verdict.
- **The jury gives its verdict.** If the accused is found not guilty, he or she is free to leave the court, and cannot be tried again for the same offence (**double jeopardy** rule, although a retrial can take place in limited circumstances).
- **Pre-sentencing** – If the accused is found guilty, prior convictions are heard. Before sentencing, a plea for leniency may be made and character witnesses may be called.
- **Sentencing** – The trial judge passes sentence.



Figure 4.17
Barristers at the
Supreme Court

STREAMLINING JURY DIRECTIONS

The *Jury Directions Act 2013* (Vic.) aims to streamline jury directions and reduce their complexity, technicality and length. It was written in response to a Victorian Law Reform Commission report which recommended legislation to simplify jury directions. The Jury Direction Advisory Group (consisting of legal profession stakeholders) developed the Act, which:

- **codifies the law** in relation to jury directions
- lists the general jury directions which must be given to a jury and streamlines the summing-up process by encouraging the judge, with assistance from legal counsel, to

focus on the **issues in dispute** and provide the jury with sufficient information to make an informed decision about these issues

- allows judges to explain the term '**beyond reasonable doubt**' to the jury upon request, and provides guidelines as to how the term could be explained
- allows **for integrated jury directions** (and jury guides) to help the jury understand the issues and apply the law. Instead of giving the jury a mini law lecture, the judge embeds the legal issues in a list of factual questions which the jury can consider in reaching their verdict.

Double jeopardy

The *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.) changed the common law rule against double jeopardy. It allows, in limited circumstances, for a person to face a retrial for the same offence despite a previous acquittal. Police must seek the approval of superiors and the Director of Public Prosecutions (DPP) before launching a formal reinvestigation. The DPP then has 28 days (from the day the person is charged) to apply to the Court of Appeal to set aside the previous acquittal. The DPP is limited to one application per acquittal. The Court of Appeal may authorise a new trial if it is in the interest of justice for the order to be made and it will result in a fair retrial. Retrials can only be authorised in specific circumstances.

Table 4.5 Circumstances required for the Court of Appeal to authorise a new trial (double jeopardy)

CIRCUMSTANCES	RELEVANT OFFENCES
Fresh and compelling evidence – There is new and probable evidence against the accused; for example, they confess to the crime or conclusive DNA evidence is discovered.	Only in the most serious cases like: • murder (including attempts and conspiracy to commit murder) • manslaughter • child homicide • arson causing death • aggravated forms of rape and armed robberies (involving serious injuries or the threat thereof) • drug trafficking or cultivation in large commercial quantities.
A tainted acquittal – The accused or another person has been convicted of an administration of justice offence such as bribery, perjury or perverting the course of justice and this behaviour resulted in the acquittal.	In cases where the alleged offence is punishable by 15 years' or more imprisonment.
Administration of justice offence – There is fresh evidence to suggest the accused committed an administration of justice offence which resulted in the acquittal.	Any indictable offence.

APPEALS FROM CRIMINAL CASES

If the accused or the prosecution is not happy with the decision made by the court, grounds for appeal may exist. The accused or the prosecutor may appeal on a point of law (the interpretation of the law) or on a point of fact (the facts of the case). The person making the appeal is known as the **appellant**. The other party is called the **respondent**.

Appeals can be made to the following courts:

- Appeals from the **Magistrates' Court** can be made to the County Court on a point of fact (the conviction or the severity of sentence), or to the Supreme Court on a point of law.
- Appeals from the **County Court** can be made to the Court of Appeal (three judges) on a point of law or a point of fact.
- Appeals from the **Supreme Court** (single judge) can be made to the Court of Appeal.
- Appeals from the **Court of Appeal** can be made to the **High Court** if leave is granted by the High Court. The High Court will generally only hear appeals if the matter is in the interests of natural justice or of public interest.

LEARNING ACTIVITY 4.9

Criminal procedure

- 1 Draw a flow chart showing the stages of a trial when the accused is pleading not guilty.
- 2 What is the purpose of:
 - a examination-in-chief
 - b cross-examination
 - c re-examination?
- 3 If the prosecution calls a witness, which party will cross-examine that witness?
- 4 If the accused calls a witness, which party will re-examine that witness?
- 5 Who is the respondent in an appeal case?
- 6 Which court is empowered to hear an appeal in each of the situations below?
 - a Mitho has been convicted of manslaughter in the Supreme Court. He wishes to appeal the severity of the sentence.
 - b William has been convicted of fraud in the County Court. He wishes to appeal on a point of law.
 - c Jassi has been convicted of shop stealing in the Magistrates' Court and she wishes to appeal on a point of fact.
 - d Matilda wishes to lodge a further appeal from the Court of Appeal on a point of law.
- 7 **Mock court**
 Using the information relating to the Jaidyn Leskie case, or another case of your choosing, conduct a mock court. In groups decide:
 - which case you will use
 - who will be the prosecution, accused, barrister for the prosecution, barrister for the accused, witnesses. The rest of the class will form the jury and a judge
 - questions to ask and possible answers
 - comments to make during the summing up.
 Conduct the mock court.

RIGHTS IN CRIMINAL PROCEEDINGS

The *Victorian Charter of Human Rights and Responsibilities* protects human rights, although these may be limited if the limits can be demonstrably justified in a free and democratic society, based on human dignity, equality and freedom, and taking into account all relevant factors such as the nature of the right and the purpose of the limitation.

The Charter protects rights within the criminal justice system. Some of these are listed in table 4.6.

Table 4.6 Rights within the criminal justice system

RIGHT LISTED IN THE CHARTER	EXPLANATION OF THE RIGHT	HOW THE RIGHT IS PROTECTED IN CRIMINAL PROCEEDINGS
Equality before the law	Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.	• There are restrictions on police during questioning; for example, a person can only be questioned for a reasonable time and has the right to silence – these restrictions protect a person accused of a crime from incriminating themselves or saying something in the heat of the moment that may mislead a court. • Criminal proceedings are presided over by a judge or magistrate, whose role is to ensure the parties are treated equally and rules of evidence and procedure are followed. • Everyone is bound by rules of evidence in a court of law, which state the evidence that can be admitted, such as opinion evidence given by an expert in the particular field. • Rules of procedure give each party to a criminal case the opportunity to cross-examine witnesses to try to bring out the truth. • A jury is asked to put aside all biases and make judgements on the facts of the case brought out in court.
Right to liberty and security of person	Everyone is entitled to liberty and security and must not be subject to arbitrary arrest or detention. A person must not be deprived of his or her liberty except on grounds – and in accordance with procedures – established by law. A person who is detained must be promptly informed of the reason for the detention and must be brought before a court promptly.	• Every person being questioned by the police must be released unconditionally, released on bail or brought before the Magistrates' Court within a reasonable time. • A person must be cautioned as to his or her right to silence and informed of the reason for his or her detention.
Protection from torture and cruel, inhuman or degrading treatment	A person must not be subjected to torture or treated or punished in a cruel, inhuman or degrading way or subjected to medical or scientific experimentation without full and free consent.	• There are restrictions on police questioning; any torture or treatment in a cruel way would be an assault and could lead to the police officer being charged. • The <i>Sentencing Act 1991</i> provides guidelines relating to fair punishment for a person who has been found guilty. • Maximum and minimum penalties for crimes are provided under Acts of parliament.
Humane treatment when deprived of liberty	All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary. An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.	• Our criminal law revolves around a presumption of innocence – people must be treated as innocent until they have been proved guilty – to this end the burden of proof is on the prosecution (although there are instances when that burden of proof is reversed). • Suspects who have not been found guilty, but are held in prison, are held at a remand centre, away from convicted criminals. • The <i>Bail Act 1977</i> provides for bail for most suspects and allows the courts to remand a suspect in custody only in certain circumstances, where, for example, it is thought necessary to protect the community or witnesses from the suspect.

RIGHT LISTED IN THE CHARTER	EXPLANATION OF THE RIGHT	HOW THE RIGHT IS PROTECTED IN CRIMINAL PROCEEDINGS
Children in the criminal process	An accused child who is detained or a child detained without charge must be segregated from all detained adults. An accused child must be brought to trial as quickly as possible. A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.	- Children who are held on remand are taken to a youth justice centre where they will be provided with counselling and legal assistance. - The <i>Criminal Procedure Act 2009</i> is aimed at speeding up the justice system by requiring police to commence Children's Court proceedings within six months of a summary offence. - Under the age of 18, children who have been convicted and sentenced to detention are held in youth justice centres designed to cater for the needs of children in detention, rather than adult prisons.
A fair hearing	A person charged with a criminal offence or a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. In some circumstances a court or tribunal may exclude members of media organisations or other persons or the general public if permitted to do so by law. All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless required otherwise in the best interests of a child, or permitted by a law other than this Charter.	- Hearings and trials or courts and tribunals are presided over by an independent arbitrator – if biases are shown in court, the party who has been discriminated against would have grounds for appeal. - In most cases the courts are open courts for the public to see the proceedings, although there are instances when a court will refuse entry to the media and general public; for example, to protect the identity of a child. - Members of the media that report particular details of a court hearing while it is progressing could be found to be in contempt of court and could be charged.
Rights in criminal proceedings	A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees: - to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands - to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her - to be tried without unreasonable delay - to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the <i>Legal Aid Act 1978</i> - to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the <i>Legal Aid Act</i>	presumption of innocence – Under the common law right, the burden of proof is on the prosecution, so an accused is presumed innocent until proved to be guilty, although there are crimes where this is reversed. informed promptly of the offence – Before a person is questioned they are cautioned and informed of the offence they are suspected of committing; an interpreter is used where required. communicate with a lawyer – A person may contact his or her legal advisor before questioning. tried without delay – The <i>Criminal Procedure Act 2009</i> provides a number of time limits. For example, a summary offence must be commenced within 12 months of the date the alleged offence was committed; indictable offences (other than sexual offences) should be commenced within three months of the conclusion of the committal hearing. tried in person – A person accused of a crime has the right to defend himself or herself, the right to engage a legal representative of their choosing and to apply for legal aid if appropriate.

RIGHT LISTED IN THE CHARTER	EXPLANATION OF THE RIGHT	HOW THE RIGHT IS PROTECTED IN CRIMINAL PROCEEDINGS
Rights in criminal proceedings (continued)	- to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the <i>Legal Aid Act</i> - to examine, or have examined, witnesses against him or her, unless otherwise provided for by law - to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution - to have the free assistance of an interpreter if he or she cannot understand or speak English - to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance - not to be compelled to testify against himself or herself or to confess guilt. A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation. Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.	advice about legal aid – Under the <i>Criminal Procedure Act</i>, a warrant or summons for arrest must be accompanied with advice about eligibility for legal aid under the <i>Legal Aid Act 1978</i>; a court can order legal aid to be provided by Victoria Legal Aid. provision of legal aid – Legal aid is provided according to a means test and a reasonableness test; other avenues of legal assistance are also available, for example legal representatives acting pro bono (no charge). examine witnesses – Criminal procedure provides for the accused or the accused's legal representative to cross-examine witnesses brought by the prosecution. attendance of witnesses – Witnesses can be summoned to attend court; it is an offence not to attend court if a person has been served a summons to attend. interpreter – An interpreter must be provided during questioning if needed. Under the <i>Criminal Procedure Act</i>, an interpreter must be provided during a trial if a person has been charged with an offence punishable by imprisonment and the person does not have sufficient knowledge of English to understand the trial proceedings. not to be compelled to testify against himself or herself – The right to silence allows the accused to elect to remain silent during a trial, or before the trial during questioning. There are a number of clauses that require the accused to give information to the court or the prosecution before a summary hearing, committal hearing or trial, but these do not require the accused to give evidence or confess guilt.
Right not to be punished more than once	A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law, although a retrial can be ordered in limited circumstances.	Double jeopardy rules protect against a person being charged again for the same set circumstances once he or she has been acquitted or convicted, although if there is compelling DNA evidence, for example, a person can be tried again.
Retrospective criminal laws	A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in. A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed. If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty. Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.	This provision is applied through the courts. A court will be informed if the offence was not in existence at the time the act was carried out. For example, the <i>Summary Offences and Control of Weapons Acts Amendment Act 2009</i> created an offence of disorderly conduct in a public place – a person who was apprehended for this type of conduct before the passing of the Act cannot be charged under this Act.

RIGHT LISTED IN THE CHARTER	EXPLANATION OF THE RIGHT	HOW THE RIGHT IS PROTECTED IN CRIMINAL PROCEEDINGS
Statement of compatibility	A minister who introduces a Bill to parliament must prepare a statement of compatibility with the Charter of Human Rights and Responsibilities, which is discussed in parliament.	• The statement of compatibility is considered before the second reading of a Bill. This statement must indicate whether, in the member's opinion, the Bill is consistent with the <i>Charter of Human Rights and Responsibilities</i> and, if so, how it is consistent, or, if the member considers that the Bill is inconsistent with human rights, the nature and extent of the inconsistency. If it is found to be inconsistent the parliament will inform the relevant minister to consider the inconsistency.
Interpretation of laws	So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. This section does not affect the validity of an Act that is incompatible with a human right or a subordinate instrument that is incompatible with a human right and is empowered to be so under the Act in which it is made.	• Individuals in the community can voice any discontent with regard to any legislation that is not compatible with human rights.

LEARNING ACTIVITY 4.10

Rights in criminal proceedings

- 1 Choose three rights provided under the Charter and explain how each is protected under Victorian law.
- 2 **Investigation**
Investigate the statement of compatibility of the *Criminal Procedure Bill 2009*. Go to the Victorian Parliament website at www.parliament.vic.gov.au. Go to Hansard and search for the *Criminal Procedure Bill*. The statement of compatibility was presented to the Legislative Assembly on 4 December 2008. Explain two ways that the then Victorian Attorney-General Rob Hulls saw the Bill as being compatible with the Charter.
- 3 Read the newspaper articles 'Drug law at odds with human rights rules Victorian Court of Appeal' and 'Presumption of innocence protected' and answer the questions.
 - a What is the presumption of innocence?
 - b How is the presumption of innocence protected under Australian law?
 - c What were the facts and what was the County Court's decision in this case?
 - d Why do the writers of the articles suggest that Vera Momcilovic was denied her right to a fair trial?
 - e To what extent do you agree with the reversal of the onus of proof as outlined in S5 of the *Drugs, Poisons and Controlled Substances Act* (Vic.)?
 - f What decision did the Court of Appeal make in the Momcilovic case in relation to:
 - i her conviction for trafficking and her sentence?
 - ii whether the reversal of the onus of proof under Victorian drug laws infringed the right to a fair trial?
 - g What is the purpose of a 'declaration of incompatibility' under the *Victorian Charter of Human Rights*?
 - h What was the High Court's final decision in relation to Vera Momcilovic's conviction for drug trafficking?

EXTRACT

Drug law at odds with human rights rules Victorian Court of Appeal

Melissa Iaria, Catherine Best, *Herald Sun*, 18 March 2010

In a legal first, a Victorian court says a drug-related law is at odds with the state's *Charter of Human Rights and Responsibilities*.

The Victorian Court of Appeal's decision followed the appeal of a woman jailed for a minimum 18 months for drugs trafficking.

Lawyer Vera Momcilovic's conviction in 2008 came after methylamphetamine was found in her city apartment in 2006.

She denied the charge, and her live-in boyfriend admitted he was drug trafficking and the drugs were there for that reason. He and the accused denied she knew of the drugs and trafficking.

But under the *Drugs Act*, the occupier of a place where drugs are found is deemed to possess them unless they can prove otherwise.

Momcilovic's failure to do so meant she was guilty of possession and a jury convicted her on the more serious count of trafficking.

Yesterday, the Appeal Court said it would use Victoria's *Charter of Human Rights and Responsibilities* to make its first 'declaration of inconsistent interpretation'.

The Charter allows the Supreme Court to make the declaration if it thinks a certain law 'cannot be interpreted consistently with a human right'.

In its ruling, the court said the law presumed a person guilty of the offence of drug possession unless they proved otherwise.

'That is not so much an infringement of the presumption of innocence as a wholesale subversion of it,' the court said.

The court will give Victorian Attorney-General Rob Hulls and the Victorian Equal Opportunity and Human Rights Commission notice of its declaration and they can make submissions.

The appeal judges had rejected arguments put on behalf of Mr Hulls that the infringement of the presumption of innocence was at a 'reasonable limit'.

The court's decision will not make the relevant law invalid, but will pave the way for parliament to consider changing it.

But Liberty Victoria president Michael Pearce SC said the declaration won't affect people already convicted under that law.

'It doesn't invalidate the law, that's the thing about a Charter as opposed to a bill of rights,' he said.

'The bill of rights would override the law and mean that people who'd been convicted in the past were probably wrongly convicted, but the law remains and anyone convicted under that law in the past was properly convicted.'

Pearce said if the law changed it would be highly unlikely to have retrospective effect.

'There's a lot of scaremongering by opponents of human rights about the way that charters of human rights operate. But they don't operate to override laws. All they do is trigger a mechanism whereby parliament is asked to reconsider a law which is held to be inconsistent with one of the human rights.'

Hulls said the Charter required parliament to respond to the court's declaration, but the government was not obliged to change the law.

He said the law at issue in this case would be considered in a review now under way into the *Drugs Act*.

Momcilovic, who was on bail pending the appeal, failed to win leave to appeal her conviction. But she was resentenced to serve the remaining 16 months of her sentence as a suspended term after the court found errors in her original sentence.

EXTRACT

Presumption of innocence protected

Edward Santow, *The Age*, 20 March 2010

The trial of a suspected drug trafficker infringes Victoria's *Charter of Human Rights and Responsibilities*.

This week, the Victorian Court of Appeal gave one of its most important decisions, in a landmark case that considered the right to a fair trial and the Victorian *Charter of Human Rights and Responsibilities*. The case shows that the Charter operates more subtly than some have suggested, and the result will certainly frustrate both Charter advocates and opponents. But, in my view, the court made the right decision and it will be good for our democracy.

The case was about Victoria's unusual drugs law, and it started with a drugs bust at the home Vera Momcilovic shared with her partner. Imagine it were you. A fateful knock on your door; the police enter and find drugs. Not enough to make you Australia's answer to Pablo Escobar, but enough to suggest trafficking and not personal use.

There are various possible explanations. But, understandably, the police go with the most obvious one: that you're a drug trafficker.

But what if you're not a trafficker at all? Perhaps someone left the drugs at your place; maybe a previous tenant or someone who holds a grudge against you.

Those alternatives might be less likely than the obvious explanation, but they're not outlandish either. When you're brought to trial, the consequences of getting this question wrong are catastrophic. If convicted of trafficking any sizeable quantity of drugs, you'll almost certainly go to prison, probably for a long time.

The law has long required the prosecution to prove the main elements of any serious offence. This would mean, for instance, that the prosecution would have to prove you knew (or should have known) that the drugs were at your home.

Even for the prosecution, with all the resources of the state behind it, this burden of proof can be difficult to discharge. From time to time, it means the guilty go free. However, our system has long prized fair trials. We rightly view as abhorrent the prospect of an innocent person being deprived of their liberty.

And yet Victorian law takes the highly unusual step of reversing the burden of proof in this sort of drugs case. If the police find drugs at your home, then you must show that you are not a drug trafficker. You must find enough evidence to satisfy a court of some other explanation.

Momcilovic was tried and convicted under this law. She appealed, arguing that she was denied a fair trial. Basically, the court was asked two questions. Does the Victorian drug law infringe the Charter's right to a fair trial? If so, did the Charter require the drug law be reinterpreted so as to put the burden back on the prosecution to prove the core elements of the offence?

In answer to the first question, the court gave a resounding 'yes'. The court said that the drug law clearly subverted the presumption that a person is innocent until proven guilty. Having made that decision, the court had three options.

First, it could try to reinterpret the drug law, placing the burden of proof back on the prosecution, thereby protecting Momcilovic's right to a fair trial. Under the Charter, a court can

reinterpret a law so as to protect rights, but only if that reinterpretation is consistent with what parliament intended when it passed the drug law in the first place.

While it might have been tempted to play the role of human rights warrior, the court concluded that the drug law was unambiguous. Parliament clearly intended that the defendant, and not the prosecution, should bear the burden of proof. While the law might stink to high heaven, the court accepted that only parliament – not the court – could fix it.

Next, the court considered whether the drug law's infringement of the right to a fair trial was justified. The Charter recognises that rights are rarely absolute, and sometimes a law quite rightly impinges on a particular right so as to protect another legitimate interest.

However, in this case, the Victorian Government made no real attempt to explain why the drug law needed to do away with the presumption of innocence.

This left the court with one final option: to issue a declaration notifying the government that the drug law infringes the right to a fair trial. This does not invalidate the drug law, and so represents something of a pyrrhic victory for Momcilovic.

This result might sound odd. After all, the US Supreme Court simply overrules laws that infringe the US *Bill of Rights*.

However, the Charter stops short of giving the Victorian courts an equivalent power, in order to preserve the supremacy of parliament.

The ball is now in the government's court. It must decide whether to amend the law and, if so, how. Quite rightly, the court's decision will provoke public debate in Victoria and elsewhere about how to combat drugs, and how far we're willing to go in winding back fundamental freedoms.

An objective of the Victorian Charter is to promote 'dialogue' between parliament, the executive and the courts. On Wednesday, the judges had their say on the right to a fair trial. Now it is up to the legislators to respond. As befits a democracy, parliament will have the final say.

Edward Santow is a senior lecturer in law at UNSW, and director of the Charter of Human Rights Project at the Gilbert + Tobin Centre of Public Law.

UPDATE IN THE MOMCILOVIC CASE

The Court of Appeal refused Momcilovic's appeal against conviction for drug trafficking but allowed her appeal against her sentence and converted her sentence to a suspended sentence.

Momcilovic continued her appeal against conviction to the High Court. The High Court upheld the appeal on the basis that S5 of the *Drugs, Poisons and Controlled Substances Act* (Vic.) applies in 'possession' cases but not in 'traffick' cases. Under S5 of the Act, a person will automatically be in possession of a drug if it is found on land or premises occupied by the person unless the person can prove otherwise.

In applying this law to Momcilovic's case, the High Court held that she was in possession of the drugs as they were found in her apartment but it was wrong to assume she was trafficking just because the quantity found was beyond the amount deemed reasonable for personal use. The High Court explained that the definition of 'traffick' requires the accused to possess the drug with the intent and distinct purpose of sale, and that Momcilovic's original trial should have considered her purpose. The High Court subsequently quashed Momcilovic's conviction, set aside her sentence and ordered a retrial.

In making this decision, the court declared Momcilovic's case a federal matter and as such the Victorian *Charter of Human Rights and Responsibilities* was irrelevant as it only applies in state matters. Momcilovic lived in Queensland at the time of her trial so her case was technically a 'dispute between residents of different states' and therefore within federal jurisdiction. The High

Court went on to say that the Victorian Court of Appeal should not have considered the Charter or made a declaration of inconsistent interpretation in this case.

The High Court was also asked to declare the Victorian drug laws invalid under S109 of the Constitution due to an inconsistency between the Victorian offence of trafficking and a similar offence in the Commonwealth Criminal Code. The High Court ruled that there was no inconsistency between these provisions.

THE ADVERSARIAL NATURE OF A CRIMINAL TRIAL

The method of trial in Australian courts is the adversary system. This system is based on the two parties to a civil dispute or criminal case battling to win the case, each party acting as the adversary of the other.

In a criminal case, if the accused is found guilty, the prosecution has won the battle. If the accused is found not guilty, the accused has won the battle.

Key features of the adversary system of trial

The key features of the adversary trial are:

- the role of the parties
- the role of the judge
- the need for legal representation
- the rules of evidence and procedure
- the burden and standard of proof.

Party control

Each party has **control of their own case**. As long as the rules of evidence and procedure are followed, each party (accused and prosecution) can decide:

- how to investigate the facts of the case
- how many witnesses to call in the hearing or trial
- what sort of evidence to bring out
- whether to have legal representation
- the method employed to bring out the evidence.

Role of the judge

The role of the judge is an essential element of the adversary system. There must be an **independent umpire** (the judge or magistrate) to ensure that the case is conducted according to the rules of evidence and procedure, and that both sides are treated fairly.

Rules of evidence and procedure

The **rules of evidence** ensure that only evidence that is relevant to the case is heard by the court. Prior convictions are not able to be heard by the court until the sentencing stage, because they may unduly influence the magistrate or judge and jury against the accused. A person should only be tried for the offence as charged, not for other things done in the past. However, in some circumstances the

court may allow **propensity evidence**. This evidence shows that the accused had a tendency to act or think in a particular way as shown by past behaviours or admissions. This evidence may include prior convictions.

The rules of procedure govern the questioning of the witnesses and the accused. **Oral evidence** is given by the witnesses and accused (if the accused elects to give evidence) in the trial. That is, each side is able to question their own witnesses (examination-in-chief) and then the other side tries to show flaws in the evidence given (cross-examination). The side calling the witness is then able to question the witness again to clear up any points which arose during cross-examination (re-examination).

This process of questioning is used to discover the truth. Each side brings out the evidence that shows their side in the best light and highlights the flaws in the other party's case.

Equal representation

For the adversary system to work effectively, **each party should be represented by legal representatives with equal skill and efficiency**. In this way, they are able to present the best evidence in support of their case and expose the truth. If the parties are not equally represented then the person with the most skilled legal representative may win the case, regardless of the truth. If a serious crime has been committed, the prosecution may use a highly skilled barrister to prosecute the case. An accused may be at a disadvantage if he or she cannot afford to hire a legal representative of similar calibre.

People who feel that they did not receive justice in the courts may have the opportunity to appeal to a higher court. This of course requires more money.



Figure 4.18

The adversary system in operation in the High Court

Advantages and disadvantages of the adversary system

The adversary system has been in operation in Australia since colonisation and is an accepted method of trial. However, the adversary system may, in some instances, lead to an unjust outcome.

Advantages of the adversary system	
the truth should emerge through questioning of the witnesses	Both sides are striving to win. Both sides question the witnesses and try to show their case in the best light. During this process the truth should emerge.
it relies on oral evidence	Because witnesses are required to give oral evidence, judges, magistrates and juries are better able to see whether a witness is telling the truth.
each party is in control of their own case	The parties are more likely to feel satisfied with the outcome if they are in control of running their own case. They may feel that they have done everything possible to win the battle.
the decision-makers are impartial	Decisions in the courts are made by impartial decision-makers: the magistrate in the Magistrates' Court, the judge in a higher court, or the jury if a jury is present. The public are more likely to feel confidence in the decision of impartial decision-makers.
Disadvantages of the adversary system	
unequal representation	The parties to a case can be greatly disadvantaged if their legal representative is not well prepared. Parties to a case in court need to be represented by someone who can bring out the evidence that is advantageous to them, otherwise they are not in an equal position to win the case.
the truth may not emerge	The process of questioning and cross-examination should bring out the truth but one party may be withholding vital evidence that is not known to the other side and that may not be brought out in the trial. The main aim of both parties is to win the case, rather than get at the truth.
oral evidence may lead to incorrect assumptions	Oral evidence depends on the witnesses being able to answer questions correctly and convincingly in court. If they make mistakes, they can give the wrong impression and affect the outcome of the case.
the high cost of proceedings	This is primarily due to the parties' need to control and win their cases. To do this, they need to employ the best legal representative. If a person is accused of a crime, it is very expensive to show that the evidence held by the prosecution is incorrect. In a civil case it is very expensive for the plaintiff to bring a case to court, and it is also very expensive to defend a case.
the legal expertise of judges is underused	Judges generally only ask questions to clarify points made by the witnesses. They rarely call witnesses themselves. If they did ask too many questions of the witnesses they might be thought to be favouring one side of the dispute. This could be grounds for appeal.

The adversary system can lead to a miscarriage of justice

It has been said that a trial using the adversary system can be compared to a stage with the two main protagonists (the prosecutor and the accused's counsel) as the actors, and the jury awards the case to the side which puts on the best show. This process can sometimes result in a miscarriage of justice if:

- the case for the accused is rushed or put together in a short time
- one side withholds evidence, is late in disclosing evidence or fabricates evidence
- unreliable forensic procedures lead to the conviction of the wrong person
- an over-reliance on expert evidence serves to confuse rather than clarify the issue in dispute.

LEARNING ACTIVITY 4.11

The adversarial nature of a criminal trial

- 1 Explain the major features of the adversary system.
- 2 Give an advantage and a disadvantage for each of these features of the adversary system:
 - a party control
 - b strict rules of evidence and procedure
 - c role of the judge.
- 3 How important is equal representation in a trial? Explain.
- 4 To what extent do you think the adversary system is an effective method of trial in our courts? Discuss.

THE ROLES OF COURT PERSONNEL IN A CRIMINAL TRIAL

For serious criminal cases a **prosecutor** will bring the matter to court. Prosecutors work under the guidance of the Director of Public Prosecutions, who is responsible for bringing all criminal matters to trial on behalf of the state. The barrister acting for the accused is referred to as the **accused's counsel**. Trained police, known as **police prosecutors**, take the accused to court in minor criminal cases heard in the Magistrates' Court.

The prosecutor tries to prove that the accused person is guilty. In a **civil case** the party bringing the case is called the **plaintiff**. The plaintiff has to prove that the other party is legally in the wrong. The party defending the case is known as the **defendant**.



Figure 4.19
Inside the County
Court

Court personnel

Barrister

A barrister is briefed (given all the information about a case) by a solicitor and will appear in court on behalf of a client. A barrister who provides outstanding legal service can apply to the Chief Justice of the Supreme Court to be known as a senior counsel (SC). This allows the barrister access to high-profile cases and generally higher fees.

BELIEVE IT OR NOT!

There was a lawyer in New York City with the name of Abel Crook (1841–1917). He was called to the New York Bar in 1864 and practised law for 55 years.

Figure 4.20 Barrister Georgia McMaster, President of Australian Women Lawyers, in the Supreme Court building in Darwin



Bench clerk

A bench clerk works in the Magistrates' Court and the Children's Court and announces the cases and calls people into court. He or she helps the magistrate draw up paperwork, swears in witnesses and directs people where to stand. The bench clerk is usually a deputy registrar or trainee registrar.

Court reporter

The court reporter records all the proceedings of the court and produces the official transcripts of court hearings.

Judge

The role of the judge is to conduct trials. The judge ensures that the rules of evidence and procedure are followed and in some instances asks the witnesses questions to clear up points made. In a criminal trial the judge decides on the sanction if a person is found guilty. In a civil trial when there is no jury the judge decides on the outcome of the case. A judge is usually addressed as 'Your Honour'. Judges are referred to as justices in the Supreme Court and the High Court.

Judicial registrar

These registrars must be qualified to practise law and can hear less complex matters in the Magistrates' Court, Federal Court and Family Court. Judicial registrars are not judges, but they exercise more power than ordinary registrars.

Judge's associate

The judge's associate sits in front of the judge in the County Court and Supreme Court. He or she performs various administrative and court duties to assist the judge, such as completing paperwork, liaising with parties, keeping a record of court proceedings and taking verdicts.



Figure 4.21

A magistrate in the Magistrates' Court

Magistrate

The Magistrates' Court is presided over by a magistrate. The magistrate ensures that the rules of evidence and procedure are followed, can ask witnesses questions to clear up points made and decides on the sanction in a criminal case and the civil remedy in a civil case. Magistrates are usually barristers or solicitors who have at least five years' experience.

Prothonotary

The prothonotary is the chief clerical and administrative officer in the Supreme Court. The prothonotary's office is the place where court documents are filed, searches of court files are conducted and court fees are paid.

Registrar

The registrar is the manager/administrator of the court. A registrar or deputy registrar (or member of the registry staff) will assist people at a court counter.

Solicitor or duty solicitor

A person with a legal problem will go to see a solicitor. The solicitor will give advice about the law and the person's rights under the law. If the matter has to go to court, the solicitor will appear in court on behalf of the client (usually only in the Magistrates' Court) or will instruct a barrister to appear in court on behalf of the client. A duty solicitor, from Legal Aid Victoria, is available at court for anyone who does not have their own solicitor.



Figure 4.22

Solicitor advising clients

Tipstaff

The tipstaff announces that the court is in session and administers oaths or affirmations to witnesses in the County Court and Supreme Court. An important duty of the tipstaff is to look after the jury. He or she escorts jury members into the courtroom and into the jury room, and deals with any practical matters for the jury. Sometimes the role of the tipstaff is undertaken by a second associate.

**Figure 4.23**

Tipstaff, judge and judge's associate

DID YOU KNOW?

Retired judges and magistrates can be appointed as **reserve judges** or **reserve magistrates** for five years, but not beyond the age of 78, to assist the court system in times of high demand.

LEGAL AID ADVICE AND ASSISTANCE

Victoria Legal Aid

Victoria Legal Aid (VLA) was established to provide free legal advice to the community and low-cost legal representation to those who cannot afford to pay a lawyer. Victoria Legal Aid provides a range of services to help people with their legal problems. Its aim is to help protect the rights of socially and economically disadvantaged Victorians in areas of criminal law, family law and some civil law matters.



USEFUL WEBSITE

Victoria Legal Aid www.legalaid.vic.gov.au

The services VLA provides include:

- **free legal advice** – VLA has offices across the state where people can make an appointment to discuss a legal problem. It also operates a telephone information service in a range of languages.



Figure 4.24 If you have a legal problem you can contact VLA.

- **grants for legal assistance or representation** – A person, with the assistance of their lawyer, can apply to VLA for money to help fund their legal case. Due to the limited resources of the VLA, the VLA cannot fund all cases. Priority is given to specific types of cases where the grant will be of benefit to the applicant or the public. VLA mainly funds criminal and family law cases but will provide assistance in other cases involving mental health, immigration and discrimination law. All grants are capped and assistance is not always free. A means test will determine if a person has sufficient assets or income to partially pay for their legal representation.
- **duty lawyers** – VLA has duty lawyers who work at a range of courts and tribunals across the state. They can provide free legal advice or they can represent a person in court if prior contact is made. While their service is free, the duty lawyer cannot help everyone. Priority is given to people with the most need who cannot afford to pay for a lawyer; for example, children, people with an intellectual disability or mental illness, Indigenous or non-English-speaking people, people in custody facing a serious charge or people at court for a family violence issue.
- **legal information and education** – VLA runs a telephone legal information service, provides legal information online and has a community law library. It produces a number of free legal publications for general use in the community and oversees the administration of funds for community legal centres. VLA also advocates for law reform where it thinks government policy or the law creates disadvantage or injustice.
- **roundtable dispute management (RDM)** – This alternative dispute resolution process is available in family disputes, including cases involving family violence. A case manager works with both parties in preparation for an RDM conference where the parties will be encouraged to find a realistic settlement to the dispute. Parties must have a lawyer with them at the conference.

CASE STUDY

Legal aid refused

James Rainsford was refused legal aid because he had gambled away \$13900 when he knew he faced criminal charges. It was claimed that the money could have been used to pay for his own lawyer. As Rainsford was accused of rape he would have had to question the 16-year-old victim in court. Fortunately for him, and the victim, a barrister offered to represent him free of charge.

CASE STUDY

Squeeze in legal aid stops Supreme Court case

Matwali Chaouk's attempted murder trial was postponed in the Supreme Court because he had exhausted all avenues of funding including a legal aid grant. A tightening of legal aid funding meant that the accused could not be represented by a barrister and an instructing solicitor in court. His grant paid for his instructing solicitor's trial preparation and two half days in court.

Justice Lasry believed that the absence of a solicitor to assist counsel throughout the trial (estimated to take two to three weeks) would increase the risk of an improper conviction and result in an unfair trial. The Director of Public Prosecutions appealed this decision. The Victorian Human Rights Commission intervened in the appeal on the basis that a fair trial is a fundamental human right. The Court of Appeal upheld Justice Lasry's ruling. As a result, Victoria Legal Aid amended its eligibility guidelines allowing more flexibility in the funding for a second lawyer in criminal trials, which allowed Chaouk's trial to proceed.

Chaouk was subsequently found not guilty of attempted murder but guilty of reckless conduct endangering life for shooting at people in a vehicle on a public street. He was sentenced to five years' imprisonment with a non-parole period of three years.

Commonwealth schemes for legal or financial assistance

Each of the eight legal aid commissions in the Australian states and territories receive funds from both the Commonwealth and state/territory governments to provide legal assistance to disadvantaged persons. The Commonwealth Government also provides financial assistance to Community Legal Centres.

The Commonwealth Attorney-General's Department administers 26 financial assistance schemes. These schemes provide limited legal assistance in cases that give rise to a special Commonwealth interest and where legal aid is not available from the state and territory legal aid commissions. Applicants are subject to guidelines which usually include hardship and reasonableness tests. Some examples of financial assistance provided are for people who:

- lodge a test case involving Commonwealth law that is of significant public interest
- appear before a Royal Commission or Inquiry
- make a native title claim.

Community legal centres

There are 51 community legal centres across Victoria that specialise in providing assistance to people in one or more areas of law or in a particular geographical location. For example, the Tenants Union of Victoria will assist renters with tenancy disputes, while the Barwon Community Legal Service provides general legal assistance to people in the Geelong/Barwon, Colac and Warrnambool regions.

The staff running the centres (both legal and administrative) may be paid workers or volunteers. Law students often volunteer to work in these centres to gain practical experience. The centres are funded from a variety of sources including state, federal and local governments, philanthropic foundations and charitable contributions. The centres help people with legal problems, provide free legal advice and help people access the appropriate legal information and assistance. They also contribute to community education and law reform programs.



Figure 4.25

The Fitzroy Legal Service, one of the oldest community legal centres in Australia, opened in 1972 and plays a significant role in legal education and assistance.

Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service (VALS) provides advice and assistance in the areas of criminal law, civil law and family law to Indigenous people across Victoria. Victoria Police will contact VALS whenever an Indigenous person is taken into custody. The provision of legal assistance is means-tested. Salaried workers generally deal with most cases.

Law Institute of Victoria

The Law Institute provides an online directory to help the public find legal professionals and free fact sheets covering a range of legal topics.

Law Aid

Law Aid is a scheme established by the Victorian Government and the private legal profession to assist people who are unable to afford the cost of civil litigation. The scheme is a charitable trust administered by the Law Institute and the Victorian Bar Council. People who are interested in using this scheme should contact their own solicitor to complete an application form.

The types of civil litigation funded include personal injuries claims, claims against institutions involving oppressive behaviour, some property claims, wills and estates matters, and professional negligence claims.

Law Aid only deals with civil law cases where the solicitor agrees to work on a 'no win, no fee' basis. Assistance is only available in cases that have merit and for people who cannot pay for legal assistance.

Justice Connect

Justice Connect, once known as the Public Interest Law Clearing House, is a non-profit organisation which specialises in coordinating the pro bono work of the legal profession in cases of public interest. Pro bono work is work that is provided free or at a reduced fee.

The aim of Justice Connect is to provide access to the legal system for eligible clients. Eligible clients are non-profit associations with public interest objectives or individuals with a legal matter of public interest who cannot pay for legal assistance elsewhere. Justice Connect matches clients with pro bono members.

Community information centres

These centres (also called citizens' advice bureaus or community information and support services) are located in local communities and offer people in the area a range of services including legal and financial advice, assistance in finding accommodation and emergency relief. Staff in these centres are trained and work mainly on a voluntary basis. The centres are often linked to local councils, service agencies or community organisations for funding purposes.

Justice service centres

The Department of Justice operates over 30 justice service centres across metropolitan and country Victoria. These centres bring together a number of services, giving the community easy access. At each centre the public can access information and staff from Community Correctional Services; the Sheriff's Office (which enforces sanctions, criminal warrants and warrants for the non-payment of fines); Consumer Affairs Victoria; the Dispute Resolution Centre of Victoria; Births, Deaths and Marriages; and the Regional Aboriginal Justice Advisory Committee.

The department also operates **mobile justice service centres**. These are specially designed vehicles that are equipped to provide similar information in more rural or remote areas.

LEARNING ACTIVITY 4.12

Court personnel and legal advice

- 1 How does the role of a barrister differ from the role of a solicitor?
- 2 How would you address a judge?
- 3 Distinguish between the role of the judge's associate and the tipstaff in the County Court and Supreme Court.
- 4 Explain the role of a magistrate.
- 5 What is the role of Victoria Legal Aid?
- 6 Is legal aid available to everyone?
- 7 Read the case studies 'Legal aid refused' and 'Squeeze in legal aid stops Supreme Court case'. Do you think Legal Aid Victoria was justified in refusing to fund each person's legal case? Explain your answer.
- 8 What is a duty lawyer?
- 9 What benefits do community legal centres provide?
- 10 How does the Law Aid scheme operate?
- 11 In what circumstances might a person attend a community information centre?
- 12 Is there a community information centre (citizens' advice bureau) near you?
- 13 What is the meaning of pro bono? How is it administered?
- 14 If you were charged with a crime, where could you go for assistance? Describe three avenues of assistance available to you.

THE ROLE OF A CRIMINAL JURY

Juries are used in the original jurisdiction of the County Court and Supreme Court. Juries are never used in the Magistrates' Court and are not used in appeals. A **jury of 12** is compulsory in criminal cases in the County Court or Supreme Court, where the accused pleads not guilty. Three extra jurors can be empanelled for lengthy trials in case someone falls ill.

The jury system is based on **trial by peers**. The jury in a criminal trial must listen to all the evidence, piece the evidence together and decide whether the accused is guilty or not guilty. In a civil case the jury decides who is in the wrong. It is the judge's role to explain the law to the jury. The jury considers the evidence with respect to the law and makes its decision.

A criminal jury must first try to reach a unanimous verdict. If this is not possible, a judge may allow a majority decision for criminal offences other than murder, treason, trafficking or cultivating a large commercial quantity of drugs or narcotic plants and Commonwealth offences. For a **majority verdict**, 11 out of 12 jurors must agree. If a majority verdict cannot be reached, there is a **hung jury**. This means that the accused has not been found either guilty or not guilty, and can be tried again at a later date.

The finding of guilt must be made **beyond reasonable doubt** in a criminal case. This means that if a member of the jury is not sure that the accused is guilty, he or she must state 'not guilty'. It is not possible for a juror to be absolutely certain because he or she was not there when the crime was committed, but they must be as sure as rationally possible. Reasonable in this instance is what the average person in the street would believe to be the case; that is, when the evidence is looked at in a logical and practical manner.

Operation of a criminal jury

Selection of jurors

People who are registered to vote at elections may be randomly selected for jury service from the electoral roll. People who are randomly selected will be notified by mail and must return a **questionnaire** to determine whether they are eligible and available to serve on a jury. If eligible, they will be sent a **jury summons** which requires them to attend court for jury service at a later date. People who do not return the questionnaire or do not attend jury service risk a substantial fine.

All people who attend jury service, whether they are selected to sit on a jury or not, are paid for their days in attendance. An employer is required to pay a juror his or her normal wage less the amount the person receives for jury service.

Some categories of people are not able to serve on a jury or request to be excused.

Ineligible

People may be ineligible to serve on a jury because of their occupation. This includes people who in the last 10 years have worked as governors, police officers, legal practitioners, judicial officers, bail justices, ombudsmen, parliamentarians and public servants employed in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration.

People who cannot understand or effectively take part in the proceedings are also ineligible. Such people may have an intellectual disability, a mental illness, a physical disability which excludes them from performing the duties of a juror, or they may have inadequate knowledge of English.



Figure 4.26
Evidence being
presented to a
criminal jury

Disqualified

People can be disqualified from jury service because of what they have done. For example, people may be disqualified because they have been in prison, they have recently served a community correction

order, they have been convicted and sentenced for an offence within the last two years or they are currently charged with an indictable offence. This disqualified category also includes people who have been declared bankrupt and have not obtained a discharge.

Excused

People can apply to the Juries Commissioner to be excused from jury duty if they have a good reason. Possible reasons include ill health, excessive inconvenience to get to the court, substantial hardship in attending court, or having to care for dependants.

EXTRACT

Section 8 *Juries Act 2000* (Vic.)

Juries Commissioner may excuse for good reason

- (1) A person, or another person on their behalf, may, at any time before the person becomes a member of a panel, apply to the Juries Commissioner for the person to be excused from jury service for the whole or any part of the jury service period.
- (2) On an application under subsection (1), the Juries Commissioner may excuse a person from jury service for the whole or any part of the jury service period if satisfied that there is good reason for doing so.
- (3) For the purposes of subsection (2), good reason includes any of the following –
 - (a) illness or poor health
 - (b) incapacity
 - (c) the distance to travel to the place at which the person would be required to attend for jury service is –
 - (i) if the place is in Melbourne, over 50 kilometres; or
 - (ii) if the place is outside Melbourne, over 60 kilometres
 - (d) travel to the place at which the person would be required to attend for jury service would take excessive time or cause excessive inconvenience
 - (e) substantial hardship to the person would result from the person attending for jury service
 - (f) substantial financial hardship would result from the person attending for jury service
 - (g) substantial inconvenience to the public would result from the person attending for jury service
 - (h) the person has the care of dependants and alternative care during the person's attendance for jury service is not reasonably available for those dependants
 - (i) the advanced age of the person
 - (j) the person is a practising member of a religious society or order the beliefs or principles of which are incompatible with jury service
 - (k) any other matter of special urgency or importance.

Source: Section 8 *Juries Act 2000* (Vic.)

INCREASING ELIGIBILITY FOR JURY SERVICE

The *Juries Amendment (Reform) Bill 2010* aimed to increase community representation on juries by reducing the categories of occupation which render a person ineligible for jury service and reducing the period after ceasing any of the ineligible occupations from 10 years to five. This Bill was abandoned with the change of government in Victoria in 2010.

Challenges

If a person is called for jury service and is not ineligible, disqualified or able to be excused, he or she must attend when required. This will initially be for one or two days, when these prospective jurors will form a **jury pool**. As new trials begin, groups of potential jurors will be selected from this pool to form a **jury panel** and are taken to a court room for the final selection process.

Once in the court, any juror who cannot do their jury service for a good reason can ask the judge to be excused. A courtroom selection process then begins where both parties in a case can either select, or object to, a particular person being on the jury. Each juror's name (or number in some cases) is read out and the barristers may challenge him or her. In a criminal case the accused's counsel is able to challenge up to six jurors without giving a reason (**peremptory challenges**), and is allowed **unlimited challenges** if there is a legitimate reason (**challenge for cause**).

The prosecution is able to **stand aside up to six jurors** without a reason, and is allowed unlimited challenges with a reason. Those jurors who are asked to stand aside return to the jury pool and may go through the jury selection process for another trial. If a person is not selected for a trial they will be dismissed after their second day in the jury pool.

If a person is not challenged, he or she enters the jury box and becomes part of the jury. Each juror takes an oath (or affirmation) and the judge will briefly explain the jury's roles and responsibilities. The selected jurors are expected to attend court for the duration of the trial. Trials usually last between two and seven days.

At the end of the trial, the jury members are given a certificate of attendance to present to employers, and those who have served on long trials may also receive an exemption certificate from further jury service. In Victoria, it is illegal for jury members to publicly name other jurors or talk about how the jury came to its decision.



Figure 4.27 Generic security tags of jurors

CASE STUDY

No-show juror

Police are investigating breaches of the *Juries Act*. A juror empanelled in a criminal trial failed to show up at court for the trial and wrote comments about the trial on Facebook. The juror phoned the court to say that he was not attending and then went to work. His employer is likely to face charges for telling the juror he could not afford to pay him while on jury duty.

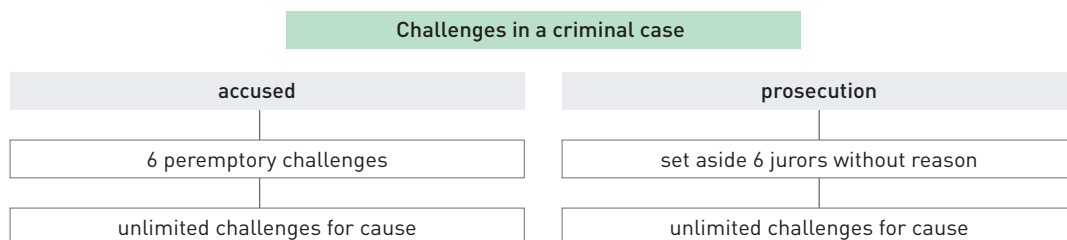


**Figure 4.28**

A prosecutor makes her opening address to the jury.

Impact of jury service on employment

Jurors are paid \$40 a day for the first six days, then \$80 a day. An employer is required to provide the juror with their ordinary pay less the amount paid by the court. An employer must release their employee and cannot dismiss or discriminate against a person for attending jury service. In exceptional cases, the prospective juror can apply to postpone jury service for employment-related reasons or ask for an exemption when selected for a trial estimated to last more than seven days on the grounds that jury duty would cause them or their employer extreme hardship.

Advantages of the jury system

The jury system has been operating successfully for many years. It is generally accepted for the following reasons.

Advantages of the jury system	
it provides a system of trial by peers	The members of the jury are picked randomly from the public and are a cross-section of the community. A person being tried can therefore feel confident that they are being tried by ordinary men and women like themselves, not a person in authority.
it provides an opportunity for the general community to be involved	The jury system allows ordinary people to be involved in the legal system by being part of a jury and seeing for themselves how the legal system works. This helps the general community to respect the legal system.
it reflects community values	The people on the jury bring community values into the decision-making process. A jury does not need to give a reason for its decision, therefore it can make a decision based on the jury members' values.
it spreads the responsibility of the decision over more shoulders	The use of a jury allows the responsibility of the decision to be spread over more shoulders, rather than being placed solely on those of a judge.

NOTE

The Jury Directions Act 2013 (Vic.) has streamlined jury directions and reduced their complexity, technicality and length.

Disadvantages of the jury system

Some people criticise the use of the jury system. Some of the problems associated with the jury system are as follows.

Disadvantages of the jury system	
it is not a true cross-section of the community	Trial by peers is the essential element of the jury system, but juries are not always a true cross-section of the community because some people are unable to serve on a jury, such as members of the legal profession or people who have committed a crime. There are also some people who can choose not to be on juries, such as people who care for dependants or who would have to travel long distances to court. The system of challenges also means that some types of people may not be represented on a jury.
it is difficult for jury members to understand complicated evidence	The general public are put into a position where they have to listen to complicated evidence and make a decision of great importance to the parties involved.
jurors may be influenced by the arguments of clever barristers	Every barrister will try to influence the jury to find in favour of their client. Barristers play on the emotions of the jury and will often make powerful closing speeches which can cause jurors to put aside logical arguments. The more experienced barristers will have greater success in influencing a jury.
jurors may be influenced by the media	Some of the better known and media-worthy cases will be known to the jurors before they attend court. They could therefore have formed opinions about the case before they hear the evidence.
jurors may have personal biases	Jurors have to be able to put aside all personal biases to be able to make a decision that is fair.
jurors may not follow the law	Because jurors do not have to give a reason for their decision, they may decide to ignore the law and make their decision for another reason. Also, the accused does not know why a decision has been made.

LEARNING ACTIVITY 4.13

The role of a criminal jury

- 1 Are juries used in all courts? Explain which courts use juries and under what circumstances.
- 2 How many jurors usually hear criminal cases in the County Court and Supreme Court?
- 3 What is the difference between a unanimous verdict and a majority verdict in a criminal case?
- 4 What would the decision of the jury be if 10 jurors thought the accused was guilty and two of the jurors were not sure?
- 5 When must a jury in a criminal trial return a unanimous verdict?
- 6 Outline the jury's role in criminal cases. Make sure you cover:
 - what the jury decides
 - how they make their decision and how sure they must be of this decision
 - what happens if the jury cannot decide or agree on an appropriate decision.
- 7 Draw a flow diagram showing the steps taken to summon a person to attend court for jury duty through to the selection of a jury for a trial.

8 Why are police, legal practitioners and judicial officers ineligible for jury service?

9 Why may some people be disqualified from jury service?

10 What is a peremptory challenge?

11 View a film

Arrange to view the film *Twelve Angry Men* and answer the questions.

- a What did the judge outline in the summing up to the jury in this case?
- b Try to find the occupation of each juror. Would these people be eligible to serve as jurors in Victoria? Explain.
- c What was the role of the foreman in this case?
- d What does the term 'beyond reasonable doubt' mean?
- e What evidence in this case led the jurors to have a 'reasonable doubt'?
- f Why does the eighth juror vote 'not guilty' and what impact does this have on the jury's decision?
- g What 'hidden' reasons did some of the jurors have for believing that the accused was guilty in this case?
- h A jury does not need to give reasons for its decision. Give one reason for and one reason against juries having to give reasons for their decision.
- i Would you want to serve on a jury? Give reasons for your answer.

12 Debate

Organise a class debate on the topic: 'The current jury system should be replaced with a system of professional jurors who are allocated to cases as they arise, according to their expertise.'

- Choose two teams – one to argue in favour of the proposition and one against.
- The rest of the class is to participate in the debate by asking each team questions.
- Each individual class member is to decide which side of the argument they agree with, and write a report giving reasons.



Figure 4.29
Part of a jury

BELIEVE IT OR NOT!

After a Boston woman listed her pet cat as a member of the family on the Census, the cat was sent a jury service summons. The court rectified the error when the owner informed the Jury Commissioner that the cat named Sal was unable to 'speak or write English' and provided a veterinary document which described Sal as a cat.

BELIEVE IT OR NOT!

A Victorian Supreme Court murder trial was aborted when a juror fell asleep during the judge's opening directions to the jury. The accused's counsel asked for the jury to be discharged and the prosecutor did not oppose the application on the grounds that he had heard the juror snoring. The jury was discharged and a new jury empanelled.

THE CAPACITY OF CRIMINAL PROCESSES TO ACHIEVE JUSTICE

In this chapter you have looked at the court hierarchy and courtroom processes used to resolve criminal cases. You need to examine the capacity of these processes to achieve justice.

Justice can be viewed differently by one society compared to another and over time. Three elements that are seen as integral to achieving justice in our legal system are:

- entitlement to a fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes.

Table 4.7 A fair and unbiased hearing

ACHIEVING A FAIR AND UNBIASED HEARING	PROBLEMS
• right to silence – Suspects are allowed to remain silent during police questioning and during their trial if they are charged with a crime. In this way they can protect themselves from saying something that may incriminate them or show them in a bad light. • a suspect can only be questioned for a reasonable time – A person can become very tired and distressed during extended police questioning and may say something that can be construed as admitting guilt. • rules of evidence – During a trial, evidence that may be unsound, such as hearsay evidence, is not accepted in court (hearsay evidence is evidence that is gathered by one person from another person, i.e. the person reporting the evidence has no direct experience of that evidence). • rules of procedure – The truth is arrived at by the court through a process of questions and answers, with each side being able to question the other. • the adversary system – The adversary system allows the parties to fight to win their case, employing a legal representative of their choosing. • the jury system – The jury system provides trial by peers, which provides an ordinary person's understanding of a set of circumstances.	• the parties may not have equal representation – If one party has better legal representation than the other, then injustices can occur because one party is better able to bring out evidence in such a way as to favour their client. • the adversary system relies on winning the case rather than getting at the truth • juries may be confused by complicated evidence – The role of the jury is complex in that they have to listen to complex evidence given in a question-and-answer format, rather than chronologically. • juries may not be a cross-section of society • media influence – The jury may be influenced by media reports of a crime before they hear the evidence in court.

Table 4.8 Effective access to the legal system

EFFECTIVE ACCESS TO THE LEGAL SYSTEM	PROBLEMS
• a court hierarchy – A court hierarchy allows people who have been convicted and sentenced for a crime to appeal to a higher court. • levels of courts – There are different levels of courts so cases can be heard at the court most appropriate to the seriousness of the crime committed. • legal assistance – Various types of legal assistance are available, including Victoria Legal Aid and Law Aid.	• people may not know their rights – Victoria Legal Aid provides free consultations and brochures but people may not be aware of their rights, although the police should inform suspects of their rights. • suspects may not be eligible for legal aid – Due to limited resources, Legal Aid grants are means-tested, capped and restricted to certain types of cases. • high cost of defending a charge – If a person is not eligible for legal aid, they may have to pay large sums of money for legal representation.

Table 4.9 Timely resolution of disputes

TIMELY RESOLUTION OF DISPUTES	PROBLEMS
• committal proceeding – A committal proceeding is held to avoid an accused continuing to be charged unnecessarily in cases where police have insufficient evidence. • summary hearings – Most criminal offences are heard in the Magistrates' Court (either summary offences or indictable offences that can be heard summarily), which is quicker and cheaper. • directions hearings – Directions hearings are designed to speed up the trial by resolving issues before going to court. • early disclosure and reduction of delays – Changes in the law will help reduce delays in bringing people to court and encourage early disclosure of evidence so the accused can be aware of the evidence against him or her.	• committal proceeding – A committal proceeding is a further process for the accused to go through and can mean that it takes longer to get to a trial. • remand – If a person is held on remand, they have not been found guilty but they are being held in prison as if they are guilty. • the adversary system – The adversary system and process of questioning witnesses make the trial longer. It would be quicker if the judge or magistrate asked most questions or if the witnesses could give written statements rather than having to answer questions orally. • the jury system – Because barristers have to ensure the jury understands the evidence, they have to take longer to explain points.

PRACTICE EXAM QUESTIONS

- 1
 - a Outline the jurisdiction of the Children's Court. (2 marks)
 - b 'The adversary system gets at the truth.' Discuss this statement. In your discussion comment on the advantages and disadvantages of the adversary system. (10 marks)
 - c Identify four rights protected by the Victorian *Charter of Human Rights and Responsibilities* and explain how these rights are protected in criminal proceedings. (8 marks)
- 2
 - a Describe the role of a jury in a criminal trial. (4 marks)
 - b Describe the selection process for jurors in a criminal case. (4 marks)
 - c 'The jury system should be abolished.' Discuss, looking at the advantages and disadvantages of the jury system. (12 marks)

Note: Do not list the advantages and disadvantages. Present an argument linking each advantage with a disadvantage.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK VISUAL REPORT

Court hierarchy

You have been asked to teach the court hierarchy to a class of hearing-impaired children. Although the children can lip-read you want to make the lesson as visually informative as possible.

Create a visual report that will explain the court hierarchy to the children. In your annotations:

- outline the jurisdiction of the Court of Appeal, Supreme Court, County Court and Magistrates' Court
- show links between the various courts (for example, the appeal process)
- include information about the various court personnel.

ASSESSMENT TASK CASE STUDY

Martin Smart

Read the case study 'Martin Smart' and answer the questions.

- 1 What is the jurisdiction of the Magistrates' Court in criminal cases? *(1 mark)*
- 2 Why was the Martin Smart case heard in the Magistrates' Court and who decided the case? Explain. *(2 marks)*
- 3 Why is Smart lodging an appeal? *(1 mark)*
- 4 Which court would hear the appeal in this case? *(1 mark)*
- 5 Would a jury be used to hear the appeal? Explain. *(1 mark)*
- 6 Who can represent the accused at the original hearing and in the appeal court? *(1 mark)*
- 7 Using the legislation and past cases provided, prepare:
 - the prosecution's case
 - the case for the accused. *(4 marks)*
- 8 You be the judge. Decide the case and give reasons for your decision. *(4 marks)*

(Total 15 marks)

Martin Smart

Facts

Martin Smart, 18, was charged with theft. On the night of the offence the police set up a blood alcohol testing station on a highway in Smart's neighbourhood. As Smart was exiting the test area he thought it would be 'funny' if he took a fluorescent light that the police had placed on the roadside to guide drivers through the testing station.

Smart was apprehended at the next intersection and the light was found on the back seat of his car. In his police interview Smart said that he wanted to take the light to a party to impress friends. He intended to return it to the steps of the local police station later because after that he had no use for the light. Smart was found guilty of theft in the Magistrates' Court. Smart lodged an appeal based on the fact that the magistrate did not take into account the information given in the police interview.

Relevant legislation

Section 72 of the *Crimes Act 1958* (Vic.) defines theft as 'A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'.

Section 73 (4) of the *Crimes Act* states that 'Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner'.

Similar past cases

R v. Crump (1825) (UK)

Crump was found not guilty of stealing a horse. He stole a number of items and a horse from a stable. Some distance down the road, he set the horse free once he had got the items to a place where he could sell them and therefore had no further use for the horse. He was found guilty of stealing the other items.

Sharp v. McCormick (1985) Victorian Supreme Court

A person took a car part from his employer but intended to return the part if it did not fit his car. He was prosecuted when his employer found he had taken the part without the employer's permission. He was found guilty of theft.

ASSESSMENT TASK MOCK COURT OR ROLE PLAY

Criminal case

Choose an example of a criminal case or make up a scenario of a criminal case. The Martin Smart case in the earlier assessment task could be used. In groups, choose:

- a barrister who will act on behalf of the accused
- an accused
- a prosecutor
- two witnesses for the accused
- one witness for the prosecution.

Make up a list of questions that the prosecutor would ask the accused and the witnesses, and the responses that would be made to the questions. Make up a list of questions that the barrister for the accused would ask the accused and the witnesses, and the responses that would be made to the questions.

Act out the questions and answers; the rest of the class is to act as the judge and jury.

Write a report on the mock court or role play. In your report include a description of the operation of the adversary system and jury system.

(10 marks)

ASSESSMENT TASK REPORT

The criminal courtroom

Write a report on the following aspects of your study in this chapter. This can be presented to the class as a multimedia presentation. Your report is to be designed as advice for a person charged with murder.

- What is an indictable offence?
- Which courts can hear murder offences?

- What is remand?
- What is bail and is the person charged with murder likely to be given bail?
- What are committal hearings and what is their purpose?
- How does the adversary system work and how will it benefit or not benefit the person charged with murder?
- Will a jury be used? Will this be beneficial to the person charged with murder?
- Where can the person charged with murder get legal help?

[20 marks]

ASSESSMENT TASK ESSAY

The effectiveness of the legal system

'The legal system is effective in achieving justice.' Discuss this statement. In your discussion comment on:

- entitlement to a fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes.

[20 marks]

ASSESSMENT STRUCTURED ASSIGNMENT

Court visit

Visit a court operating within the Victorian court hierarchy. Using the material below, report on your visit.

[20 marks]

LAYOUT OF THE COURTS

There is no jury in the Magistrates' Court and the accused will often sit at the front of the main body of the court, in one of the front seats. In front of the accused, at the Bar table, sits his or her legal representative. In a criminal case, the prosecutor sits to the left of the accused counsel, closest to the witness box. The magistrate sits at the raised bench at the very front, facing the court, with the bench clerk immediately below the magistrate, ready to give assistance and swear in the witnesses.

The County Court and the Supreme Court each have a jury box. In a criminal case, the prosecutor and accused counsel sit at the Bar table, facing the judge. The accused counsel usually sits on the left, closest to the witness box, with the prosecutor occupying the right-hand side of the Bar table.

The solicitors who are instructing counsel (assisting) sit opposite their barristers at the Bar table, facing the court. The judge's associate sits in front of the judge, with the tipstaff alongside. The dock (where the accused stands) is usually at the back of the court.

It is possible to move in and out of a court while it is in session, but only if this is done quietly and infrequently. It is, however, expected by the court that no-one leaves or enters the court while a witness is being sworn into the witness box. It is also necessary that all visitors remain silent while the court is in session.

- 1 You should take pencil and paper with you to the court and make notes as the hearing proceeds. Some of the things you should look out for are listed on the next page. Copy the table and make comments on the right-hand side.

The court visit checklist and questions can be used as a guide for reporting on a court visit, and can be taken into court to respond to during the session.

First impression	Is it informal, formal, friendly, comfortable?
Dress	What are the magistrate (or judge), legal representatives and court assistants wearing?
Efficiency	Does the court appear to be dealing with cases quickly and efficiently?
Comprehensibility	Is the case (or cases, if you see more than one) easy to follow?
Fairness	Does it appear that the witnesses and accused are being treated fairly?
Acoustics	Are you able to hear everything clearly?
Comfort	Are the witnesses, legal representatives, accused (or parties, in a civil case) and members of the public able to sit comfortably? Consider such matters as the heating and seating.
Jury (in the County Court or Supreme Court)	Are members paying attention, taking notes, looking bored, looking confused?
Legal representatives	Do you think they are doing a good job? Are some better than others?

COURT VISIT CHECKLIST

- 1 Names of the parties involved.
- 2 Case: civil or criminal?
- 3 **Criminal case**
 - a What is the offence?
 - b Accused pleading guilty or not guilty?
 - c Prosecution: number of witnesses?
 - d Accused: number of witnesses?
 - e Briefly, what are the facts of the case?
 - f Was the accused represented?
 - g Was the accused found guilty?
 - h If guilty, what sanctions were imposed?
 - i At what stage was the past record of the accused introduced?
- 4 **Civil case**
 - a What does the case relate to?
 - b Plaintiff: number of witnesses?
 - c Defendant: number of witnesses?
 - d Briefly, what are the facts of the case?
 - e Did the court find in favour of the plaintiff or the defendant?
 - f What remedy was decided?
- 5 Were the witnesses cross-examined after the examination-in-chief?
- 6 Were the witnesses re-examined after the cross-examination?
- 7 Who was presiding over the court? Did s/he show concern for the accused?
- 8 Which other court officials did you see?
- 9 Was the accused represented?
- 10 Jot down one or two words giving your impression of the accused (e.g. neat, nervous).

- 11 Give one or two words to indicate the condition of the following facilities:
 - a heating
 - b lighting
 - c seating
 - d acoustics.
- 12 Did you notice relatives or friends of the accused in court?
- 13 Describe the composition of the jury (e.g. age, sex, clothing), where appropriate.
- 14 What were your impressions of the jury (e.g. bored, appearing to understand the evidence)?
- 15 What are your impressions of the court proceedings? Circle the words you think are most appropriate:
 - formal/informal
 - quick/slow
 - efficient/inefficient
 - concerned/unconcerned.
- 16 Jot down any legal terms you heard during the court proceedings.
- 17 Give your impression of the court proceedings.

- 2 Find out details of one case. You could check the court lists before going into court to get the names of the cases to be heard in that court that day. (This will help with the spelling of the names.) If the case being heard is a long case, and you only hear a small part of it, you could check the court's website to see if the case is reported or track the case by doing other Internet research.
- 3 Draw a diagram showing the layout of the courtroom.
- 4 After the court visit you should:
 - a describe the functions of any court officials seen during the court session
 - b give the meaning of legal terms heard during the case
 - c note whether you saw any use of legal precedents in the comments made by the judge (or magistrate) or barristers.
- 5 If the court is hearing a variety of cases, or if you moved from one court to another, you could answer the following questions.
 - a How many of the accused seem to fit into the following age brackets?
 - i 18–24 ii 25–34 iii 35–45 iv 46 and over?
 - b How many of the accused pleaded guilty/not guilty?
 - c How many of the accused were male/female?
 - d In your opinion were men and women treated differently during the court hearings?
 - e How many of the accused were legally represented?
 - f How many of the accused were first offenders?
 - g Were the sanctions given for similar offences consistent?
 - h Did you notice any differences in the sanctions given to those people who were represented as opposed to those who were not represented?
 - i Did people generally have legal representation?
 - j What was your overall impression of the visit to the court?
 - k Were some cases more interesting than others? Give reasons.
 - l If there was a jury, what impressions did you gain regarding the effectiveness of the jury system?
 - m Describe the facts of a case heard.



UNIT

2

ISSUES IN
CIVIL LAW



CHAPTER 5

CIVIL LAW

OUTCOME

On completion of this unit you should be able to explain the principles of civil law, law-making by courts, and elements of torts, and apply these to relevant cases.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- the need for civil law
- key principles of civil law
- the distinction and relationship between civil law and criminal law
- an overview of law-making through the courts
- torts, including negligence, defamation and related defences.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about civil cases, using print and electronic media
- discuss, interpret and analyse legal information
- describe the process of law-making through the courts, using illustrative cases
- apply civil law principles to relevant cases
- explain types of torts, their respective elements and related defences.

KEY LEGAL TERMINOLOGY

balance of probabilities The standard of proof in a civil case.

binding precedent A decision of a higher court that must be followed by lower courts in the same hierarchy.

common law/case law/judge-made law Decisions made by judges that form part of the law.

court hierarchy The ranking of courts according to the seriousness of the matters they deal with.

damages A civil remedy (an order of a court) that aims to compensate the person who has been wronged for the injury or loss suffered.

defamation Written or verbal statements that lower a person's reputation in the eyes of the community.

defendant Person against whom a civil action is taken.

disapprove When a court expresses disapproval of a previous precedent but is still bound by it.

distinguish When a court decides that the material facts of a case are sufficiently different to a precedent to make the precedent not binding on that court.

doctrine of precedent The common-law principle by which the decisions of higher courts in a hierarchy are binding on lower courts in the same hierarchy where the material facts are similar.

duty of care A legal obligation to avoid causing harm to a person or group when harm is 'reasonably foreseeable' if care is not taken; there must be a sufficiently close relationship (sometimes referred to as 'proximity') between the two people in order for a duty of care to exist.

injunction A civil remedy, being a court order that stops someone from doing something or compels someone to do something.

jurisdiction The lawful authority or power of a particular court to decide a particular case.

negligence Doing or not doing something a reasonable person would or would not do in certain circumstances, which causes harm or loss to another person.

neighbour principle Used in negligence cases to determine whether a duty of care was owed to the person injured. A person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their 'neighbours'; that is, the people who would be closely and directly affected by their acts or omissions.

obiter dictum A remark made by a judge in passing, which is not binding.

order of specific performance A civil remedy (an order of a court) that requires someone to perform a specific act; usually applied in contract law to order someone to complete a contract.

overrule A new case in a higher court creates a new precedent, which means the previous precedent in a different case is no longer applicable.

persuasive precedent A decision of another court which is influential but not binding.

plaintiff Person bringing a civil action; person who has the burden of proving the case.

precedent A court decision that is followed by another court lower in the hierarchy.

private nuisance An act or omission that substantially and unreasonably interferes with the use and enjoyment of land.

public nuisance An act or omission that interferes with the comfort or convenience of a number of people to a considerable degree.

ratio decidendi The reason for a decision (the binding part of a decision).

remedy A way in which a court will enforce a right, impose a penalty or make another court order for the benefit of the plaintiff. It is aimed at restoring the plaintiff to the position he or she was in before the wrongful act occurred. The most common remedy is damages.

reverse A higher court makes a different decision than a lower court in the same case on appeal.

statute An Act of parliament; a piece of legislation.

sue Start civil proceedings against another person.

tort A civil wrong; an act that injures someone in some way, and for which the injured person may sue the wrongdoer for damages.

trespass to goods Direct interference by one person with another person's possession of goods.

trespass to person Assault, battery or false imprisonment of another person.

INTRODUCTION TO CIVIL LAW

Civil law deals with disputes between two individuals or groups where an individual's or group's rights have been infringed. Governments and companies can also be a party to a civil case, either as the party that has been wronged or as the party that is in the wrong. Examples of the types of disputes that arise include:

- a person making an incorrect statement that damages another person's reputation
- a person carelessly causing harm to another person
- a family dispute
- a person not fulfilling a promise or obligation made under a contract.

Civil law protects the rights of individuals by providing a means for returning the wronged person to the position they were in before the wrong was done. This is done through civil remedies, the most common of which is monetary compensation paid by the party in the wrong to the party whose rights have been infringed.

When people believe their rights have been infringed, they can sue the person who has infringed their rights under civil law. This means they start court proceedings.

THE NEED FOR CIVIL LAW

Civil laws protect the rights of individuals. If an individual's rights are infringed, such as when someone is negligent towards them, they can take the matter to court to ask for compensation as a way of righting the wrong. If there were no opportunity for individuals to take action in court against people who had infringed their rights, some individuals would be exploited by others and it would be survival of the fittest. For example, toy manufacturers could make toys using the cheapest materials without concern for the safety of the children playing with them, people could be made to work in unsafe conditions, and doctors could be careless when dealing with patients.

Civil law therefore provides guidelines for acceptable behaviour in many situations where individuals interact. These laws are enforceable through the courts and tribunals.

Particular types of civil law also serve different needs of the community. For example:

- Contract law aims to ensure that people who make promises under a contract are obliged to stick to those promises, or else compensate the other party to the contract if they fail to comply with the contract.
- Family law ensures some level of harmony or consistency is provided in family disputes; for example, by providing rules on the custody of children.
- Tort law, such as that relating to negligence and defamation, aims to protect the rights of individuals.
- Laws relating to wills and estates aim to provide a consistent set of rules when a person dies.

KEY PRINCIPLES OF CIVIL LAW

The wronged person bringing the matter to court is called the **plaintiff**. The party alleged to be in the wrong is called the **defendant**. The plaintiff will sue the defendant in court or in a tribunal, seeking a **remedy**. A remedy is aimed at returning the plaintiff to his or her position before the wrong occurred. Types of remedies include **damages**, which is a sum of money paid by the defendant to the plaintiff for loss or injury caused to the plaintiff, or an **injunction**, which is a court order forcing the defendant to, or preventing the defendant from, doing something.

The plaintiff has the **burden** of proving that the defendant is in the wrong. The standard of proof is **on the balance of probabilities**; that is, according to which side of the story is most probably correct. This is a less stringent standard of proof than in a criminal case. In a criminal case the accused has to be proved guilty beyond reasonable doubt.

Civil law can be enforced through courts, tribunals and alternative dispute resolution methods such as **mediation**, **conciliation** and **arbitration**.

the onus of proving who is in the wrong	the extent to which the case must be proved
burden of proof	standard of proof
plaintiff	on the balance of probabilities

THE DISTINCTION BETWEEN CIVIL AND CRIMINAL LAW

The aim of a criminal action is to punish the offender. The aim of a civil action is to return the victim to the position they were in before the act took place. This is usually done through monetary compensation. The main difference therefore is the consequence of the action, which is punishment or a civil remedy.

Table 5.1 Different words used in criminal and civil cases

	CRIMINAL CASES	CIVIL CASES
Person bringing the case	prosecution	plaintiff
Other party	accused	defendant
Standard of proof	beyond reasonable doubt	on the balance of probabilities
Consequences	sanctions include: • fine • prison • community correction order	civil remedies include: • damages • order of specific performance
Pre-trial proceedings	committal proceedings, bail or remand	pleadings, directions hearings and discovery
Instigate action	issue a summons or warrant	sue

THE RELATIONSHIP BETWEEN CIVIL AND CRIMINAL LAW

The same behaviour can give rise to a civil dispute and a criminal case. For example, a person who hits another person can be charged with assault, and if this matter goes before a court, they may be found guilty and punished. The victim of the assault may also sue the offender for assault (trespass to the person). If the victim is successful, the offender may have to pay damages to the victim to compensate the victim for any injury suffered as a result of the assault.

In other circumstances, a victim may sue someone who they believe is responsible for a crime. For example, a person may be assaulted outside a nightclub by a security guard. That victim may not only sue the security guard but also the nightclub for failing to take proper care when employing the security guard, or failing to prevent the assault.

A court that is hearing a criminal matter is able to order the defendant, on having been found guilty or convicted of an offence, to pay compensation to a victim. This is known as a **compensation order**.

CASE STUDY

Steven James Hunter convicted

Steven James Hunter, after pleading guilty to the murder of Sarah Louise Cafferkey at Bacchus Marsh on 10 November 2012, was convicted in the Supreme Court and sentenced to imprisonment for life without a minimum term.

Hunter had spent most of his adult life in prison serving sentences for previous offences. At the time he murdered Sarah Cafferkey, he had only completed his last period of parole 11 days earlier.

CASE STUDY

Family seeks legal advice

The *Sunday Herald Sun* reported that Sarah Cafferkey's family is seeking legal advice about a possible **civil action** against the Victorian Government. There are allegations that the government, through bodies such as Corrections Victoria and the Adult Parole Board, acted negligently in that they failed to take reasonable care to ensure the safety of the community when making decisions about the parole of offenders.

CASE STUDY

Victims apply for compensation

A criminal court can order compensation. In some instances, an offender is ordered to pay compensation to the victim. Brother Robert Best was convicted in 2011 of abusing boys while he was a teacher in Ballarat. In 2012, eleven of his victims lodged applications for a compensation order in the County Court of Victoria, which they are entitled to do, seeking compensation from Best.

LEARNING ACTIVITY 5.1

Civil law

- 1 Define the term 'civil law'.
- 2 Can the government be a party to a civil case? Explain.
- 3 Provide two reasons why we need civil laws.
- 4 Who is responsible for commencing a civil case in court?
- 5 What is the standard of proof in the civil case? How does this differ from a criminal case?
- 6 Read the case study 'Jury finds for the plaintiff' and answer the questions.
 - a Is this case a criminal case or a civil case? Explain. In your explanation, point out all the words that influenced your decision.
 - b What was the outcome of this case?

CASE STUDY

Jury finds for the plaintiff

Carol Stingel successfully sued former ATSIC chair Geoff Clark for assault. In February 2007, a Country Court jury of three men and three women found, on the balance of probabilities, that Geoff Clark had led two pack rapes against her in 1971 when she was 16 years old.

The jury ordered Clark to pay \$20 000 in damages and \$70 000 in legal costs. After the case was closed, Stingel said that she had taken back control over her life.

Clark failed to pay the damages owed to Ms Stingel and in June 2009 voluntarily declared himself bankrupt.

- 7 Look back at the case studies 'Steven James Hunter convicted' and 'Family seeks legal advice' and answer the questions.
 - a Explain which is a civil case and which is a criminal case. Give reasons.
 - b Explain the relationship between criminal cases and civil disputes. Comment on these two cases in your explanation.
 - c Explore the reasons why you think the defendants to the action might be Corrections Victoria and the Adult Parole Board, and not Steven James Hunter.
- 8 Give an example of a case where compensation is being sought from a criminal court.

LAW-MAKING THROUGH COURTS

The main purpose of courts is to settle disputes that arise in the community. A court's primary responsibility is to apply existing laws to the facts in cases that come before the court and to make a determination on the case based on those laws.

Sometimes it is difficult for a court to apply the law in a particular case because the parliament may not have passed a law to cover the situation in the case before the court or the relevant law is unclear in its meaning. Because the court must still resolve the dispute, the judge will make a decision and provide reasons for the decision. This is the secondary role of courts; that is, law-making. As this type of law evolves through judicial decisions in legal cases, it is often referred to as **judge-made law**, **case law** or **common law**. Law made through parliament is known as **statute law** or **legislation**.

Precedent

When a court makes a decision in a case that is the first of its kind, the court is said to be setting a **precedent**. A precedent, which is a statement of law made through the courts, may be followed in similar cases that come before the courts in the future. These precedents then form part of the law.

Precedents made in higher courts are followed by lower courts in the same hierarchy. In this way the courts are able to ensure a consistent approach.

For example, if you were leaning back on your chair, your class teacher may decide to punish you because **deliberate unsafe behaviour is unacceptable**. For a consistent approach, other students found leaning back on their chairs should also be punished because their behaviour is also unsafe.

On the other hand, a student who accidentally tripped another in class may not be punished if the teacher decides that the accidental nature of the unsafe act makes it different (distinguishes it) from the other cases above, which were deliberate. The most important aspect of the teacher's decision is the **reason given for the decision** – that deliberate unsafe behaviour is unacceptable. The precedent created in the past should be a guide to teachers in similar situations.

Similarly, legal precedents are established through court decisions. The most important part of the judgment is the reason for the decision. This is known as the **ratio decidendi**. To ensure consistency in decision-making, courts ranked lower in the same hierarchy must follow the ratio decidendi of superior courts.

Precedent does not apply to sanctions or remedies handed down by the court. It is not the sentence (in criminal cases) or remedy (in civil cases) that is the precedent for future decisions; it is the reason given for the decision that is the precedent. Using the example above, a teacher may set a precedent by deciding that deliberate unsafe behaviour is unacceptable when a student is leaning back on the chair, but students may be given different punishments depending on the circumstances of the case (for example, one student may lean back in a much more deliberate and dangerous way than another, and therefore may get a harsher sanction than another).

CASE STUDY

Example of ratio decidendi

In *Pervan v. North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, the High Court had to consider the defences available in a defamation action. The High Court found that, when considering the 'fair comment defence' (a defence available to a defendant in a defamation case where the defendant claims that the statement was made in the public interest), the defence is **only available if the facts on which the comment is based are either notorious or are stated or referred to in the published material**. This is to enable readers to decide for themselves whether the comment is fair, rather than relying on the word of the publisher. This formed the ratio decidendi of the case and became a precedent.

Donoghue v. Stevenson [1932] AC 562

One of the most famous precedents set in common law is the British case of *Donoghue v. Stevenson*, also known as the **snail in the bottle case**. This case was about a soft drink manufacturer, David Stevenson, who made bottles of ginger beer. May Donoghue's friend purchased a bottle of ginger beer for Donoghue. After she had drunk half the contents of the bottle, a decomposed snail was poured out of the bottle. She became ill. She did not have a contract with the café or the manufacturer because she did not buy the bottle of ginger beer.

She claimed the manufacturer had been negligent in the washing of the bottles before filling them with ginger beer. She sued the manufacturer for negligence. The House of Lords found that the manufacturer had been negligent. Because the bottle was opaque, Donoghue did not have any opportunity to check the bottle's contents before drinking it.

Before this case, the legal concept of negligence did not exist. The ratio decidendi in this case provided the guiding principle for the law of negligence and this principle continues to be used today. Put simply, the ratio decidendi in this case is that a person owes a duty of care to those who they can reasonably foresee will be affected by their actions.

EXTRACT

Commemorating the Paisley snail case

Michael McKiernan, 7 March 2012, *Legal Feeds*, the blog of *Canadian Lawyer & Law Times*

While thousands of golf enthusiasts flock every year to the sport's Scottish spiritual home, St Andrews, tort litigators are more interested in a small town about 150 kilometres west of there that a retired British Columbia judge has dubbed the 'birthplace of the modern law of negligence'.

From May 25 to 26, Paisley, Scotland, will play host to the Paisley Snail Conference, an international event to mark the 80th anniversary of the UK House of Lords' decision in *Donoghue v. Stevenson*.

'It was the beginning of manufacturers' liability and consumer protection in the law of tort,' says former [British Columbia] Court of Appeal Justice Martin R. Taylor, now associate counsel at Vancouver firm Hunter Litigation Chambers.

The 1932 judgment came down four years after May Donoghue and a friend walked into Paisley's Wellmeadow Café, where her friend bought her a bottle of Stevenson's ginger beer. Part way through the drink, she discovered a partially decomposed snail in the bottle, resulting in shock and treatment for gastroenteritis.

Unable to sue the café owner because she had not bought the drink herself, Donoghue launched an action against the drink's maker. Stevenson's moved to have the action dismissed as disclosing no cause of action, and the case finally ended up at the UK's top court, the House of Lords. Lord Atkin, siding with Donoghue, summed up the case in a much-quoted judgment.

'The rule that you are to love your neighbour becomes in law you must not injure your neighbour ... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour,' Atkin wrote.



Figure 5.1

Memorial at the site of the former Wellmeadow Café where Ms Donoghue drank the ginger beer

Binding precedent

A binding precedent is one that must be followed by courts lower in the same hierarchy. A precedent is considered to be binding on a new case when:

- the material facts of the precedent are similar to the material facts of the new case
- the precedent was set in a higher court in the same hierarchy as the new case.

A decision of the Supreme Court is therefore binding on decisions in the County Court and the Magistrates' Court, but not binding on the Court of Appeal or the High Court. In this way there is consistency in the way cases are decided.

Persuasive precedent

Precedents from courts in other states or other countries are not binding on Victorian courts as the decisions come from courts outside the Victorian court hierarchy. A decision in another court hierarchy may have made an important statement of law and this may persuade a court to choose to follow the precedent. This precedent is therefore not binding, but persuasive. The court can choose whether or not to follow the earlier decision in deciding the case currently before the court.

Superior courts do not have to follow precedents set in lower courts, but may consider the decision in the earlier case as a persuasive precedent. Therefore, the High Court does not have to follow a precedent set in the Supreme Court, but may be persuaded by it in the decision it makes. Courts of the same level are persuaded and not bound by the decisions of its own court. Therefore, the Supreme Court is persuaded by previous decisions made by that court.

CASE STUDY

Grant v. Australian Knitting Mills Ltd [1936] AC 85

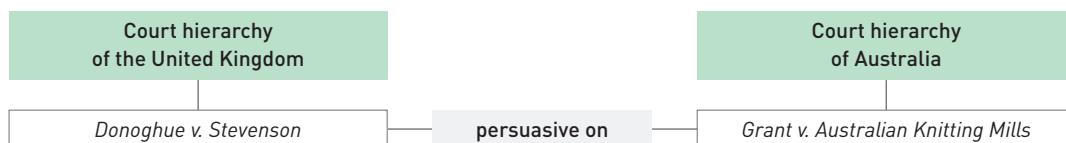
In 1936, the courts decided *Grant v. Australian Knitting Mills* and used the British case *Donoghue v. Stevenson* ruling as a guide. A man (Grant) purchased a pair of underpants and found when he wore them he got a rash. He had the underwear tested and discovered that the chemical residue from the manufacturing process was still in the finished garment.



At this time, the 'buyer beware' principle applied to the purchase of all goods. It was the purchaser's responsibility to look for defects in goods before buying them. However, in this case the purchaser could not have detected the fault even if he inspected the goods. The court followed the precedent set in *Donoghue v. Stevenson* and ruled that the actions or omissions of the manufacturer directly caused Grant an injury and that the 'manufacturer owed a duty of care to the ultimate consumer'.

Figure 5.2

The Australian Knitting Mills building, now converted into apartments, can still be seen from Richmond railway station.



Obiter dictum

Sometimes a judge will make a statement that is not part of the reason for the decision, but is an important statement relating to the main issue of the case. This statement, known as an **obiter dictum**, a statement made by the way, can influence decisions in the future. An obiter dictum is only ever persuasive on all the courts, regardless of which court made the statement, as it does not form part of the reason for the decision.

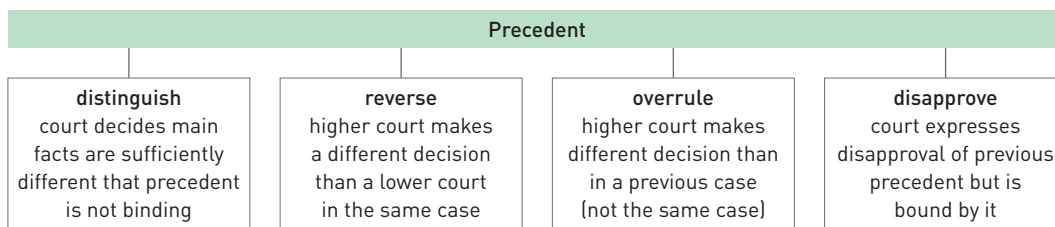
EXAMPLE OF OBITER DICTUM

In *The Queen v. L* (1991) 174 CLR 379, a husband was charged with raping his wife. A majority of the High Court made statements to the effect that **common law no longer recognised the irrevocable consent of a wife to sexual intercourse with her lawful husband**; in other words, that common law did not recognise that rape in marriage was allowed. As this did not form part of the decision, it was considered to be a statement made 'by the way'.

Developing or avoiding earlier precedents

There are four main ways of developing or avoiding earlier precedents:

- If the material facts of a case are sufficiently different from the material facts in a binding precedent, a lower court may not have to follow the precedent. Instead they may **distinguish** the present case from the previous case and make a different decision. For example, a person found in the front seat of a car, over the legal alcohol limit, with his keys in his hands was found guilty of being in control of a car while over the legal alcohol limit. The accused appeared to be about to drive the car. This case was distinguished from a previous case, where the accused was found asleep in the car with the engine running, trying to keep warm. He did not appear to be about to drive the car.
- A precedent can be **overruled** by a higher court in a **different case**. For example, the High Court may overrule a decision of a different case decided in the Court of Appeal. When a precedent is overruled, it no longer applies.
- A precedent can be **reversed** when the **same case** is taken to a higher court on appeal. For example, a case may have been decided in the Supreme Court and then taken on appeal to the Court of Appeal, where the decision is changed. When a precedent is reversed, it no longer applies.
- In some instances a court is bound by a precedent but expresses its disapproval of the precedent. This is known as **disapproving**. This does not change a precedent, but a higher court, when deciding a later case, may choose to agree with the court that disapproved of the precedent and decide to overrule that precedent.



LEARNING ACTIVITY 5.2

Law-making through courts – precedent

- 1 What is a precedent?

- 2 Look back at the case study 'Example of a ratio decidendi' and answer the questions.
 - a What is the meaning of ratio decidendi?
 - b What was the ratio decidendi in *Pervan v. North Queensland Newspaper Co Ltd*?
 - c How does this form a precedent?
- 3 Read the information about the cases of *Donoghue v. Stevenson* and *Grant v. Australian Knitting Mills* and answer the questions.
 - a What incident occurred in the *Donoghue v. Stevenson* case and where did it occur?
 - b What event now marks the decision in *Donoghue v. Stevenson*?
 - c At the time, what was the law that Ms Donoghue could sue under? Why was it not possible to sue under that law in this situation?
 - d Explain why *Donoghue v. Stevenson* is a persuasive precedent for *Grant v. Australian Knitting Mills*.
 - e In what way is *Grant v. Australian Knitting Mills* binding on future cases in Australia?
 - f Why are these old cases still considered important today?
 - g How do the precedents set in these cases apply in the following situations?
 - i Emma bit into a hazelnut cream chocolate that contained a piece of metal from the manufacturing process. She broke her tooth and suffered severe pain as a result.
 - ii A hospital gave Taylor the wrong drug and as a direct result he suffered a stroke which left him paralysed on one side.
- 4 Look back at the case study 'Example of obiter dictum'. What was the obiter dictum in *The Queen v. L*? Why was the statement made obiter dictum?
- 5 Match each of the following legal terms with its definition.

reversed	laws made by the courts
persuasive precedent	a court's decision that is the first of its kind
	the reasons a court gives for setting a precedent
disapproved	a statement a court makes in setting a precedent that is related to the main issue in the case but does not form part of the reasons given for the decision
distinguish	a decision made in a superior court that must be followed by inferior courts in the same court hierarchy
court hierarchy	past decision where the court can choose whether or not to follow the precedent set
precedent	when a court does not follow a binding precedent because the main facts of a case are sufficiently different from the facts in the binding precedent
case law	when a case goes to appeal and the appeal court changes the precedent set in the original court
overruled	when a precedent from a lower court is changed by a superior court that is deciding a different case with similar circumstances
statute law	a statement made when a court dislikes a precedent but does not have the authority to change it
ratio decidendi	laws made under the authority of parliament
binding precedent	when courts are ranked according to the order of the seriousness of the cases they handle
obiter dictum	

- 6 Read the case studies *Nagle v. Rottnest Island Authority* and *Prast v. Town of Cottesloe* and answer the questions.
- What are the similarities in this case, and what are the differences?
 - In what way was the second case distinguished from the first?
 - What area of civil law do you think these cases are about?
 - Do you agree that there should have been a warning in the first case and not in the second? Explain.

Nagle v. Rottnest Island Authority (1993) 177 CLR 423

A public authority that encourages the public to participate in activities on its reserves or areas set aside for public use has a duty to take care to alleviate foreseeable risk of injury to visiting members of the public.

In *Nagle v. Rottnest Island Authority*, the local authority was found to be negligent and ordered to pay compensation to the plaintiff. The plaintiff became a quadriplegic after diving from a rock ledge and striking submerged rocks. A majority of the High Court found that it was reasonably foreseeable that a reasonable person may choose to dive from the rocks and the local authority should have given a warning to members of the public that the ledge was unsafe for diving.

CASE STUDY



Figure 5.3
Diving from rocks

Prast v. Town of Cottesloe (2000) 22 WAR 474

In the case of *Prast v. Town of Cottesloe*, 22 September 2000, the Full Court of the Supreme Court of Western Australia found that there was no need to warn the public of the ordinary risks involved in bodysurfing. The plaintiff in this case became quadriplegic after being dumped when bodysurfing at the beach controlled by the local authority. There was no evidence of other similar injuries having occurred at the beach, and the plaintiff was an experienced swimmer and bodysurfer.

CASE STUDY

The court distinguished this case from previous diving cases saying that in the diving cases there was a need to warn people about hidden dangers involving serious risks. Whereas, in the bodysurfing case, the danger of being hurled onto the seabed, out of control, by a wave that turns out to be a dumper was obvious to all who were involved in the sport. It was therefore found that the authority was not obliged to warn bodysurfers of the risks involved. In this case the public authority was entitled to rely on common sense, skill and experience of visitors to take reasonable care for their own safety.

Statutory interpretation

When a precedent is created, it often relates to the interpretation of words in an Act (known as a statute). This process, where a judge clarifies or interprets the laws written by parliament, is known as **statutory interpretation**. An Act is written in general terms to apply to all types of situations. Sometimes an unusual situation arises and the courts have to interpret words within the Act.

For example, a court may be required to interpret the word 'traffic' or 'supply' as it applies to drugs. Can a person who has a traffickable amount of drugs in her fridge, be charged with trafficking drugs even if the drugs belonged to a flatmate and she did not know they were there? A court would have to interpret the word 'trafficking' in the Act to decide if it included these circumstances.

There are other reasons why statutory interpretation is required. For example:

- Mistakes can occur during the drafting of an Act of parliament. This might be because of an oversight or for some other reason. The court may need to consider what was intended.
- The Act may not include new types of technology, such as smartphones or tablets. The court may need to consider whether the use of a particular word was intended to include newer technology.
- A word may not be defined in the Act. Normally each Act of parliament has a 'definition' section where many words are defined. If a word is not defined, a court may need to consider what it means.
- The meaning of the words may be ambiguous. An Act may try and cover as many issues as possible. However, sometimes circumstances may arise where it is unclear what the words were intended to mean. For example, did the words 'intent to supply' include 'temporarily holding a package on someone's behalf' when that package had been left in a friend's car for collection later?
- Word meanings can change over time. For example, the term 'de facto relationship' used to mean a man and a woman living in a domestic relationship. The meaning of the term has now changed to include a couple living in a domestic relationship, regardless of gender.

CASE STUDY

What is a public place?

In *Mansfield v. Kelly* [1972] VR 744, the court was required to interpret the words 'public place'. Under section 13 of the *Summary Offences Act 1966* (Vic.) it is an offence to be drunk in a public place. The person in this situation was drunk in his car which was in a public street and argued that he was therefore in a private place. The court decided that the words 'public place' included a car parked in a public place and therefore the accused was found guilty.

LEARNING ACTIVITY 5.3

Law-making through courts – statutory interpretation

- 1 Explain the process of statutory interpretation.
- 2 Look back at the case study 'What is a public place?' Why did the words 'public place' need to be interpreted in *Mansfield v. Kelly*?
- 3 Read the case study 'Is ciabatta bread or a biscuit?' In *Lansell House Pty Ltd v. Commissioner of Taxation*, why was it important to decide if ciabatta is bread or a biscuit?

Is ciabatta bread or a biscuit?

Ciabatta is a type of Italian bread, but it is dry and crisp so it could be a biscuit. If it is bread it can be sold free of GST. If it is a biscuit then GST has to be charged when it is sold. A court would have to interpret the word 'bread' in the Act that deals with GST laws to decide if it included ciabatta. In the case of *Lansell House Pty Ltd v. Commissioner of Taxation* [2010] FCA 329 it was decided that ciabatta was a biscuit, not bread.

CASE STUDY

4 You be the judge

Read the information provided in 'The stolen sperm case' and answer the questions.

- a What is the legal issue to be decided in this case?
- b How will you, as the judge in this case, make your decision if:
 - i there is an existing statute law (clear in meaning) that applies to this case?
 - ii there is no statute law, but there is a previous decision in a similar case decided in a superior court in the same hierarchy?
 - iii there is no statute law, but there is a previous decision in a similar case decided in a superior court in another country?
 - iv there is no statute law and there are no cases from superior courts that apply to this case?
- c Make your decision on the case. Give reasons for your decision (ratio decidendi).
- d What is an obiter dictum?

The stolen sperm case

Peter is suing Kellie for becoming pregnant against his wishes. He says he was tricked into becoming a father and he refuses to pay child maintenance. He has accused her of 'intentionally acquiring and misusing' his semen when they had sexual intercourse. Peter claims Kellie promised to use the contraceptive pill but then quit without telling him.

He argues that Kellie has forced him to be a father and pay the child support that goes with fathering a child. Kellie says she became pregnant accidentally. She argues that she could not have 'stolen' Peter's sperm because he gave up any rights to it when he transferred it during voluntary sexual intercourse. She believes the sperm should be considered a 'gift'.

CASE STUDY

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Law-making through courts

- 1 Provide one reason why civil laws are needed. (2 marks)
 - 2 Define the term 'ratio decidendi'. (1 mark)
 - 3 Distinguish between a binding precedent and a persuasive precedent. (2 marks)
 - 4 Define the term 'obiter dictum'. How can it influence other cases? (2 marks)
 - 5 What occurs when a case is:
 - a distinguished
 - b overruled
 - c reversed
 - d disapproved? (4 marks)
 - 6 Describe the process of law-making through courts using the case of *Grant v. Australian Knitting Mills*. (5 marks)
 - 7 Explain one reason for statutory interpretation. Use an example in your explanation. (4 marks)
- (Total 20 marks)

ASSESSMENT TASK CASE STUDIES

Civil disputes

Read the following four case studies on transsexuals and the law and answer the questions.

- 1 How do we know that the case of *Corbett v. Corbett* is a civil case? (2 marks)
 - 2 Explain the precedent set in the case of *Corbett v. Corbett*. (2 marks)
 - 3 To what extent is the decision in *Corbett v. Corbett* a binding precedent? Justify your answer. (4 marks)
 - 4 Explain how the decision in *R v. Harris and McGuiness* differs from the decision in *Corbett v. Corbett*. (2 marks)
 - 5 What was the decision in the case of *Department of Social Security v. SRA*? How is this decision different from the decision made in *R v. Harris and McGuiness*? (4 marks)
 - 6 Explain the decision in the case of Kevin and Jennifer. Explain the significance of this case. (6 marks)
- (Total 20 marks)

Corbett v. Corbett

In the case of *Corbett v. Corbett (otherwise Ashley)* (1970) 2 ALL ER 33 (a UK decision), Arthur Corbett had knowingly married April Ashley, a male-to-female post-operative transsexual. He had known about Ashley's sex change well before the marriage. A few months later, the relationship fell apart. Corbett did not want Ashley to have maintenance or inheritance rights so he argued that the marriage should be declared null and void on the grounds that he had married a male.

Ashley, on the other hand, wanted her female status recognised and argued that if the marriage was to be declared null and void then it should only happen on the grounds of non-

consummation. The judge ruled that a person's sex is determined by their psychological, physical and chromosomal characteristics. While Ashley lived as a female, she still had male (XY) chromosomes and was declared a male in the eyes of the law.

The marriage was void because marriage is essentially a relationship between a man and woman. This case therefore defined marriage as a relationship between a man and a woman.

NOTE

Since this case, the definitions of 'man' and 'woman' have broadened, and same-sex marriages are now legally recognised in England, Wales and Scotland.

R v. Harris and McGuiness

In *R v. Harris and McGuiness* (1989) 17 NSWLR 158, two male-to-female transsexuals were charged with procuring a male person (undercover police officer) to commit an act of indecency with another male person. Both Harris and McGuiness dressed as women and worked as prostitutes, but only one (Harris) had undergone sex reassignment surgery.

The pair argued that the charges should be dropped, as they were females and not males. The NSW Court of Criminal Appeal ruled that Harris was a female (for the purposes of criminal law) as she had undergone full sex reassignment surgery and could not function as a biological male. McGuiness, on the other hand, was considered to be male even though he had lived as a woman for many years.

Department of Social Security v. SRA

In *Department of Social Security v. SRA* (1993) 118 ALR 467, the Federal Court of Australia ruled that a male-to-female transsexual was eligible for a wife's pension under the *Social Security Act 1991* (Cth). The transsexual, known as SRA, could not afford sex reassignment surgery but considered she was a female.

She had presented as a female for more than 10 years and was known in the community as the de facto partner of a male. The Court ruled that a person's psychological sex and their social and cultural identity were important factors in determining 'sexual status' for the purposes of the *Social Security Act*.

Kevin and Jennifer

In *Attorney-General for the Commonwealth v. Kevin and Jennifer and the Human Rights and Equal Opportunity Commissioner (Re Kevin)* (2003) 172 FLR 300, the Full Court of the Family Court ruled that Kevin (a female-to-male transsexual) and his female partner, Jennifer, were legally married. Jennifer met Kevin in 1996 and was aware of his transsexuality at that time. Kevin had presented as a male since 1994, was given hormone treatment in 1995 and had sex reassignment surgery in 1998. By the time the couple married in 1999, they had lived together for two years and Jennifer had become pregnant using donor sperm and IVF treatment.

The couple argued that they were not a same-sex couple and that at the time of the marriage Kevin was a male.

NSW law allowed Kevin to change his birth certificate to reflect his preferred sexual status. The court accepted that Kevin had presented as a male, was considered a male by family, friends and work colleagues, and had undergone hormonal treatment and surgical procedures to align his physical attributes with his psychological sex. The court ruled that a person's sexual status is not linked to their sex at birth for the purpose of marriage law. The court accepted that psychological, social and cultural sexual identity should be taken into account when determining such cases.

ASSESSMENT TASK CASE STUDY

The studded belt case

Read the case study 'Studded belt as a weapon – *Deing v. Tarola*' and answer the questions. You may need to do extra research to find the answers.

- 1 Outline the material facts of the case. (2 marks)
- 2 What legal issue needed to be decided in this case? (2 marks)
- 3 Identify the decision of the Magistrates' Court. (1 mark)
- 4 Did the Magistrates' Court set a legal precedent in this case? Justify your answer. (2 marks)
- 5 Why was the case heard again in the Supreme Court? (2 marks)
- 6 What was the Supreme Court's ruling on the legal issue and what reasons did it give for the decision? (3 marks)
- 7 Identify the Act of parliament that the judge interpreted when making the decision. (1 mark)
- 8 What is the legal term used to describe a judge's reasons for a decision? (1 mark)
- 9 Explain the process of law-making illustrated by this case. How are new laws made, using this method? (6 marks)

(Total 20 marks)

Studded belt as a weapon – *Deing v. Tarola* [1993] 2 VR 163

A man, 20, pleaded not guilty to possessing a regulated weapon under the *Control of Weapons Act 1990* (Vic.). The weapon in this case was a studded belt used to hold up his trousers. The magistrate found him guilty of the charge, but did not record a conviction. The accused appealed against the finding of guilty and the confiscation of his belt.

The Supreme Court, hearing the appeal, had to decide what a regulated weapon was, in the context of the Act and the regulations made under the Act, to ascertain whether a studded belt used to hold up trousers was in fact a regulated weapon.

Supreme Court Justice Beach decided that the studded belt was not a regulated weapon under the *Control of Weapons Act* because anything that is not in common use as a weapon cannot be classified as a weapon. The Act defined a regulated weapon as 'anything that is not in common use for any other purpose but that of weapon'. The definition of a weapon has now been removed from the Act.

The decision of the Magistrates' Court was quashed and the confiscated belt was returned, because the accused could not be found guilty of carrying a regulated weapon when the article he was carrying was not a weapon.

INTRODUCTION TO TORTS

A tort is a **civil wrong**. The law of torts deals with the rights and obligations that people owe to others and the infringement of these rights and obligations.

The main aim of the law of torts is to return the wronged person to the position he or she was in before the wrong occurred, by providing compensation or damages to the person whose rights have been infringed. These rights include the right to be protected from negligence, defamation, nuisance

and trespass. If a person feels that their rights have been infringed and the infringement fits into one of the categories of torts, the injured party can sue the other party under tort law.

Not all rights are protected under the law of torts. For example, there is no separate tort of invasion of privacy.

HINT

There are four torts – negligence, defamation, nuisance and trespass. The *VCE Legal Studies Study Design* only requires you to know negligence and defamation.

NEGLIGENCE

Negligence means a **failure to take reasonable care**. A person is obliged to take reasonable care in regard to other people, where it is reasonably **foreseeable** that other people could be harmed by their actions or omissions.

Key principles

When bringing an action for negligence it must be proved that:

- the person who was negligent **owed a duty of care** to the person injured
- the duty of care was **breached**
- the breach of the duty of care caused loss or damage (**causation**) and
- the wronged person has suffered **loss or damage**.

If it can be proved that the person was owed a duty of care and that the duty of care was breached and harm was caused, then the wronged person can claim compensation, normally by seeking an order for **damages**.

The law of negligence was developed through common law. The British case of *Donoghue v. Stevenson* [1932] AC 562 established the tort of negligence.

Principle of law established in *Donoghue v. Stevenson*

In *Donoghue v. Stevenson* [1932] AC 562, the House of Lords ruled that manufacturers owe a duty of care to ensure that their products are free from defects that could injure someone's health.

In this case, the court ruled that a manufacturer (David Stevenson) failed to take reasonable care in providing a product which he knew would be used directly by consumers who would consume it with no reasonable opportunity for the distributor or consumers to inspect the goods before consumption.

In this case, the court established the **neighbour principle** as a way of explaining a person's duty of care. A **neighbour in law** is someone you **ought to have had in contemplation** when carrying out an action.

Remoteness of damage

For a case of negligence to be successful, the plaintiff must show that they suffered harm as a result of the plaintiff's negligent behaviour. Harm is defined as injury or death, damage to property or economic loss. The plaintiff needs to show a link between the negligent act or omission and the injury or loss sustained. The defendant, on the other hand, may try to prove **remoteness of damage**.

CASE STUDY

Figure 5.4

Donoghue v. Stevenson – the case of the snail in the bottle of ginger beer



Remoteness of damage may show that the defendant was not liable because the injury, harm or loss was too remote from the wrongful act. For example, A comes across a serious car accident that occurred five minutes earlier and is shocked at the sight of the wreckage. A sues the person who caused the accident for the mental trauma suffered. The defendant to this case may argue that he could not have predicted that his negligent driving would harm a person who was merely passing by after the accident and that A's injuries were too remote because they were not directly linked to the loss of concentration or poor driving that caused the accident in the first place. The situation might be considered differently if the person passing by had actually witnessed the accident or the person had close relatives or friends directly involved in the accident.

Duty of care

A person owes a duty of care if:

- the risk was foreseeable (the person knew or ought to have known about the risk)
- the risk was significant or not insignificant (not far-fetched or fanciful) and
- in the circumstances, a reasonable person in the same position would have taken precautions to eliminate any risk of harm.

CASE STUDY

Example of a duty of care

Workers of the Waverley Municipal Council in New South Wales had dug a trench. They placed a railing around the trench (which was not childproof) and left for the day. Rain filled the trench with water. Ms Chester's son, who was seven, fell into the hole and drowned. After looking for him for hours, Ms Chester found her son and suffered significant nervous shock and illness. She sued the council for negligence, claiming that it owed her a duty of care.



The High Court on appeal found that clearly the council owed a duty of care to the child. However, the court said that the council did not owe a duty of care to the mother, stating that it was not reasonably foreseeable that their actions towards the child would so affect a mother seeing the dead body of her child. One judge of the High Court dissented (meaning he disagreed with the others).

Figure 5.5 There is a general presumption that doctors and nurses owe a duty of care to their patients.

The courts over time have established that certain categories of persons are presumed to owe a duty of care to another category of persons. For example:

- Teachers and schools have a duty of care to their pupils.
- Doctors and nurses owe a duty of care to their patients.
- Motorists who are driving their car owe a duty of care to other road users.
- Manufacturers owe a duty of care to consumers.

EXCEPTIONS TO THE DUTY OF CARE

- When participating in a risky recreational activity, consumers can sign a waiver to show they accept responsibility for injuries. The waiver is not legal if the operator is grossly negligent or makes a false statement in relation to the waiver. For example, bungy-jump operators may ask patrons to sign a waiver accepting any reasonable risk associated with the jump, but if the operator has not maintained their equipment or has said the jump was safe when it was not then the operator will still be liable for a patron's injury.
- A good Samaritan is a person who gives care, help and advice in an emergency situation. 'Good Samaritans' are exempt from legal liability in negligence claims as long as they act in good faith, within their competence and without payment. It will be up to the courts to decide if the rescuer acted in good faith.
- A person who donates food in good faith for charitable purposes is protected from legal liability if a person is harmed from having consumed the food as long as the food was safe to consume at the time it left the possession or control of the donor.
- Volunteers (people who do community work for a community organisation, association, local government or public authority) cannot be held personally liable if they cause damage or injury to another. Instead, the community organisation may be held liable as long as the worker was not affected by drugs or alcohol, and acted within the scope of the organisation and any instructions given by the organisation.

Breach of a duty of care (standard of care)

A breach of a duty of care occurs when a person does not take all the care they should. The duty is breached (broken) when the defendant fails to do what a reasonable person would have done. This will vary from case to case, depending on the circumstances. However, in determining whether a reasonable person would have taken precautions against a risk of harm, the court considers:

- the likely risk of harm
- the likely seriousness of the harm
- the burden of taking precautions to avoid the risk of harm
- the social utility (benefit or worth) of the activity that creates the risk of harm.

Example of a breach of a duty of care

Shane was waterskiing on a lake that was regularly used by waterskiers. He fell and struck his head. He suffered quadriplegic paralysis as a result of the fall. It was found that the water where he fell was very shallow. Shane thought it was safe to ski in that particular spot because there were signs that said 'deep water'. He sued the council and the case went all the way to the High Court.

**CASE
STUDY**

The council argued that 'deep water' meant before the signs, not around the signs. It was clear that the council owed Shane a duty of care; however, the court had to consider whether the duty of care was breached. The High Court found that the council breached its duty of care, noting that it was reasonably foreseeable that such harm could occur, which was very serious.

Causation

To succeed in a claim under the law of negligence, it has to be possible to prove that the injury was caused by the breach of duty of care, and the injury would not have occurred without the breach of duty of care. This is particularly important in cases that have been going for a long time, such as asbestos cases, where the plaintiff has to show that the harm caused was as a result of the breach of the duty of care of the defendant, and there were no other intervening causes.

If it can be shown that the harm was **too remote from the breach of duty of care**, the plaintiff will not be successful in claiming negligence. For example, a person may suffer nervous shock from hearing a car accident happen but not actually seeing it happen. This harm may be too remote from the actual event.

In other circumstances, there may be a **break in the chain of causation**. This is where the tort occurred, and an intervening act happened that resulted in the loss or damage being caused, not the original tort. For example, if a person hits another person, that would be considered a tort (assault). If the victim then sits under a tree and gets struck by lightning and dies, it could not be said that the assault caused the death, rather an intervening act occurred which resulted in the death.

CASE STUDY

Example of causation – poisoning

In the 1960s, a man was having a cup of tea at work and started feeling ill. He went to hospital and was instructed by the doctor to go home and rest. The doctor was not at work that day but was called by the nurse to find out what to do. Five hours later he died due to arsenic poisoning. His widow sued the doctor and the hospital, claiming that their negligence caused the man's death.

The court found that the doctor did owe a duty of care and breached the duty by not going to the hospital to check on him. The court, however, found that even if the deceased had been examined and admitted for treatment, it is more likely than not that he would have died anyway. Therefore, the court found that the doctor did not cause the loss suffered by the widow, and it was the poisoning alone that caused the husband to die.

Loss or harm

As a general rule, the plaintiff can only rely on a legal remedy through the law of negligence if it can be proved that he or she suffered a loss or harm, even if it is minor. The loss or harm can be physical, mental or damage to property.

Figure 5.6 If a local council fails to remove a dead branch on a tree when requested to do so, and the branch then causes loss or harm to someone, the council may have breached its duty of care.



Defences to negligence

The defendant can claim that the plaintiff has not established the four elements of negligence. The defendant will try to prove that a duty was not owed, or a duty was not breached, that the damage or injury was too remote from the defendant's act or omission, or that no loss or harm has been suffered. If all elements are proven, the defendant may have to rely on one of the following defences.

Contributory negligence

The defendant may try to prove that the plaintiff helped to cause the harmful situation or is partly to blame for the harm done. In determining contributory negligence, the court will look at the defendant's actions to determine the degree of care taken, what the defendant knew or ought to have known about any associated risks and whether a reasonable person in the same position would have acted in the same way as the defendant.

Pedestrian partly to blame

A pedestrian who carelessly steps onto the road in front of a speeding car may sue the driver for injuries. However, the court may decide that the pedestrian was partly to blame for the incident. In *Pennington v. Norris* [1956] HCA 26, the High Court ruled that where a person suffers injuries partly as the result of his or her own fault, the court would apportion blame and then reduce the claim for damages accordingly.

CASE STUDY

Assumption of risk (*volenti non fit injuria*)

The defence of **volenti non fit injuria** refers to the voluntary acceptance of the risk of injury. The defendant must prove that the plaintiff was aware of an obvious risk and that he or she voluntarily chose to take the risk. For example, a person who knowingly accepts a ride with a drunken driver is accepting an obvious risk of being injured in a car accident, as it is well known that excessive alcohol consumption impairs driving ability.

Similarly, sportspeople accept the risk of suffering common injuries that may occur within the rules of their sport. For example, jockeys consent to injuries of the type reasonably expected in racing. However, the defence of assumption of risk does not apply in cases involving the provision of professional or health services as health providers have a legal responsibility to warn people of any inherent risk associated with their work.



Figure 5.7
Jockeys accept the risks of their profession.

LEARNING ACTIVITY 5.4

Negligence

- 1 What is a tort?
- 2 What can you do if someone has infringed your rights?
- 3 What are the key elements necessary to establish a duty of care in a negligence case?

- 4 Read the case study 'Principle of law established in *Donoghue v. Stevenson*' and answer the questions.
 - a How does the *Donoghue v. Stevenson* case have an effect on manufacturers today? How was this different before the case was heard?
 - b What did the court rule in this case?
 - c Explain the 'neighbour principle'.
 - d Who are the 'neighbours' (in the legal sense) of:
 - i a schoolteacher
 - ii a builder
 - iii a manufacturer of food
 - iv a goldmine that uses highly poisonous arsenic in the process of separating the gold
 - v a train driver?
 - e Why is remoteness of damage important in a negligence case?
 - f 'For a duty of care to be breached, the consequence of the action must be reasonably foreseeable.' Explain the meaning of this statement.
- 5 Explain two exceptions to a duty of care being owed.
- 6 Explain the main defences to negligence.
- 7 Look back at the case study 'Example of a duty of care'. Why do you think the Waverley Municipal Council was found to owe a duty of care?
- 8 Look back at the case study 'Example of a breach of a duty of care'. Why do you think that the council in this case was found to have breached its duty of care?
- 9 Look back at the case study 'Example of causation – poisoning'. Do you think the court's ruling would have been different if it could have been shown that it was likely that the husband could have been saved if the doctor had attended the hospital and given him proper treatment, but did not? Explain.
- 10 What is contributory negligence? Use an example to illustrate your answer.
- 11 How can the fact that the plaintiff accepted a risk reduce the liability of the defendant?
- 12 Read the case of *Stocks & Anor v. Baldwin* and answer the questions.
 - a Who is the 'neighbour' of the driver of the car in this case?
 - b Who is the plaintiff and who is the defendant in the original case?
 - c Do you think the injury caused to the plaintiff was reasonably foreseeable? Give reasons.
 - d Do you think that a duty of care was owed to the pedestrian by the driver? Explain.

CASE STUDY

Stocks & Anor v. Baldwin [1996] NSWCA 1

The pedestrian (the plaintiff in the original case) sued the driver of the car that knocked him over and injured him. In the original case, the court heard that a pedestrian had proceeded from a median strip across two lines of stationary traffic and, without pausing, walked into the path of the defendant's vehicle. The driver had been travelling at 30–35 km/h in a kerbside lane on a wet, murky afternoon.

The court found that the driver was 60 per cent to blame because he should have been looking out for pedestrians who might be doing foolish things. In other words, it was reasonably foreseeable that a pedestrian might walk out into the path of the driver's car. The defendant did not agree with the decision of the original court and took the matter to the Court of Appeal in New South Wales. In this appeal the court discussed the duty of a driver to foresee, and take into account, the likelihood of a pedestrian acting foolishly. The Court of Appeal dismissed the appeal.

Note: 'Anor' stands for 'another' and is often used in the names of cases if another person is also party to the case.

13 Read the case study 'Wrongful life claim' and answer the questions.

- a Why was the doctor in this case sued for negligence?
- b Why did the plaintiff bring the case?
- c What did the High Court decide in this case? Do you agree with the decision? Explain.

Wrongful life claim

In the case of *Harriton v. Stephens* [2006] HCA 15, a doctor was sued for negligence because he failed to tell a pregnant woman that she had contracted rubella (also known as German measles) and that there was a high risk that her child would be born disabled. The child was born with severe disabilities. The woman argued that by not giving her this information, the doctor had denied her the option of terminating the pregnancy.

The High Court decided the case in the doctor's favour. In its 6–1 judgment, the court focused on whether the child had suffered harm as a result of the doctor's misinformation. The court looked at whether the child was in a worse position due to the doctor's actions. It ruled that it was impossible to compare being born (albeit severely disabled) with no life at all – the court could not quantify the damages because it was impossible to compare the child's current life with non-existence.

CASE STUDY

14 Read the case of *Bourhill v. Young* and answer the questions.

- a Why did Bourhill claim that the motorcyclist had been negligent?
- b Do you think the damage was too remote in this case? Discuss.
- c What did the court decide in this case?
- d What were the reasons for the decision in this case?

Bourhill v. Young (1943) AC 92

In this case the plaintiff, Mrs Bourhill, was getting off a tram when a motorcyclist sped past on the other side. She heard the collision between the motorcycle and a car. Bourhill was eight months pregnant at the time. She walked around the tram and saw the aftermath of the accident. There was blood on the road and the driver of the motorcycle was dead.

She suffered nervous shock. As a result of the nervous shock, she had a miscarriage and gave birth to a stillborn baby.

Bourhill sued the estate of the motorcyclist claiming his negligence had caused her nervous shock. The court decided that Bourhill had been protected by the tram and she did not actually see the accident. It was therefore held that the motorcyclist did not owe her a duty of care as he could not have foreseen the potential danger to Bourhill, and the damage was too remote from the negligent act.

CASE STUDY

15 Read the article 'Bracken, CA set for court over injury claim' and answer the questions.

- a Why does Nathan Bracken believe he has a case of negligence against Cricket Australia?
- b What harm did Nathan Bracken say he has received as a result of the negligence?
- c What remedy is he seeking?

EXTRACT

Bracken, CA set for court over injury claim

Daniel Lane, *The Age*, 22 July 2013

After being embarrassed by South Africa-born Mickey Arthur's claim he was racially vilified during his tenure as Australia's coach and his revelation Michael Clarke considered Shane Watson a 'cancer', Cricket Australia (CA) faces more of its dirty linen being aired when Nathan Bracken takes it to the NSW Supreme Court on July 31.

It is understood his lawyers have subpoenaed 'explosive' documents that could put Cricket Australia's medical practices under unwelcome scrutiny. [The NSW Supreme Court granted Bracken access to these documents in August 2013 and ordered CA to pay Bracken's legal costs.] The former Australian fast bowler will argue CA failed in its duty of care to protect him from long-term damage as a result of his knee injury. Bracken accused CA of negligence, claiming that as an elite athlete, CA failed to give him competent medical advice.

He is seeking compensation for lost wages, potential earnings in the Indian Premier League with Bangalore and other Twenty20 tournaments, sponsorship deals and also for the career-ending injury deemed severe enough to entitle him to a disabled parking permit.

In his statement of claim, Bracken said CA should have realised from medical scans that he needed to be referred to a specialist. He said CA failed to 'investigate, diagnose and treat' the

right knee he injured the day before a one-day match against England in January 2007.

Bracken alleged CA's failure to refer him to a specialist orthopaedic surgeon and to limit his training and playing commitments combined to ruin his career, which included five Tests and 116 one-day internationals. He said a consequence of the organisation's alleged negligence was he could not straighten his right leg and the knee swells and leaves him in pain if he runs. Bracken, 35, retired in 2011 after the injury left him with a pronounced limp.

It is understood Bracken took action when he realised CA did not have the equivalent of WorkCover to underwrite claims such as his. He was also said to have been advised by a CA official the only way he would get any compensation was to 'sue us'.



Figure 5.8
Nathan Bracken

DEFAMATION

The tort of defamation is aimed at protecting the character of individuals against attempts to discredit their standing in the eyes of the community. A statement or other published material is therefore regarded as defamatory if it lowers the reputation of the plaintiff in the eyes of others in the community. Defamation laws give people the right to take legal action against people who have wrongfully attacked their reputation.

A person's reputation is thought to be lowered when disparaging remarks are made and he or she is subjected to ridicule or hatred so that people may shun or avoid that person.

Following pressure from the Federal Government to enact uniform defamation laws, each state of Australia agreed to pass substantially similar legislation. These uniform laws preserve and modify the common law of defamation, outline possible defences and remedies and encourage a speedy non-litigious (out-of-court) resolution to defamation disputes.

Key principles of defamation

To prove defamation it must be shown that:

- a statement is defamatory
- the defamatory statement refers to the plaintiff
- the statement has been published (communicated to people other than the person it refers to) by the defendant.

Statement is defamatory

A defamatory statement lowers a person's reputation or standing in the community, exposing them to ridicule, contempt or hatred. The onus is on the plaintiff to prove that his or her reputation has been damaged by the publication of such material. It is not necessary to prove that the defendant had the intention to hurt the plaintiff.

Non-profit organisations or small private companies with fewer than 10 employees can use the law of defamation to protect their business reputations but large companies cannot. Instead, large corporations may launch an action for injurious falsehood in situations where a person intentionally and maliciously makes false statements about a company resulting in that company suffering economic loss.

Teenager ordered to pay damages for Twitter comments

The District Court of New South Wales has ordered a former student to pay \$105000 to a school teacher after making defamatory comments on Twitter and Facebook.

Andrew Farley was 20 years old when he posted a series of defamatory comments on the two social media sites. The court found that the comments had a 'devastating effect' on the popular teacher, who took sick leave and later returned to work on a limited basis. District Judge Michael Elkaim ordered that Mr Farley pay Ms Mickle \$85000 in compensatory damages and \$20000 in aggravated damages. The judge noted that, 'when defamatory publications are made on social media it is common knowledge that they spread'.



CASE STUDY

Figure 5.9
Christine Mickle

Defamatory statement does not need to name the plaintiff

The person defamed need not be mentioned by name. It may be sufficient to prove that people reading, hearing or seeing the statement would reasonably conclude that it was about the plaintiff. A plaintiff may also be defamed as part of a group. The group must be sufficiently small for it to be recognised that the plaintiff is part of that group and that his or her reputation is lowered by reference to the group.

CASE STUDY

Example of plaintiff not named

A man wrote an open letter to 'the current local mayor' of his hometown, in which he made derogatory and defamatory statements about the mayor. The open letter did not refer to the mayor by name. However, the open letter was clear enough that the people reading it could reasonably deduce that it was about the mayor at the time.

Defendant published the defamatory statement

The statement must be communicated to a person other than the plaintiff. It is not defamation for a person to make untrue or derogatory comments directly to the person concerned as long as it is done in private. However, these comments will become actionable once a third person reads, hears or sees the defamatory material.

It does not matter whether the material is published to the general public or to a smaller group. In fact, what seems like harmless chat may be defamatory. For example, a case of defamation may exist where Jane tells Peter that Shaun is a convicted thief and Peter repeats this to Paul and Mary knowing that the information might be wrong.

Publications can either be verbal or in writing. Most defamation cases are in relation to written publications. These can include articles, letters and books, as well as online publications such as blogs, websites, articles and comments made on social media sites such as Twitter and Facebook.

CASE STUDY

Example of publication

An Australian man, Joshua Meggitt, threatened television personality and author Marieke Hardy for comments made on Twitter. The matter was settled out of court. Mr Meggitt later sought to sue Twitter for damage suffered by 'the retweets and the original tweet'. The case against Twitter was not pursued.

Defamation on the Internet

If an Internet service provider is unaware that defamatory material is being transmitted through its service, it cannot be sued. However, people who publish defamatory information via the Internet (for example articles on websites or chat-line exchanges) can be held liable for what they publish. In the past, it was difficult to sue for defamatory Internet publications because of the different laws and extra expense of taking legal action in the country of origin. It is unclear how far defamation laws extend to making social media sites such as Twitter liable for defamation.

Defences to defamation

As with negligence, the defendant may argue that any or all of the three principles of a defamation action have not been proved. The defendant may argue that the statement is not defamatory, or that it

does not refer to the plaintiff, or that he or she did not publish the statement. If not, the defendant may rely on any of the following defences.

Justification

The defence of justification applies when a defamatory statement is **substantially true**. A person who commits an act of indecent exposure before a crowd of 50 people cannot claim defamation if a publication wrongly states that there was a crowd of 30, as the substance (core issue) of the publication is true.

Contextual truth

The defence of contextual truth applies when a number of defamatory statements are made within the same context and the plaintiff objects to one statement but not all. An example of contextual truth is where a publication correctly states that a person caused a serious accident by riding a bike into oncoming traffic while intoxicated, but incorrectly states that the rider was without a bike helmet. If the plaintiff claims that the incorrect statement is defamatory, then the defendant may argue contextual truth because, when read in context, the statement is substantially true. The truth of the more serious allegations overrides the falsehood in the less serious allegation, because the effect of the untrue statement on the plaintiff's reputation is insignificant.

Absolute privilege

A person may be able to use the defence of absolute privilege where he or she can prove that the defamatory material was published in relation to proceedings of parliament, parliamentary bodies, courts, tribunals or communication between husband and wife.

Publication of public documents

It is a defence to an action for defamation to prove that the published material was a fair copy, summary or extract of a public document, but only if the material was published in the public interest or for educational purposes. A public document is one readily available from a parliamentary body, court, tribunal, local government or statutory authority.

Fair report of proceedings of public concern

A defendant can argue that the material was no more than a fair report of proceedings published for the information of the public or for educational purposes. Proceedings of public concern are those involving:

- a parliamentary body, local government, court or tribunal because their procedures are usually open to public scrutiny
- government inquiries, law reform bodies, the ombudsman, international organisations or conferences where governments are represented
- learned, professional, trade, sporting or recreational associations where membership or contractual issues are involved
- company shareholders or other meetings dealing with a matter of public interest.

Qualified privilege

The defence of qualified privilege is applicable where the defendant:

- believes the recipient of defamatory information has a moral or legal interest in receiving the information
- acts without malice or spite
- acts reasonably in the circumstances.

In determining whether a defendant's actions were reasonable in the circumstances, a court will consider:

- the seriousness and extent of any allegations
- the integrity of the source of the information
- the steps taken to verify the information
- whether the matter is of public interest or needed to be published quickly
- whether the information relates to the performance of a person's public duties
- the nature of the business environment in which the defendant operates.

Honest opinion

A defendant may claim that the defamatory material is an expression of his or her honest opinion (as a commentator) rather than a statement of fact. The matter must be of public interest and the opinion must be based on proper material. Proper material is a statement that is substantially true or relates to public documents or a fair report of proceedings of public concern.

Figure 5.10

A food critic may make unflattering comments about the food he or she was served in a restaurant if it is his or her honest opinion. If, however, the statement is grossly exaggerated or untrue, or goes beyond what would reasonably be expected of a critic, then the 'honest opinion' defence would not apply.



Innocent dissemination

The defence of innocent dissemination protects people who may unknowingly distribute defamatory information, such as printing companies, booksellers, libraries and Internet or email providers. For this defence to be successful, these people would need to show that they:

- published the material as a subordinate distributor or as an employee or agent of one (a subordinate distributor is any person other than the author, primary distributor or editor of a publication)
- did not know (nor should have known) that the publication contained defamatory information
- did not have an obligation to check for defamatory material.

Triviality

This defence applies where the publisher can show that the plaintiff is unlikely to be harmed by the publication of the defamatory material.

LEARNING ACTIVITY 5.5

Defamation

- 1 Look back at the case study 'Teenager ordered to pay damages for Twitter comments' and answer the questions.
 - a Who were the parties in this case?
 - b Where were the comments made? Conduct some further research to determine the nature of the comments.
 - c What elements must the plaintiff prove to be successful in a defamation case?
 - d Why do you think defamation was proved in this case?
 - e What remedy did Ms Mickle receive?
 - f Do you agree with the decision in this case? Explain.
- 2 Can a person sue for defamation if he or she is not named in the defamatory material? Explain, using an example of this occurring.
- 3 Why must defamatory material be published? Explain different ways that defamatory can be published.
- 4 Read the case study 'Bad review leads to loss of restaurant' and answer the questions.
 - a What were the defamatory statements in this case?
 - b Who is the plaintiff and who is the defendant in this case?
 - c Who has the burden of proof?
 - d Explain the case for the plaintiff.
 - e Explain the case for the defendant. In your explanation, comment on the defence that was used in this case and other defences that could have been used.
 - f Do you agree with the decision in this case? Give your reasons.

Bad review leads to loss of restaurant

In September 2003, the *Sydney Morning Herald* published a review of Coco Roco's restaurant at Sydney's King Street Wharf. The review made comments such as 'unpalatable' dishes, 'a shocker' and scored the restaurant at 9/20 in a 'stay home' category. The restaurant went into administration in March 2004.

The article was found to have conveyed three defamatory meanings:

- that the restaurant sold some unpalatable food
- that it provided some bad service
- that the owners were incompetent restaurant owners because they employed a chef who made poor-quality food.

Owners Aleksandra Gacic, her sister Ljiljana Gacic and Branislav Ciric sued publisher John Fairfax and critic Matthew Evans for defamation. In December 2009, Justice Ian Harrison of the NSW Supreme Court found in favour of the publisher and Evans and ordered the owners to pay their legal costs. He found the defence of truth had been established in relation to some bad service.

CASE STUDY

- 5 Read the case study 'Yahoo! and Google ordered to pay' and answer the questions.
 - a Were Yahoo! and Google the publishers of the defamatory material? Explain.
 - b What action of Google and Yahoo was seen to be defamatory?

- c What remedies were ordered to be paid in these cases?
- d Think about this situation happening to you. What sort of harm, loss or damage might you suffer?

CASE STUDY

Yahoo! and Google ordered to pay

An Australian man has been successful in two separate defamation cases against Yahoo! and Google.

Both Yahoo! and Google published images of Michael Trkulja alongside gangland figures including Tony Mokbel. Mr Trkulja had never been involved in criminal activity, but he was shot in the back while dining at a Melbourne restaurant in 2004. The incident did not have any connection with underworld or gangland figures.



Mr Trkulja sued Yahoo! and Google given his concerns of online searches 'linking' him and his incident with gangland crimes. He argued that the search results suggested he had been involved in crime. He gave evidence of the loss and harm he had suffered as a result.

Google argued that it was not the publisher of the material and was simply acting as an intermediary. Justice Beach of the Supreme Court found in favour of Mr Trkulja and ordered that Google pay damages of \$200 000. In a previous case, Yahoo! had been ordered to pay Mr Trkulja \$225 000.

Figure 5.11
Michael Trkulja

- 6 Read the case study of *The Church of Scientology Inc. v. Leslie Anderson* and answer the questions.
 - a What has to be proved for a defence of justification to be successful?
 - b What other defence could be appropriate for the radio announcer to use in this case?
 - c Do you think the Church of Scientology would be successful? Give reasons.

CASE STUDY

The Church Scientology Inc. v. Leslie Anderson, WA Supreme Court

A radio announcer on a talkback show in Western Australia made comments about a particular religion. She said that it was nothing but a charlatan type of religion and it was only being called a religion to avoid legal action that could be taken against it.

The public relations officer of the religion replied that the religion had been registered as a church since 1954. The announcer went on to say, 'Yes, but that was only because it was a very smart way of evading taxes and making a lot of money.'

The Church of Scientology Inc. sued for defamation.

OTHER TORTS

- **Nuisance** deals with the violation of the right of a person to reasonable convenience and comfort in life. There are two forms of nuisance: private nuisance (interference with use and enjoyment of private land) and public nuisance (interference with use and enjoyment of public land, such as a park).
- **Trespass** deals with interference with a person's self, goods or land. An assault can be trespass to person. Damage to a person's property or land can be trespass to goods or trespass to land.

PRACTICE EXAM QUESTIONS

- 1 Describe the process of law-making through courts. *(8 marks)*
- 2 Consider the law of tort and the case study 'The neighbour and tort law' and answer the questions.
 - a List two torts that might be relevant in this case and explain what has to be proved for each tort. Show how the elements of these torts can be applied to the case. *(8 marks)*
 - b Explain one defence that is applicable for each type of tort mentioned in question 2a. *(4 marks)*

The neighbour and tort law

Kahlid's neighbour Kevin repeatedly burned a foul substance in his backyard. One day Kevin lit a fire on a windy day and Kahlid's fence and shed burned down. Kahlid suffered burns when he was trying to put the fire out.

Kahlid retaliated by distributing a letter to his immediate neighbours saying that Kevin was 'lazy, dirty around the home, untrustworthy, unreliable, thoroughly unlikeable and he would be highly risky as an employee'. Kevin worked in the neighbourhood.

Kahlid sued Kevin in court. Kevin sued Kahlid in court.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK FOLIO AND REPORT

Torts – negligence and defamation

Collect information on negligence and defamation from newspapers, magazines or the Internet. For each piece of information write a report that:

- gives the date and source of the article
- provides a brief summary of the facts
- discusses the case in relation to legal principles
- discusses the appropriateness of the civil remedy given or suggests a possible civil remedy
- explains why civil law rather than criminal law is more appropriate in dealing with the issues in the case.

(10 marks)

ASSESSMENT TASK CASE STUDY

Victim of fallen tree

Read the case study 'Victim of fallen tree' and answer the questions.

- 1 Who is the plaintiff in this case and who is the defendant? (1 mark)
- 2 What is the standard of proof in this case? Who has the burden of proof? (2 marks)
- 3 What principles have to be proved for a finding of negligence? How do these principles apply to this case? (4 marks)
- 4 Assume you have been asked to act for the defendant in this case in the trial in the County Court. Explain the plaintiff's case to the defendant. (4 marks)
- 5 What was the ruling of the first court in this case? (2 marks)
- 6 What damages were awarded by the County Court? (2 marks)
- 7 What was the outcome of the appeal to the Court of Appeal? (1 mark)
- 8 Do you agree with the final outcome of the case? Explain. (2 marks)
- 9 Explain the connection of the cases *Donoghue v. Stevenson* and *Grant v. Australian Knitting Mills* to this case. (2 marks)

(Total 20 marks)

Victim of fallen tree

Mrs Harper, who was camping at the Torrongo Falls Reserve in West Gippsland, was badly injured when a 28-metre tree fell on her. She suffered back and foot injuries, broken ribs and a ruptured spleen. A County Court judge, Graeme Anderson, said that the Department of Natural Resources and Environment had 'breached the duty of care it owed to the plaintiff by failing to erect an appropriate sign or signs warning of the danger of hazardous trees in the reserve, particularly in certain weather conditions'. According to Judge Anderson, the injuries were 'a foreseeable consequence of the defendant's breach of duty'. Harper was awarded \$300 000 for her injuries.

The Victorian Court of Appeal reversed this decision. The court ruled that in entering the forest area she was accepting a risk of injury, as adults should be aware of the danger of trees on windy days. It also ruled that it was unreasonable to expect the Department of Natural Resources and Environment to put up signs warning about the danger of falling trees in forest areas. A forest area cannot be compared with a city park or playground.

ASSESSMENT TASK MULTIMEDIA REPORT

Law-making through courts

- 1 Working in groups or individually, prepare a multimedia report. In your report you should:
 - explain law-making through the courts – this can be done as a flow chart
 - describe two negligence cases – one mentioned in the text and one found in newspapers or on the Internet; explain the elements of negligence (duty of care, breach of duty of care, causation, and loss or harm)
 - describe related defences for each case
 - include two made-up scenarios relating to negligence and defamation (one of each).
- 2 Conduct a role play of one or both of your scenarios and discuss the defences that could be used for each scenario. Explain the expected outcome of the scenario if it were to be tried in court.

(20 marks)



CHAPTER

6

CIVIL LAW IN ACTION

OUTCOME

On completion of this unit you should be able to explain and evaluate the processes for the resolution of civil disputes.

KEY KNOWLEDGE

This chapter is designed to help you to understand the key knowledge of:

- the role of the court hierarchy in civil disputes
- the civil jurisdiction of courts in the Victorian court hierarchy
- methods of civil dispute resolution, including mediation, conciliation, arbitration and judicial determination
- purpose and operation of civil pre-trial procedures
- an overview of the adversarial nature of a civil trial
- civil remedies and their purpose
- difficulties faced by parties when attempting to resolve civil disputes.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- apply legal principles to relevant civil cases and issues
- evaluate methods of dispute resolution relevant to civil cases
- explain and evaluate the procedures used by courts when resolving civil disputes
- analyse the effectiveness of civil remedies
- consider and explain difficulties faced by parties in dispute resolution.

KEY LEGAL TERMINOLOGY

appeal When a party to a dispute heard by a court takes the matter to a higher court to challenge the lower court's decision.

arbitration When a third party (the arbitrator) decides a case, but only after he or she has tried to persuade the parties to come to an agreement; the parties usually agree to be bound by the decision of the arbitrator.

balance of probabilities The standard of proof in a civil case.

conciliation When a third party (the conciliator) helps the parties to a dispute to come to an agreement; the conciliator may give suggestions about how to resolve the dispute.

court hierarchy The ranking of courts according to the seriousness of the matters they deal with.

defendant A person against whom a civil legal action is taken.

judicial determination When parties take a legal dispute to court for a judicial ruling or VCAT when it is presided over by the president or vice-president (who are court judges). The presiding judicial officer uses processes to consider the evidence presented by both parties before making a binding decision.

jurisdiction The extent of the power or authority of a particular court to hear a case.

mediation When a third party (the mediator) helps the parties to a dispute to come to an agreement, the mediator or mediators help the parties maintain open communication; mediators do not take sides and will not tell the parties how to resolve the dispute.

plaintiff A person bringing a civil action and who has the burden of proving the case.

precedent A court decision that is followed by another court lower in the hierarchy.

sue Start civil proceedings against another person.

THE ROLE OF A COURT HIERARCHY IN CIVIL DISPUTES

As discussed in chapter 4, the court system provides a means of resolving disputes, which includes civil disputes. The courts in Australia are ranked in a hierarchy, with the higher courts hearing the more serious and complicated cases, and the lower courts dealing with everyday issues.

The court hierarchy also plays a role in civil disputes. It allows the courts to **specialise** in different matters. Courts develop their expertise in dealing with the types of cases that come before them.

The court hierarchy system allows matters to be **appealed** to higher courts. This means that a party who is not satisfied with the decision in the lower court, and feels the court made an error, can take the case to a higher court on appeal. It also enables the higher courts to establish judge-made law that is binding on lower courts. This is known as the **doctrine of precedent**.

Finally, a court hierarchy allows for **administrative convenience**, because the courts have different jurisdictions to hear different matters. It allows smaller claims (of which there are more) to be heard in the Magistrates' Court, and more complex and larger claims to be heard in the County Court and the Supreme Court.

NOTE

See chapter 5 for more information.

THE CIVIL JURISDICTION OF COURTS IN THE VICTORIAN COURT HIERARCHY

The Victorian court hierarchy extends from the Magistrates' Court to the Court of Appeal. The High Court is a federal court but can hear appeals from Victorian courts (and courts in other Australian states).

The courts have original and appellate jurisdiction. When a court is hearing a dispute for the first time, it is operating in its original jurisdiction. When a court is hearing an appeal, it is operating in its appellate jurisdiction.

Magistrates' Court

Original jurisdiction

Minor civil disputes of up to \$100 000 are heard in the Magistrates' Court. That means that the Magistrates' Court is not able to award damages greater than \$100 000 to the plaintiff, who will have to file the claim in a higher court (the County Court or Supreme Court) to seek an amount greater than that.

When the amount sought in civil damages is less than \$10 000, the Magistrates' Court must refer the matter to arbitration. Arbitration is a more informal hearing in which a third party (the registrar or a magistrate) will listen to both sides of a dispute and make a decision on behalf of the parties. The decision is binding on the parties. Legal representation is allowed in these proceedings.

Appellate jurisdiction

As the Magistrates' Court is the lowest court in the Victorian court hierarchy, it has no appellate jurisdiction. That means it is not able to hear any appeals from other courts.

Children's Court

Original jurisdiction

The **Family Division** of the Children's Court hears a range of applications and makes a variety of orders in relation to the protection and care of any person under the age of 17 years. The Family Division also has jurisdiction to hear applications for intervention orders under the *Crimes (Family Violence) Act 1987* and the stalking provisions of the *Crimes Act 1958* where either party is under the age of 17 years.

Appellate jurisdiction

The Children's Court is a specialised court dealing with matters relating to children, and therefore has no appellate jurisdiction.

County Court

Original jurisdiction

The jurisdiction of the County Court for civil claims is unlimited. Litigants can choose to have their case heard in either the County Court or the Supreme Court. In civil cases, they have a choice of trial by a judge alone or by a judge and jury (six jurors). Most cases would be heard in the County Court because it would be more expensive to take a case to the Supreme Court; though many of the more complex cases are heard in the Supreme Court.

Appellate jurisdiction

The County Court does not have the jurisdiction to hear appeals in civil matters except where an Act specifically provides for appeals to be heard in the County Court.

CASE STUDY

Kingston Plant Hire Victoria Pty Ltd v. Eltrax Pty Ltd [2014] VCC 136 (5 March 2014)

The plaintiff sued the defendant seeking \$149 747.40 for the cartage of contaminated acid sulphate from a site in Southbank. The plaintiff alleged that a rate of \$45 per tonne was orally varied to \$45 per cubic metre in a conversation with the defendant, and that it had overpaid the defendant by \$149 747.40. The defendant alleged that the rate was \$30 per tonne, and that only \$102 739.45 was overpaid. The court had to consider what the agreement was between the parties as to the appropriate rate, and whether the plaintiff established an entitlement to the money sought.

After considering the evidence submitted by the parties, Judge Kennedy of the County Court found in favour of the plaintiff, satisfied that on the balance of probabilities, the plaintiff had proved that it was owed an amount of \$149 747.40.

Supreme Court (Trial Division)

Original jurisdiction

The Supreme Court is divided into the **Trial Division** (with one justice) and the **Court of Appeal** (usually with three justices). The Trial Division's jurisdiction for civil claims is unlimited. As in the County Court, a jury of six is optional in civil cases. The Supreme Court is used for many complex and large civil disputes, such as class actions, matters involving complex areas of law, and disputes between large corporations. Class actions (also known as group proceedings) are cases that are usually brought by one individual on behalf of a group of people who have suffered similar injuries caused by the same individual or group; for example, over 1000 people suffering from salmonella poisoning as a result of eating contaminated peanut butter.

Appellate jurisdiction

In civil cases, a single judge in the Supreme Court can hear appeals from the Magistrates' Court on a point of law. A single judge can also hear appeals from the Victorian Civil and Administrative Tribunal (although when the tribunal is constituted for the purpose of an order being made by the president or the vice-president, an appeal from such an order would go to the Court of Appeal).

Supreme Court (Court of Appeal)

The Court of Appeal, in its original jurisdiction, hears appeals from the County Court or Supreme Court on points of law, questions of fact or the amount of damages awarded. It also hears appeals from the president and vice-president of the Victorian Civil and Administrative Tribunal (VCAT).

An appeal on a question of fact in a civil case would look at whether the facts of the case had been applied appropriately to reach the decision which was given – either that the defendant was in the wrong or was not in the wrong.

HINT

You are only required to know the jurisdiction of the courts in the Victorian court hierarchy. Although the High Court is part of the federal court hierarchy, it is useful to know its role and jurisdiction as Victorian cases may ultimately end up in the High Court.

**Figure 6.1**

The Supreme Court

High Court

Original jurisdiction

The most important role of the High Court in its original jurisdiction is to hear disputes that arise between states and cases that require interpretation of the Constitution. The High Court hears federal law matters arising out of a treaty and where the Commonwealth Parliament is a party.

Appellate jurisdiction

The High Court is a federal court that hears state matters on appeal. It is the highest court of appeal for all Australian states and hears appeals on questions of law and in the interests of the administration of justice. A person who wishes to appeal to the High Court must seek leave to appeal from the High Court. There is no right to appeal to the High Court. Leave is only granted if it is seen that there has been an obvious injustice or the issue is particularly important to the wider community. Decisions of the High Court are binding on all courts throughout Australia.

Appeals against the decisions of the supreme courts of states and territories, the Federal Court of Australia and the Family Court of Australia are heard by the Full Court of the High Court, which consists of at least two justices. The Full Bench of the High Court (with five to seven justices) hears cases where the court may be invited to depart from one of its previous decisions, or where the court considers the principle of law to be of major importance.

Table 6.1 The civil jurisdiction of the Victorian court hierarchy

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court (1 magistrate)	- claims up to \$100 000 - cases claiming less than \$10 000 decided by arbitration in the Magistrates' Court	- no appellate jurisdiction - rehearings can take place in some circumstances (e.g. one of the parties did not appear)
County Court (1 judge and an optional jury of 6)	unlimited; litigants can choose to have their case heard in either the County Court or the Supreme Court	no appeals, unless under a specific Act

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Supreme Court (Trial Division) (1 justice with an optional jury of 6)	unlimited	appeals on points of law from the Magistrates' Court and Victorian Civil and Administrative Tribunal (1 justice)
Supreme Court (Court of Appeal) (3 justices)		with leave on a point of law, or question of fact, or amount of damages from a single judge of the County Court or Supreme Court and from the Victorian Civil and Administrative Tribunal when constituted by the president or vice-president
High Court * A federal court but the highest court of appeal for the states (1 justice)	matters arising under a treaty where the Commonwealth is a party	
Full Court of the High Court * (at least 2 justices)	special leave for appeal applications	appeals against the decisions of the supreme courts of states and territories, the Federal Court of Australia and Family Court of Australia
Full Bench of the High Court * (5–7 justices)	interpretation of the Constitution	cases where the court may be invited to depart from one of its previous decisions, or where the court considers the principle of law to be of major importance
* The High Court is part of the federal court hierarchy, not the Victorian court hierarchy. The federal court hierarchy sits above the Victorian court hierarchy in that appeals from the Supreme Court (Court of Appeal) are made to the High Court.		

>>GOING FURTHER

Federal courts

Family Court

The Family Court is a federal court that derives its jurisdiction from the *Family Law Act 1975* (Cth). The court deals with matrimonial disputes, including divorce, maintenance arrangements, parenting plans and parenting orders, injunctions and property settlements.

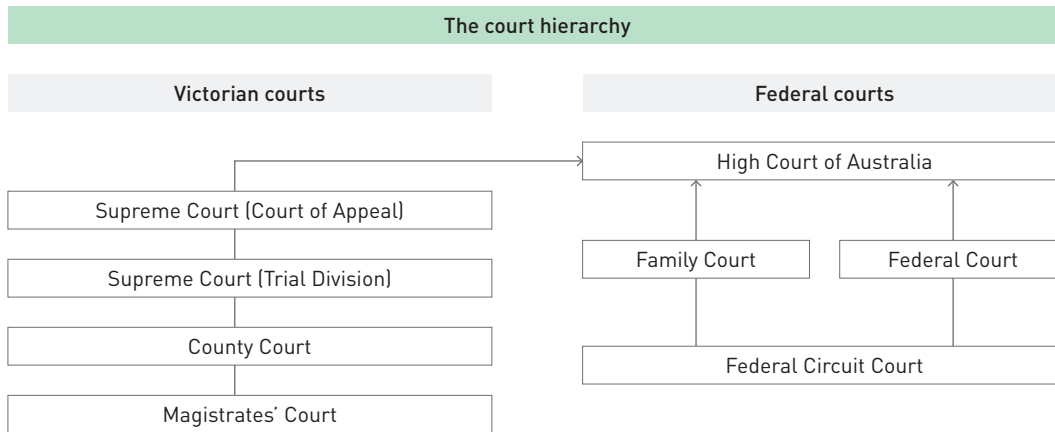
Its jurisdiction has been extended to include disputes relating to ex-nuptial children and de facto relationships. A de facto relationship now covers same-sex relationships that have been registered.

Federal Court

The Federal Court of Australia deals with matters involving Commonwealth law and hears cases involving native title, human rights, bankruptcy, workplace relations, copyright, trademarks, patents, fair trading and consumer protection.

Federal Circuit Court

The Federal Circuit Court, formerly known as the Federal Magistrates Court, hears less complex family law cases and cases relating to bankruptcy and consumer protection.



DISPUTE RESOLUTION BODIES

Other than courts, there are a number of bodies that can also resolve disputes. Taking a matter to one of these organisations is much less formal and therefore it is a much less expensive method of dispute resolution than taking a dispute to a court.

The following bodies are places that parties may approach to resolve their civil dispute:

- **Victorian Civil and Administrative Tribunal (VCAT)** – VCAT has many lists that specialise in hearing different types of civil disputes; for example, the Human Rights List, which deals with disputes relating to discrimination, and the Civil Claims List, which deals with small civil claims.
- **Dispute Settlement Centre** – The Dispute Settlement Centre of Victoria deals with a wide variety of civil disputes, including neighbourhood disputes, fences and noise complaints. They can help people to resolve disputes without having to resort to taking legal action. They offer practical strategies, mediation services and education programs, and their service is free.
- **Family Relationship Centres** – Family Relationship Centres offer a range of services and programs aimed at helping families at all stages of life, including people starting relationships, those wanting to make their relationships stronger, those having relationship difficulties and those affected when families separate.
- **Consumer Affairs Victoria** – Consumer Affairs helps people who have a consumer dispute. It offers advice and education programs and will conduct conciliation between parties to try to reach a resolution.
- **Ombudsman Victoria** – The Ombudsman will help people who have a dispute with a Victorian government department, public statutory authority or officers of a municipal council. They will investigate on behalf of the complainant and help to resolve the issue.

LEARNING ACTIVITY 6.1

Court hierarchy and the jurisdiction of courts and dispute resolution bodies

- 1 Explain the role of a court hierarchy.
- 2 Outline the civil jurisdiction of the Magistrates' Court.
- 3 To which court can a civil matter be appealed from the Magistrates' Court?
- 4 Look back at the case study *Kingston Plant Hire Victoria Pty Ltd v. Eltrax Pty Ltd* and answer the following questions.

- a What was the plaintiff seeking?
 - b Could this case have been heard in either the Magistrates' Court or the Supreme Court? Give reasons for your answer.
 - c If this case were to be appealed, which party is likely to appeal it?
 - d Where would the appeal be heard?
- 5 How does the jurisdiction of the Trial Division of the Supreme Court differ from the jurisdiction of the Court of Appeal?
- 6 Outline the jurisdiction of the High Court.
- 7 For each of the cases below, identify which court it would be heard in. Provide a reason for your answer.
- a Magnus's fence has been damaged by a man who lives two houses down from him. He has a quote for the repair of the fence, which amounts to \$9900. The man disputes his liability.
 - b Naysan has lost his case against his employer for damages for a serious injury suffered at work. He was seeking \$300 000 in the County Court. He wants to appeal the case.
 - c Marianna was a defendant in an action in the Victorian Civil and Administrative Tribunal. The case was heard by the president of VCAT. She wants to appeal.
 - d Andrew is looking to start a class action against a large corporation for misleading and deceptive conduct. He is seeking an unknown amount of damages.
- 8 **Investigation**
- Choose one of the alternative dispute resolution bodies and investigate its role. Write a short report.

METHODS OF CIVIL DISPUTE RESOLUTION

When a civil dispute arises, the parties will usually try to **negotiate** with each other to resolve the dispute without the assistance of a third party. If this is not successful, the parties will either decide to abandon the claim or use other methods of dispute resolution. In other situations, negotiation may not be desirable or possible, in which case one of the parties may use the court or tribunal system to resolve the dispute.

Dispute resolution through the courts is known as **judicial determination**. In civil disputes, there are methods of dispute resolution other than going to court that can help the parties to reach a settlement. These are known as **alternative dispute resolution** (ADR). ADR is also referred to as **appropriate dispute resolution** because the methods used in ADR are often more appropriate than taking a matter to court.

The legal system encourages the use of alternative methods of dispute resolution because they are less stressful and less expensive than court action. These methods include mediation, conciliation and arbitration.

Tribunals provide an informal, inexpensive and speedy way of dealing with legal disputes, particularly minor complaints or those of a specialist nature.

Judicial determination

Judicial determination refers to resolving disputes through the courts. Justices of the Supreme Court, judges of the County Court and magistrates in the Magistrates' Court are known as judicial officers; when they make a decision in a hearing or trial, they are judicially determining a case.

VCAT also uses judicial determination to resolve some disputes. When a VCAT hearing is presided over by the president or the vice-president of VCAT, who are Supreme Court justices, this is known as judicial determination.

Resolving a dispute through judicial determination is normally used as a last resort, as it is expensive and time-consuming.



Figure 6.2 Chief Justice of the Supreme Court Marilyn Warren

Mediation

If individuals are unable to reach a decision between themselves, it may be appropriate to ask for the assistance of an independent third party (a mediator) who can mediate between the parties.

Mediators are trained to assist the parties to reach a decision between themselves. The mediator tries to 'empower' both parties. That is, the mediator helps the parties feel more in control of the situation and more confident during negotiations. The mediator discusses the issues with the parties and tries to even out any imbalance between the parties while providing them with support. The mediators do not need to be experts in the area under dispute but they do need to have good people skills. Their job is to help people come to a decision, not make the decision for them.

The mediators will not force a decision, make suggestions about the best way to resolve the matter or tell the parties what to do.



Figure 6.3 Mediation

Mediation agreements are not binding, but most people are happy to stand by the agreement made. If the parties resolve the case through mediation, they will normally enter into a legally binding contract known as terms of settlement, or a settlement agreement. This means that the parties will be bound by the promises they make at mediation. This deed of settlement or agreement is enforceable through the courts.

Parties to a court case are often referred to mediation before the trial to see if a resolution can be reached.

The Dispute Settlement Centre of Victoria and Family Relationship Centres offer free or low-cost mediation services to help resolve disputes.

DISPUTE SETTLEMENT CENTRE OF VICTORIA

The Dispute Settlement Centre of Victoria (DSCV) deals with a wide range of disputes including disputes about trees, fences, noise, behaviour of people and animals, workplace disputes, business disputes, civil/court matters, environmental and planning disputes, public policy facilitations, shared households, clubs and organisations, some family matters, cultural differences, wills and relationships. The role of the DSCV is:

- to provide an informal, impartial, accessible, low-cost dispute resolution service to all communities in Victoria
- to assist people to be responsible for the resolution and outcome of their own disputes
- to provide an alternative to legal action
- to conduct public education and information sessions about the program and about appropriate dispute resolution practices.

FAMILY RELATIONSHIP CENTRES

Family Relationship Centres offer a range of services and programs aimed at helping families at all stages, including people starting relationships, those wanting to make their relationships stronger, those having relationship difficulties and those affected when families separate. The centres encourage separating parents to focus strongly on the needs of their children.

Conciliation

The process of conciliation also requires the assistance of an independent third party. This third party conciliates between the parties. In other words, they **listen to both sides of the dispute and make suggestions about appropriate ways of resolving the matter**. The final decision is made by the parties, and is not binding. For example, if you have a problem relating to discrimination against you, you could contact the Victorian Equal Opportunity and Human Rights Commission. A conciliator from the commission will try to help you settle the problem with the other party through conciliation.

If a case of discrimination is not resolved by conciliation, the parties can take the matter to the Victorian Civil and Administrative Tribunal (the Human Rights List). The tribunal will hear both sides and make a binding decision.

The courts and VCAT are also able to refer matters to conciliation before a case goes to a final hearing or trial. VCAT uses a method known as a compulsory conference, which uses conciliation as the dispute resolution method. The Magistrates' Court uses a process known as a pre-trial conference, which again uses conciliation to try and help the parties resolve the dispute.

Arbitration

During an arbitration session, a **third party listens to the parties and tries to help them reach an agreement. If this is not possible, the third party makes a decision.**

In taking their case to arbitration, the parties are agreeing to abide by the arbitrator's decision. For example, in a commercial contract a clause may be included stating that the parties agree to take any dispute between the parties to an arbitrator, and to be bound by the decision of the arbitrator.

There are professional arbitrators who will charge the parties a fee for acting as an arbitrator in a dispute. Arbitration is often used in commercial situations. Legal representation is usually allowed during the arbitration process. It can therefore be an expensive process.

The Magistrates' Court uses arbitration to resolve civil claims of less than \$10 000. The court attempts to facilitate an agreement between the parties. If unsuccessful, a magistrate or registrar can make a binding decision. VCAT is also able to refer parties to arbitration.

>> GOING FURTHER

Collaborative law

Collaborative law provides another method of dispute resolution in civil matters. In this case, disputing parties and their lawyers sign a contract to agree to work together in good faith to resolve their dispute without going to court. Negotiation and problem-solving techniques are used to try and reach a fair and just outcome for both parties. Collaborative law provides an opportunity for the parties to negotiate between themselves while their lawyers are present to make sure their best interests are considered.

EVALUATION OF METHODS OF CIVIL DISPUTE RESOLUTION

An evaluation requires a consideration of both strengths and weaknesses to form a conclusion or judgment about the value or worth of something. When evaluating methods of civil dispute resolution, you should consider the strengths and weaknesses of each.

Strengths of civil dispute resolution methods

- **Judicial determination**
 - Decisions made through judicial determination are **binding**, meaning that they are made by a third party and more easily **enforceable** than resolutions reached during mediation and conciliation.
 - A court is able to **make precedent**, particularly when the court is deciding an area of common law that requires reform. Decisions made in mediation, conciliation and arbitration do not form precedent.
- **Mediation and conciliation**
 - A decision made by the parties through mediation or conciliation is more likely to be **acceptable to the parties**, as they have reached the decision themselves rather than it being imposed by a third party.

- Mediation and conciliation are held in an **informal atmosphere**, which can help alleviate the stress and intimidation of the parties that may be felt in a courtroom.
- Mediation and conciliation are **less confrontational** and therefore better for continuing relationships.
- In mediation and conciliation, matters can be **discussed openly** and without fear of publicity or them being held against a party.
- There is **more flexibility** for the parties in mediation and conciliation, as the parties are free to explore options to resolve the dispute that the court might not have the flexibility to do.
- **The third party can give assistance** to the parties in mediation or conciliation in their negotiation.
- A conciliator can give **advice**.
- The types of resolutions are **flexible** and the parties are not bound to the remedies sought by the plaintiff in the statement of claim.
- Due to the private nature of some disputes, parties can **avoid publicity**.
- **Arbitration**
 - Arbitration is **binding**.
 - Arbitration is **more informal** than judicial determination.
 - During the arbitration process, **advice** can be given about how to resolve the dispute.
 - The parties are able to **discuss matters openly** because matters brought up during discussion cannot be tendered as evidence in court if resolution cannot be reached through arbitration.

Weaknesses of civil dispute resolution methods

- **Judicial determination**
 - It is **more expensive** than mediation and conciliation.
 - It can be **stressful, inconvenient and traumatic** for some parties.
 - It can involve **long delays**.
 - It involves a hearing or trial that is **open to the public**, which will attract the attention to parties who may not wish to have their matters known to the public.
 - A court is limited to granting the remedies sought in the claim, and to the issues that are in dispute.
- **Mediation and conciliation**
 - Mediation and conciliation require the **participation and willingness of the parties** to attend and explore options.
 - Unless the parties enter into terms of settlement, decisions reached during mediation and conciliation are **not binding**.
 - In mediation, **the third party has little involvement** and will not be able to advise the parties.
 - Mediation and conciliation are **not appropriate for some disputes**, such as family disputes or where there is an unfair bargaining power or advantage of one of the parties over the other.
 - One party may be **more dominant** than the other and can influence a decision.
 - In the mediation process **no advice** is given about how to resolve the dispute.

- **Arbitration**

- Arbitration is more expensive than mediation and conciliation because the parties normally use legal representatives.
- There can be delays before a matter is brought before an arbitrator.

Table 6.2 A summary of the evaluation of dispute resolution methods

	STRENGTHS	WEAKNESSES
Judicial determination	• makes binding decisions • decisions more easily enforceable • may create a binding precedent	• high cost of proceedings • traumatic for parties to attend court • can involve long delays • heard in public and attracts publicity • limitations of a court
Mediation and conciliation	• parties more likely to reach an acceptable decision • informal atmosphere • less confrontational • can discuss matters openly • the types of resolutions are flexible • parties can avoid publicity	• both parties must attend • one party may be more dominant • decisions not binding • no advice given about how to resolve the dispute • not appropriate for some disputes
Arbitration	• binding • more informal than a court hearing • advice can be given • can discuss matters openly	• more expensive than other types of ADR • there can be delays

LEARNING ACTIVITY 6.2

Methods of dispute resolution

- 1 Define the term 'judicial determination'.
- 2 What is the difference between conciliation and mediation?
- 3 Identify two bodies that use mediation.
- 4 What is arbitration? Give examples of the use of arbitration by the legal system.
- 5 For each of the examples given, explain one dispute resolution method that could be used, and the advantages and disadvantages of using this method.
 - a Jacqi, who is from Nigeria, wants to rent a house. The real estate agent keeps telling her that the house she wants is not available, even though it is still empty and available for rent. She thinks she is being discriminated against and wants to take the dispute further.
 - b Jock and Jack are neighbours who are constantly feuding. Jock decides to put garden lattice on the fence between their properties. Jack doesn't like the lattice. He says it's an eyesore. He wants it removed but Jock refuses to take it down. Jack asks Jock to attend the Dispute Settlement Centre so they can discuss the issue on neutral ground.
 - c Jenny has separated from Max. They cannot agree on custody arrangements but they do not want to take their dispute to court.
 - d Sue claims that Sally owes her \$15000. Sally keeps denying that she owes the money. Sue has tried to resolve the matter for over a year and now wants to take legal action.
 - e David has purchased a watch that does not work properly. He paid \$2000 for the watch. The seller is denying any liability. David wants to get this matter resolved.

6 Internet exercise

Using the Internet, search for information on mediation offered by the courts of Victoria as a means of settling disputes, then answer the following questions. Information can be gained from the Supreme Court website (Support Services).

- a When is mediation used?
 - b What are the benefits of mediation?
 - c Who can act as a mediator?
 - d Who pays for mediation?
- 7 Evaluate the use of judicial determination as a means of resolving a dispute.



USEFUL WEBSITE

Supreme Court www.supremecourt.vic.gov.au

PURPOSES AND OPERATION OF CIVIL PRE-TRIAL PROCEDURES

If you believe a civil wrong has been committed against you, and a resolution cannot be reached between you and the other party using alternative methods of dispute resolution, you can arrange an appointment with a **solicitor** to obtain legal advice. The solicitor will inform you of the likelihood of success if you pursue the matter through the courts, the costs of engaging the solicitor and pursuing the case, and the remedy that may be sought.

The solicitor will normally send a **letter of demand** to the person you think has infringed your rights. The letter will request an early settlement of the matter. If a settlement cannot be reached at this stage you can take the matter further.

If all attempts at resolving a dispute have failed, a party to a civil dispute may decide that the only way of resolving the dispute is to take the matter to court.

Purposes of civil pre-trial procedures

Before taking a matter to court, there are a number of procedures that should be completed. The purposes of these pre-trial procedures are:

- to inform the defendant of the case being brought against him or her
- to inform the plaintiff if the defendant wishes to defend the case
- to clarify the issues in dispute
- to allow the counsels for both parties to become familiar with the facts of the case
- to provide details about each other's case
- to give the parties time to prepare adequately
- to allow the parties time to consider the merits of their cases
- to encourage out-of-court settlement
- to provide the court with a written record of the issues and arguments to be discussed during the trial

- to reduce the time in court, as some issues will have been settled before the trial. This will reduce delays in bringing matters to court, and reduce the cost of the trial.

Pre-trial proceedings in the Magistrates' Court

Civil claims up to \$100 000 will be heard in the Magistrates' Court. Claims less than \$10 000 will be dealt with using the process of **arbitration**. In arbitration, a magistrate or registrar tries to persuade the parties to come to an agreement, but will then decide the case if the parties cannot reach agreement.

Claims over \$10 000 commence with the plaintiff lodging a document known as a Complaint outlining the particulars of the claim. This document is served on the defendant, who must file a notice of defence and/or counterclaim. If the amount is over \$10 000, the parties will normally first attend a pre-hearing conference with a registrar to see if they can come to an agreement. If not, the case proceeds to a full hearing in the Magistrates' Court. In most cases, if the amount is less than \$10 000, the matter goes straight to arbitration.



USEFUL WEBSITE

Magistrates' Court www.magistratescourt.vic.gov.au

Pre-trial proceedings in the County Court or the Supreme Court

For claims over \$100 000, the parties can choose to have their case heard in the County Court or the Supreme Court.

Set out below are the pre-trial procedures for cases that will be taken to the County Court or the Supreme Court.

Pleadings

The pleadings contain details of the claims made and the defences raised. Pleadings are a series of documents that are formally served on the parties and filed with the court. The purpose of pleadings is to give the court a written record of the case and to inform the parties of the claims being made and the defences raised. The pleadings include:

- **a writ or originating notice** – This is prepared by the plaintiff and issued by the court. The writ explains the action that will be taken against the defendant. It provides basic details to the defendant including the mode of trial (judge or judge and jury), the place of trial, and how long the defendant has to file a notice of appearance (see below). It is usually attached to the statement of claim.
- **a statement of claim** – This gives details of the claim made by the plaintiff, and is often attached to the writ. It is prepared by the plaintiff.
- **a notice of appearance** – This is filed with the court and served on the plaintiff by the defendant, showing that he or she wishes to defend the case. The notice of appearance is a simple document and provides the plaintiff and the court with formal notification that the defendant will defend the case.
- **a defence and counterclaim** – The defence gives details of the defence being put forward by the defendant to the plaintiff's claims. A counterclaim is optional for the defendant, if he or she thinks they have a claim against the plaintiff.

- **a reply to defence and counterclaim** – Used if the plaintiff wants to agree with the defendant on an issue. This is an optional step.
- **further and better particulars** – Either party may request further details of the other party's claim; that is, the defendant may require 'better particulars' (more details) of the plaintiff's case. For example, the plaintiff may have claimed that there is a contract between the plaintiff and the defendant. The defendant may ask for more details about that contract, such as when it was made, how it was made and what it contained. This is known as a request for further and better particulars.

CASE STUDY

Filing a request for further and better particulars

The plaintiff, Sarah Moses, has issued a statement of claim against her employer seeking damages for a serious injury she has suffered at work. In her statement of claim she has pleaded that she has been an employee of Workers Are Us for 10 years; that on 10 March 2013, she suffered a serious injury at work; and that the defendant was negligent.

The defendant has filed a document called a 'Request for further and better particulars' and has sought in that document further details of the serious injury that Sarah has alleged she has suffered. Sarah has a certain amount of time to file a document called 'Further and Better Particulars', providing particulars of the details requested. If she does not, this might arise in a dispute between the parties, which the court may need to resolve at a directions hearing (see next page).

Certifications

The *Civil Procedure Act* requires the parties to file two certifications with the court at the time when they file the first pleadings document. These certifications are:

- **a proper basis certification** – to be signed by the party or, if represented, by their legal representative certifying that the party has a proper basis for the claim (if the plaintiff), or a proper basis for the defence (if the defendant)
- **an overarching obligations certification** – to be signed personally by the party (or a representative of the party if it is a company) certifying that they have read and understood the 10 overarching obligations imposed on the parties. Examples of the obligations are to act honestly, to cooperate with the other party and to disclose documents.

Discovery

The discovery stage allows the parties to find out further information on matters that remain unclear. This stage includes:

- **discovery of documents** – Either side is normally required to disclose any relevant documents or a class of documents. Once a party has received details of the documents in the other party's possession or control, that party is able to inspect or receive a copy of those documents.
- **interrogatories** – These are a list of questions about the case, served by either party on the other.
- **discovery by oral examination** – One party may ask the court if they can put questions to the other party before going to court.
- **medical examinations** – If necessary, either side may ask the other side to attend a medical examination.

**CASE
STUDY**

Example of discovery of documents

The plaintiff has issued a claim in the County Court seeking damages for a publication made by the defendant. The defendant is a writer of an online blog, who posted an article about the plaintiff. The plaintiff alleges that the article is defamatory and that it has caused significant loss and harm, alleging that she has lost her job as a result. The defendant is specifically seeking discovery about the harm the plaintiff alleges she has suffered. In particular, the defendant wants to see documents that establish the reason why the plaintiff lost her job.

Directions hearings

Directions hearings are a pre-trial procedure during which the court may give any directions to the parties about the conduct of the civil proceeding. The court may require the parties to undertake further steps to enable the parties to get ready for trial. These are known as 'directions'. For example, the court may order the parties to attend mediation by a certain date in an attempt to resolve the dispute. The court can also make orders (directions) that the defendant file and serve a list of documents (being documents that fall within a certain class) by a certain date, if there is a dispute between the parties about whether certain documents have been discovered.

More than one directions hearing may be held, particularly in long or complex cases. A directions hearing is held at the court where the plaintiff has issued his or her claim. It is presided over by a judge or, in some instances in the Supreme Court, by an associate judge.

At the directions hearings, the court may make a number of requests of the parties in order to reduce the likely duration of the trial and arrive at a decision as promptly as possible. For example, the court will encourage the parties to make admissions that will speed up the proceedings.

The directions hearings will take place at least 35 days after the defendant has filed a notice of appearance, during which time the pleadings should have been completed. Further directions hearings can be held if the court thinks fit.

**CASE
STUDY**

Example of a directions hearing

The plaintiff and the defendant are involved in a dispute in the Supreme Court about a contract. The plaintiff has asked the defendant a number of times to provide further particulars of the defence. In particular, the defendant has claimed that there was a 'variation to the contract' between the plaintiff and the defendant. The defendant refuses to provide more particulars other than saying there was a variation.

During a directions hearing, the plaintiff raises this as an issue. The justice reads the defence and agrees with the plaintiff that the defence is deficient. The justice directs the defendant to provide further and better particulars within 28 days of the directions hearing. The court set the matter down for another directions hearing in two months' time.

Notice of trial

A notice of trial is issued by the court when both sides have completed the pre-trial procedures. It states the time and place of the trial.

Offer of compromise

An offer of compromise is a document sent by one party to the other in a proceeding, in which the party makes a settlement offer. Either party can make an offer of compromise, and it can be made at any time during the proceeding. If the other party does not accept the offer of compromise, and the party who has made the offer of compromise (the offeror) achieves an outcome in the proceeding that is more favourable than what was contained in the offer, then legal costs can be awarded on a higher basis by the court. This is because the party did not accept a better outcome under the offer and has caused both parties to incur legal costs in taking the matter to trial. An offer of compromise is therefore used as a weapon to obtain a better costs offer if the party is successful at trial.

CASE STUDY

Smith v. Jovanoska & Anor (No 2) [2013] VSC 714

The first defendant served an offer of compromise on the plaintiff on 30 September 2013. The offer was for the first defendant to pay the plaintiff \$40 000 inclusive of costs. The offer was not accepted.

The matter proceeded to trial on 23 October 2013. Following trial, the first defendant sought an order that the plaintiff pay her costs on an indemnity basis (a basis on which most of her legal costs could be recovered). The court found that it was unreasonable for the plaintiff not to accept the offer of compromise and ordered that the plaintiff pay the first defendant's costs from 2 October 2013, on an indemnity basis.

Mediation before trial

The rules that govern the procedures of the Supreme Court state that, at any time during the pre-trial or trial proceedings, the court may order the matter to be referred to mediation. More often than not, a court will order that the parties attend mediation before trial.

The majority of civil cases go straight to mediation after the directions hearing rather than going to trial. At any stage of a proceeding the court may, with or without the consent of any party, order that the proceeding be referred to a mediator. The mediator assists the parties to reach a settlement. The mediator can report the outcome of the mediation to the court. An agreement may be made at the mediation or later.

LEARNING ACTIVITY 6.3

Pre-trial procedures

- 1 If alternative methods of dispute resolution have failed to reach a resolution, and a wronged person wishes to take the matter further, what action is he or she likely to take?
- 2 Explain the purposes of civil pre-trial procedures.
- 3 How do you commence a civil action through court?
- 4 Describe two documents that may be filed in the pleadings stage.
- 5 Look back at the case study 'Filing a request for further and better particulars'. Why did Sarah Moses want further and better particulars?
- 6 What does the discovery stage involve?
- 7 Look back at the case study 'Example of discovery of documents'. Why did the plaintiff wish to discover the documents in this case?
- 8 Look back at the case study 'Example of a directions hearing'. What occurred at this directions hearing?

- 9 Look back at the case study *Smith v. Jovanoska & Anor*. Why do you think that the plaintiff was only ordered to pay the defendant's costs on an indemnity basis from 2 October 2013?
- 10 When can mediation be used during a court hearing?
- 11 Read the case study 'Out-of-court settlement for promising young footballer' and answer the questions.
 - a Who is the plaintiff in this case?
 - b Who is the defendant in this case?
 - c What is the alleged civil wrong in this case?
 - d What injury has been suffered by Lincoln Johnson?
 - e Outline three pre-trial procedures that could have taken place leading up to the out-of-court settlement.
 - f Do you think these procedures would have assisted the parties to come to a settlement? Explain.
 - g What advantage do you think there is for Johnson and the Royal Melbourne Hospital in an out-of-court settlement rather than a full court hearing?

Out-of-court settlement for promising young footballer

Lincoln Johnson, of Benalla, was referred to the Royal Melbourne Hospital after complaining of headaches following a heavy fall at a football match earlier in the day. Some X-rays were taken at the hospital but Johnson was not given a brain scan and was not admitted as an in-patient. He was sent home with an aspirin prescription.

The next morning he was found unconscious and rushed to the hospital. He was taken to the operating theatre to have a blood clot removed. A similar operation was performed a week later after bleeding continued.

Mr Galbally, counsel for Johnson, said that the bleeding and the failure to attend to it on the first occasion had left Johnson with a significant cognitive deficiency. He said that Johnson should have been given a brain scan when he was first sent to the hospital and, as this had not been done, the hospital had been negligent. The hospital denied liability.

Johnson had been an A-grade student in Year 9 and an outstanding athlete. He had been chosen for the Melbourne Football Club's junior development program. Johnson continued school in Years 10 and 11 but had to drop out in Year 12 because he could not cope. Johnson said that he could not ride a bicycle and he dragged his foot when he walked.

The Royal Melbourne Hospital and Johnson reached an out-of-court settlement which was approved in the Supreme Court by Justice Ashley.

CASE STUDY

CIVIL TRIAL PROCEDURE

If a dispute is not resolved at mediation, a trial coordinator lists a callover before the registrar. This is a request from the registrar for information about whether the dispute is settled in principle or ready to proceed to trial. The legal representatives in court for the plaintiff and the defendant are referred to as the plaintiff's counsel and the defendant's counsel respectively.

The courtroom procedure for civil claims in the County Court and the Supreme Court	
calling-on of the case	calling-on of the case by the judge's associate in the court (County Court or Supreme Court) – this is the announcement of the commencement of the case when the legal representative of each party announces who they act for by saying: 'If the court please, I appear for the plaintiff/defendant.'
empanelling and swearing-in of the jury	if either party has requested a jury
witnesses	ordered out of the courtroom
view	if applicable, the case may be adjourned until the judge (and jury if present) and the parties to the case have met at the scene of the civil wrong to investigate evidence
opening address	by the plaintiff's counsel
plaintiff's counsel presents his or her case	• examination-in-chief by the plaintiff's counsel • cross-examination by the defendant's counsel • re-examination by the plaintiff's counsel
opening address	by the defendant's counsel
defendant's counsel presents his or her case	• examination-in-chief by the defendant's counsel • cross-examination by the plaintiff's counsel • re-examination by the defendant's counsel
closing address	by the defendant's counsel (order of closing addresses reversed where defence presents no evidence – plaintiff sums up followed by summing-up of the defence)
closing address	by the plaintiff's counsel
if there is a jury	the judge directs the jury on the relevant law, and explains the burden of proof, the substance of the plaintiff's case and the defence relied on by the defendant
jury	retires to consider its verdict (if applicable)
if the plaintiff is the successful party	the jury (or judge if no jury) grants a remedy to the plaintiff and may order the defendant to pay the costs of the plaintiff

Role of the jury in civil cases

In the Magistrates' Court there is no jury. A jury is optional in a civil case tried in the County Court or Supreme Court although mostly only used in defamation cases. There are **six jurors in a civil jury** in the County Court and the Supreme Court. Up to two extra jurors can be empanelled if the trial is expected to be lengthy.

The parties have some influence over the composition of the jury. They can do this by challenging some of the jurors before they are empanelled. The plaintiff and the defendant are entitled to three peremptory challenges each. **Peremptory challenges** are challenges without a reason. A peremptory challenge in a civil trial is made by striking the name or number of the potential juror from the list of persons to be selected to serve on the jury. There can be an unlimited number of **challenges for cause**; that is, challenges with a reason.

The role of a civil jury is to consider the facts of the case and decide who is most likely in the wrong. Their decision is made on the balance of probabilities. If a unanimous decision cannot be reached, a majority decision of up to five out of six will be accepted. If present, a civil jury may also be required to decide on the appropriate remedy, for example on the amount of damages to be awarded. In defamation cases, only a judge can decide the amount of damages.



Figure 6.4 Jury box in the Supreme Court – there are six jurors in a civil trial.

The adversarial nature of a civil trial

The method of trial used in Australian courts is the adversary system. This system is based on the two parties to a case battling to win, each party acting as the adversary of the other. In a civil case, the plaintiff (the person with the complaint) wins the case if the defendant is found to be in the wrong.

Key features of the adversary system

There are five key features of the adversary system of trial:

- **the role of the parties** – Each party has control of their own case and is able to choose what evidence they may adduce (provide as proof) and which witnesses they may call, as long as they follow the rules of evidence and procedure and advice given by their legal representatives. The parties have some influence over the composition of a jury (if there is one) and have complete control over the way the case is put.
- **the role of the judge** – There must be an independent umpire (the judge or the magistrate) to ensure that the case is conducted according to the rules of evidence and procedure, and that both sides are treated fairly. The judge is not able to take sides and cannot force the parties to present the case in any particular way. The judge does, however, have significant powers to manage a case, including the power to limit discovery and the power to limit the time for evidence in the trial.

- **rules of evidence and procedure** – Only relevant and admissible evidence is allowed to be heard by the court. Evidence is normally given orally by witnesses; each side is able to cross-examine the witnesses of the other side and in this way the truth should emerge. Both parties are required to comply with the rules of evidence and procedure. The trial will follow a procedure, such as when the parties are able to make submissions or examine witnesses.
- **the need for legal representation** – For the adversary system to work effectively, each side is able to engage legal representation. This is to ensure that each party has an equal opportunity to be represented. However, the person with the more highly skilled legal representative may win the case; this could mean a person's ability to win the case can depend on the skill of his or her legal representative. The more-skilled legal representatives are often the most costly to employ.
- **the burden and standard of proof** – The burden of proof is on the plaintiff. He or she must prove the case to win. The standard by which the plaintiff must prove the case is on the balance of probabilities. This means that the judge (or the jury) must consider which story, or which party, is more right than the other.

Advantages of the adversary system

The adversary system of trial, while based on the notion that two parties are battling it out, has many advantages.

The impartiality and neutrality of the judge is one of the critical advantages. The judge acts as an impartial referee and takes no sides in a dispute. This promotes the notion that our justice system is fair and without prejudice, ensuring that the parties can be satisfied that their case will be heard by an outsider, free of conflict and bias, and with the knowledge and expertise to resolve the dispute.

The idea of the parties controlling their own case promotes the idea that an individual or group should be free to present their case as they wish. It also means that no party will be forced to make claims that they do not want to or defend a case in a certain way. For example, the defendant may have witnesses who could give evidence but they reside overseas. The defendant is able to choose whether or not to call those witnesses and incur the expense and inconvenience in relying on them to give evidence (although evidence can be given by video, this may be objected to by the other party).

While the use of legal representation may increase the costs of a party, it ensures that parties are able to rely on people with expertise and knowledge about the law and about the rules of evidence and procedure. The adversary system allows parties the freedom to choose their legal representatives and how much to spend on them.

The rules of evidence and procedure allow for consistency and fairness. The procedural steps ensure that parties, particularly their legal representatives, are familiar with what will take place and what, and how, to prepare the case. The rules of evidence apply to all parties, regardless of who they are.

The burden of proof ensures that whoever is bringing the case has to prove it. Therefore, it is not on the defendant to prove anything (unless he or she raises a defence or counterclaim). The standard of proof in a civil case is not as stringent as that in a criminal case. It is often very difficult to prove absolutely that someone is in the wrong. There are often arguments about who is right and who is wrong.

LEARNING ACTIVITY 6.4

Civil trial procedure

- 1 What is the first step of a civil trial in the County Court or the Supreme Court?
- 2 If a witness is called by the plaintiff's counsel, which party will cross-examine that witness?
- 3 Who will conduct the examination-in-chief of a defence witness?
- 4 Who will re-examine a defence witness?

- 5 What is the role of a civil jury?
- 6 How many jurors are there in a civil jury?
- 7 When can a civil case be heard without a jury?
- 8 If a unanimous decision cannot be reached in a civil case, will the case be dismissed or a majority decision allowed? Explain.
- 9 Explain three advantages of the adversary system.
- 10 Read the case study 'Sued over a negative review' and answer the questions.
 - a What occurred in this case?
 - b Do you think the problem highlighted in this case could be an increasing problem? Discuss.

Sued over a negative review

Merchant Achilles Archery and Outdoors sued a Western Australian man over a negative review posted on eBay as well as five posts on a separate forum where he discussed products bought from Achilles. The case was dismissed on a technicality. NSW District Court judge Judith Gibson who heard the case said, 'These considerations are even more relevant today, where parties with no prior experience of defamation law ... increasingly find themselves before the court in complex and expensive litigation. Claims for defamation are easy to commence, and difficult to defend.'

CASE STUDY

- 11 Read the case study '\$600 000 awarded for workplace bullying' and answer the questions.
 - a Who was the defendant in this case?
 - b If a jury had been used in this case, identify how many jurors there would have been and the role they would have played.
 - c Identify three features of the adversary system of trial. Explain how these three features would operate in this case.

\$600 000 awarded for workplace bullying

An employee of the Monash Law Book Co-operative (trading as Legibook) claimed that she had been bullied on a regular basis. She claimed that she had been regularly put down, shouted at and spoken rudely to. She had also been physically assaulted and deliberately left out of workplace activities. She sued Legibook claiming workplace bullying.

The Victorian Supreme Court found that the appropriate action was not taken when the bullying was reported. The employee was awarded \$600 000 in damages.

CASE STUDY

CIVIL REMEDIES

In a civil case, the plaintiff normally seeks a **remedy**, which is a way in which a court can right the wrong that has occurred. The general aim of civil remedies is to restore the party who has suffered loss or injury to the position they were in before the loss or injury occurred. This is usually in the form of a payment of money. If a person is owed a sum of money, they can make a claim through the courts. An injured person may claim a sum of money to compensate for any pain or suffering incurred as a result of the civil wrong.

There are two main types of remedies: damages and injunctions.

Damages

If there is any permanent damage, such as the loss of a limb, it will not be possible to physically restore the injured party to how they were before the injury. An amount of money (called 'damages') is therefore given to try to compensate for the damage suffered (sometimes referred to as compensation).

There are three main categories of damages:

- compensatory damages
- nominal damages
- exemplary damages.

Compensatory damages

Compensatory damages are the type of damages usually sought. There are three types of compensatory damages:

- **special or specific damages** – Awarded to compensate the injured party (the plaintiff) for items that can be calculated objectively and exactly; for example, loss of wages, medical expenses and hospital expenses.
- **general damages** – Awarded to compensate the plaintiff for pain and suffering. These cannot be calculated objectively because they include consideration of the extent of the plaintiff's emotional suffering and loss of enjoyment of life. The plaintiff's counsel may estimate the amount that would be suitable. The defendant's counsel may also make submissions about the appropriate amount.
- **aggravated damages** – Awarded to compensate the plaintiff further if the court believes that the defendant's conduct injured the plaintiff's feelings by causing humiliation and insult.

Nominal damages

Nominal damages are awarded by a court if the court believes that the defendant has infringed the rights of the plaintiff, but the plaintiff did not suffer any actual loss. The court therefore awards a very small amount as compensation. This may occur in a defamation case, where it may be shown that what was said was untrue and there was damage to the reputation of the plaintiff, but the damage was very little.

DID YOU KNOW?

Ancient Greece had a system of law where accused individuals could invite friends to testify on their behalf, which, over time, led to a system of compensation that eventually became the modern-day civil law.

CASE STUDY

Slaveski v. State of Victoria and Others [2010] VSC 441

Mr Slaveski, through his litigation guardian, sued 23 current and former police officers, sought damages for assault and battery, false imprisonment, malicious prosecution, defamation, trespass to land and other torts. He also sued the State of Victoria, stating that, as the employer of the police officers, it was liable to pay the damages.

The allegations arose from 13 incidents which occurred between 2000 and 2007 at Mr Slaveski's shop in Lalor, at two police stations, a shopping centre and the Melbourne Children's Court. Mr Slaveski suffered from a panic disorder and was unrepresented at trial.

After 115 sitting days of trial, the Supreme Court found that the majority of the claims were not proven. Justice Kyrou of the Supreme Court did find that on one day, two of the police officers

transcribed into their daybook and diary information from documents in the plaintiff's possession, which the judge found amounted to a trespass to goods. He ordered that the State of Victoria pay Mr Slaveski nominal damages of \$900 for this trespass.

The court also found that other trespass claims were proven and awarded Mr Slaveski in total \$28300.

Figure 6.5 Former and present officers of the Victoria Police were defendants in the Slaveski case.



Exemplary damages

Exemplary damages, sometimes known as punitive damages, are the only example in civil law of a court seeking to punish the defendant. Exemplary damages may be awarded if the defendant's action was so negligent that the court wishes to deter others from similar action and to show disapproval of the defendant's action.

The court may also decide to award exemplary damages if the defendant has shown total disrespect for the wishes of the plaintiff.

DID YOU KNOW?

Exemplary or punitive damages cannot be awarded in defamation cases.

Damages ordered in the case of *GGG v. YYY*

A 45-year-old man issued proceedings in the Supreme Court of Victoria against his uncle, who was 85 years old. The plaintiff alleged the uncle had sexually abused him between Easter 1977 and December 1979, and sought general, aggravated and exemplary damages. The plaintiff submitted evidence from medical experts, stating he suffered depression and other medical issues. The defendant denied any sexual abuse had occurred.

Justice Osborn stated that he was satisfied that the core allegations of sexual abuse had been established. The judge ordered that the defendant pay \$250 000 for general damages, which included aggravated and exemplary damages, and \$17 000 for special damages, which was for past and future medical expenses.

CASE STUDY

INTEREST AND COSTS

If the defendant is ordered to pay money to the plaintiff, it is regarded as payable from the time the complaint or writ was issued. The defendant may, therefore, be ordered to pay interest on the money from that date to the time it is paid.

Legal costs are usually paid by the losing party. Not all legal costs are recoverable; normally, the costs that are reasonably and necessarily incurred (called party-to-party costs) can be recovered from the losing party. Costs can also be awarded on a higher basis, called indemnity costs, where the losing party has engaged in conduct that warrants most of the winning party's costs to be paid (for example, where the losing party had a hopeless claim or defence, or where he or she did not accept an offer of compromise).

Injunctions

Injunctions are a civil remedy aimed at stopping someone doing something or making someone do something. They can be granted on a temporary or long-term basis. There are two types of injunction:

- **restrictive injunction** – This is an injunction stopping someone from doing something; for example, a person could apply for a restrictive injunction to stop a building being destroyed if it were in the interests of the nation to preserve it.
- **mandatory injunction** – This is sought when a person wishes to compel someone to do a particular act, for example to remove something from their land.

CASE STUDY

Supreme Court orders restrictive injunction against Victoria Police

In December 2011, the Supreme Court of Victoria ordered a restrictive injunction against Victoria Police, preventing them from removing three journalists' personal computers from the headquarters of *The Age* newspaper.

The Age made the application to the Supreme Court seeking the injunction after police officers executed a warrant to search electronic and hard-copy files held by three journalists. The warrant was obtained as a result of *The Age* publishing a report in November 2010 about the nature of private information about voters held in a Labor Party database, and was intended to determine whether *The Age* had illegally tapped into that database.



Figure 6.6
Police officers at
The Age

In obtaining the injunction, *The Age* argued that the removal of computers would be damaging to the newspaper because it could compromise the newspaper being able to protect its sources.

Justice Emerton ordered that the police be restrained from removing the computers but allowed them to inspect the computers at *The Age*'s headquarters and required *The Age* staff members to provide access and assistance to the police officers.

The Age subsequently filed a writ against Victoria Police in the Supreme Court alleging that the police officers, part of the e-crime unit, threatened to misuse confidential information contained on the hard drives of the computers.

Order for specific performance

An order for specific performance is an order directing someone to complete a contract. This type of civil remedy is normally used in disputes relating to contracts for the sale of land. For example, if person A had completed a contract of sale to sell his or her house to person B and then person A, the seller, changed his or her mind (perhaps because person A's child wanted to buy the house), person B could obtain an order for specific performance enforcing person A to complete the contract and sell the house to person B.

Table 6.3 Effectiveness of civil remedies

	STRENGTHS	WEAKNESSES
Damages	• Special damages can provide money to cover out-of-court expenses. • General damages can give compensation for pain and suffering. • Exemplary damages give the court the opportunity to punish the wrongdoer when the wrong has had excessive consequences. • The possibility of having to pay damages can deter people from being negligent or committing other civil wrongs.	• There is inconsistency in damages awarded. • There are difficulties in pursuing a claim for damages. • The person found to be in the wrong may face hardship as a result of having to pay damages.
Injunctions	• Injunctions can be used to stop someone doing something immediately, e.g. manufacturing a dangerous product. • They can be used to order someone to do something to rectify a situation.	• Difficulties can be caused by an injunction if it is put in place before a dispute is decided in court, especially if it is later decided that the activity should not be stopped.
Order for specific performance	• Such an order provides a mechanism for enforcing a contract. • Sometimes damages are not appropriate.	• Difficulties can be caused by enforcing a contract; damages are usually an appropriate remedy.

LEARNING ACTIVITY 6.5

Civil remedies

- 1 What are the three main types of damages?
- 2 Look back at the case study *Slaveski v. State of Victoria and Others* and answer the questions.
 - a What were some of the issues that arose in this case?
 - b When might a plaintiff be awarded nominal damages?
 - c What was the tort that nominal damages was awarded for?
- 3 Look back at the case study 'Damages ordered in the case of *GGG v. YYY*' and answer the questions.
 - a Explain the differences between aggravated damages and special damages.
 - b What are exemplary damages and why do you think they were awarded in this case?
- 4 What is a mandatory injunction?
- 5 Under what types of circumstances is a restrictive injunction used?
- 6 Look back at the case study 'Supreme Court orders restrictive injunction against Victoria Police' and answer the following questions.
 - a Who applied for the injunction in this case?
 - b Why was the injunction sought?
 - c What was the conduct that the court restrained the Victoria Police from doing?
 - d Identify and explain two possible steps that might occur next in these proceedings.
- 7 Read the case study 'Damages of \$385 000' and answer the questions.
 - a In which court was this case decided?
 - b What was the nature of the claim being made by Mrs Massoud?

- c What type of damages did Massoud receive?
- d What is the difference between special (or specific) damages and general damages?
- e Why do you think accrued interest was part of the amount awarded in damages?
- f Do you think that the outcome in this case was fair? Give reasons.

CASE STUDY

Damages of \$385 000

A Supreme Court jury awarded Mrs Debra Ann Massoud a sum of \$385 000. Her left leg was amputated after her doctor failed to diagnose a tumour in it. Her counsel, Mr Jack Rush, said that the tumour could have been diagnosed five years earlier, and steps could have been taken to treat it then.

Massoud visited Dr Jeuniewicz 33 times over a period of three years. The tumour was not diagnosed until Massoud requested an X-ray of her leg after the birth of her daughter. Her leg had to be removed because of cancer. Jeuniewicz denied negligence. Massoud claimed that the doctor's inappropriate diagnoses and his failure to properly investigate her complaints amounted to negligence.

The damages awarded included special damages for doctors' expenses and \$10 500 in accrued interest (that is, interest which had built up because the money was not paid at the time the claim was first made). The damages also included an amount to cover the loss of Massoud's leg, her pain and suffering, and her uncertainty about her future.

- 8 Explain the advantages and disadvantages of damages as a form of civil remedy.
- 9 What advantages do injunctions provide?

POST-TRIAL PROCEDURES

Enforcement procedures

If a person who has been found in the wrong during a civil trial does not follow a court order to pay damages to the plaintiff or defendant, there are a number of enforcement procedures. A defendant may be ordered to pay money to the plaintiff for repayment of a debt, damages or interest and costs. The money owing under a court order is called a **judgment debt**. If this money is not paid, the plaintiff can initiate enforcement procedures. These include:

- **a warrant of seizure and sale** – This enables a person who is owed money (judgment creditor) to seize property from the person who owes the money (judgment debtor). This property could be items such as a boat, car or house. When the item is sold, the amount of the debt is paid to the judgment creditor. The balance is returned to the judgment debtor.
- **an attachment of earnings order** – Such an order forces the judgment debtor's employer to pay the debt at regular intervals directly out of the judgment debtor's wages to the judgment creditor.
- **an attachment of debts order** – This can involve a **garnishee**; that is, a third person, who owes money to the judgment debtor, pays the debt directly to the judgment creditor.

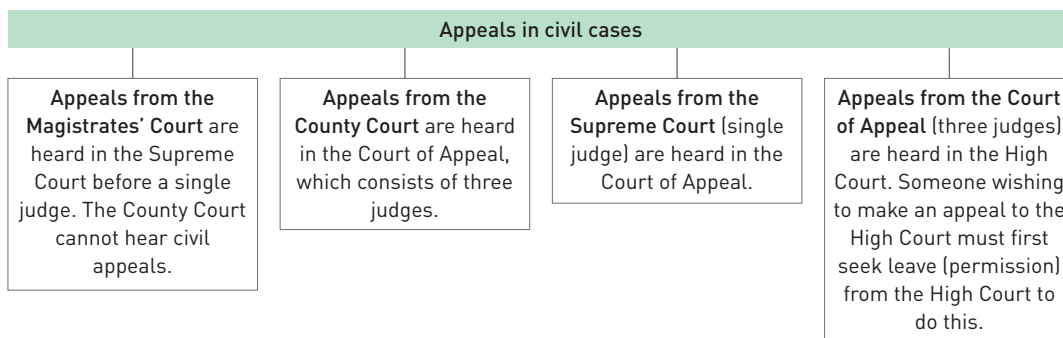
- **bankruptcy** – If the debt exceeds \$5000, the judgment creditor can serve a bankruptcy notice on the judgment debtor. The debt must then be paid within a specified time. If it is not, the debt, and most of the bankrupt's (i.e. the judgment debtor's) property, is put in the hands of the official trustee in bankruptcy. Debtors who owe money can also start bankruptcy proceedings themselves, if they want the trustee to take over their financial affairs.
- **enforcement of injunctions** – A person is **in contempt of court** if he or she does not follow an injunction (does something that he or she has been ordered not to do, or does not do something that he or she has been ordered to do). Being in contempt of court is a criminal offence, and a court can impose a term of imprisonment or a fine, or both.

Civil appeals

An important feature of our legal processes is the ability of individuals to appeal against a decision when mistakes have been made. As it is also important to finalise a matter as quickly as possible, appeals should not be allowed to go on indefinitely, and so our court hierarchy ensures this does not occur.

A person appealing against a decision is called the appellant. The other party is called the respondent. A court is said to be in its appellate jurisdiction when hearing an appeal.

Civil appeals can be made by either the plaintiff or the defendant on the grounds of a **point of law**. The trial judge may have misdirected the jury on how the law applied to the case, or on the amount of damages – for example, too small (as far as the plaintiff is concerned) or excessive (as far as the defendant is concerned).



LEARNING ACTIVITY 6.6

Post-trial procedures

- 1 What is a judgment debt?
- 2 What is the difference between an attachment of earnings order and an attachment of debts order?
- 3 In which court will the following appeals be heard?
 - a Judith was awarded \$56 000 in the County Court. She wanted to appeal against the decision because she thought the amount was not high enough for the degree of pain and suffering she had endured.
 - b Anthony was unsuccessful in his claim for personal injury in the County Court. He intended to appeal against the decision because he thought that the judge had made a mistake when explaining the law to the jury.

- c Rocchina was unsuccessful in her claim in the Magistrates' Court for the payment of a business debt of \$15000. She is going to appeal against the decision because she thinks that the court did not apply the law correctly to her case.
 - d Stuart has been successful in his claim for damages in the Supreme Court. The Royal Infirmary Hospital has been ordered to pay damages of \$500000. The hospital is going to appeal against the decision on the grounds that the amount of damages is excessive.
- 4 Match these legal terms with their definitions.

mandatory injunction	compensation given for loss of wages and medical expenses
warrant of seizure and sale	compensation awarded for pain and suffering or loss of enjoyment of life
respondent	a small amount of compensation awarded to show that an individual's rights have been infringed even though he or she has not suffered any loss
contempt of court	an additional amount in compensation imposed to punish or make an example of the losing party
bankruptcy	when the party who lost a civil law action is asked to pay some of the winning party's legal fees
order for specific performance	a court order that stops a person from doing something
appellant	a court order that makes a person do something
special damages	a court order that is used to enforce the terms of a contract
costs	when a creditor can apply to have the property and assets of a personal debtor taken and sold
exemplary damages	when a creditor can apply to have part of a debtor's wages paid directly to the creditor
nominal damages	when a trustee takes over the financial affairs of a debtor because the person cannot pay their debts
attachment of earnings	the person who is lodging an appeal in civil law
restrictive injunction	the person against whom an appeal is brought
general damage	when a person refuses to comply with an order of the court

DIFFICULTIES FACED BY PARTIES IN CIVIL DISPUTES

Many situations in everyday life can give rise to a civil dispute. For example, someone may make a defamatory statement about you that is so damaging that it affects your ability to work in your chosen profession. Another example would be if you use something that has been negligently made and it causes injury and/or financial loss.

Civil law provides you with the opportunity to make a claim against the person in the wrong in an attempt to return you to the position you were in before the wrong occurred.

There are processes in place to assist parties to resolve their civil disputes, such as mediation and judicial determination. However, parties to a civil dispute also face some difficulties, such as:

- People may not be aware of their rights.
- Some people may have circumstances that make it more difficult to pursue or defend a claim, such as a physical disability, mental illness, language difficulties or cultural differences.
- People may feel traumatised by the prospect of pursuing a claim.
- Mediation will only work if both parties agree to attend.
- Pre-trial procedures can cause long delays.
- The high cost of using legal representatives can cause people to abandon their claim, or if pursued, can cause huge financial difficulties.
- The risk of having to pay the other party's legal costs could be a deterrent.
- It can be stressful having to act in an adversarial way, particularly if the other side is an employer, neighbour or family member.
- Witnesses may have difficulty remembering the details needed to prove the case.
- It may be difficult to collect necessary evidence.
- Parties to a case may find it difficult to give evidence in court.
- A jury may have difficulty understanding the evidence.
- It may be difficult to enforce a court order.

LEARNING ACTIVITY 6.7

Difficulties faced by parties in civil disputes

- 1 Why is it important to be able to pursue a civil claim?
- 2 Imagine you have been asked what problems may arise if a person decided to pursue a civil claim.
 - a Explain these problems.
 - b Explain how you think these problems can be overcome.

PRACTICE EXAM QUESTIONS

Read the case study 'Man suing a hospital' and answer the questions.

- 1 Explain the civil jurisdiction (original and appellate) of a court that could hear this case. *(4 marks)*
- 2 Describe two pre-trial procedures that would take place before this case goes to trial. To what extent do you think these pre-trial procedures would be effective? Discuss. *(10 marks)*
- 3 Outline two types of compensatory damages that may apply in this case. Explain how effective you think each of these types of damages would be. *(6 marks)*

Man suing a hospital

A man who is claiming \$8 million damages from Geelong Hospital after being made a quadriplegic because his spine was injected with the wrong drug said he was living in a dead body. He is 26 years old, and is in constant pain and unable to move around. The plaintiff said that about 15 minutes after he had received an injection to his lower spine for cancer treatment, he heard a doctor say, 'We've made a big mistake'.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK WRITTEN REPORT

Genevieve's injuries

- 1 Read the case study 'Genevieve's injuries'. Collect information from a range of sources about the pre-trial and trial procedures that Genevieve will need to follow to be compensated for her injuries.
- 2 Draw a diagram for Genevieve that outlines:
 - the pre-trial procedures that would be applicable in her case
 - the trial procedures that would be applicable in her case.
- 3 Write a report for Genevieve that discusses the legal action she should take and the likelihood of her case succeeding. Make sure you explain:
 - the area of law involved in her case and what she needs to prove to be successful
 - what needs to be done to initiate a civil case
 - the court that will hear her case and whether a jury will be used
 - the types of injury (or loss) for which she can claim compensation
 - the type of compensation she should claim.

(Total 15 marks)

Genevieve's injuries

Genevieve was driving on a highway when another car travelling in the same direction hit a runaway horse. The horse landed on Genevieve's car bonnet. Genevieve sustained multiple injuries including a fractured skull. She was in a coma for days after the accident. She has not fully recovered from these injuries. Genevieve has partial sight and hearing loss. She also has facial scarring, memory loss and difficulty walking. Genevieve has not been able to work (as a teacher) since the accident. The horse had escaped from its owner's property where the fencing was poorly maintained and inadequate.

ASSESSMENT TASK CASE STUDY

Vioxx landmark judgment

Read the case studies 'Vioxx landmark judgment' and 'Drug company wins appeal over Vioxx' and answer the questions.

- 1 What are the facts of this case and what was the civil wrong? *(4 marks)*
- 2 What was the outcome of this case? Explain the type of civil remedy awarded by the court. *(4 marks)*
- 3 Evaluate the method of dispute resolution used in this case. *(5 marks)*
- 4 How does the original decision differ from the decision of the appeal court? *(2 marks)*
- 5 Describe two difficulties faced by parties in civil disputes. *(4 marks)*
- 6 How effective do you think civil remedies are in bringing the wronged person back to the position he or she was in before the civil wrong took place? Discuss in relation to this case. *(6 marks)*

(Total 25 marks)

Vioxx landmark judgment

The Federal Court ruled on 5 March 2010 that the controversial arthritis drug Vioxx was defective and doubled the risk of heart attacks in its users.

The court ordered the pharmaceutical giant Merck Sharp & Dohme to pay compensation to Graeme Peterson of \$287 000 after he suffered a heart attack in 2003 caused by using the anti-inflammatory drug Vioxx for his arthritis.

Vioxx, the so-called blockbuster drug, proved immensely popular with arthritis sufferers around the world. Compared to other anti-arthritic drugs, Vioxx had a lower risk of stomach problems.

Following health concerns about the drug, it was withdrawn from worldwide sale in 2004, creating the biggest and most expensive recall in history.

Peterson took Vioxx continually from 2001 until it was withdrawn from sale in 2004. He suffered a heart attack in December 2003. The Federal Court judge ruled that Vioxx contributed to his heart attack. Justice Christopher Jessup ruled that the drug was a defective product unsuitable to treat arthritic pain under the *Trade Practices Act 1974* (Cth).



Figure 6.7

Lawyer Peter Gordon (centre) with Graeme Peterson and his wife Julia during a press conference at the Slater & Gordon offices in Melbourne

Drug company wins appeal over Vioxx

A landmark ruling that the anti-arthritis drug Vioxx was not fit for sale because it doubled the risk of heart attacks has been overturned on appeal by the full Federal Court in October 2011. The original case paved the way for 1500 Australians who had heart attacks after taking Vioxx to claim compensation.

On appeal, Chief Justice Patrick Keane and Justices Annabelle Bennett and Michelle Gordon said the finding that Vioxx doubled the risk of Mr Peterson's heart attack was flawed, and did not make the drug unfit for sale.

In May 2012 the High Court refused Mr Peterson leave to appeal and therefore the decision of the Full Court of the Federal Court stands.

ASSESSMENT TASK FOLIO AND REPORT

Civil cases

Collect two newspaper articles (or reports of television or radio programs) that refer to civil cases. Put the articles into your newspaper file. Write a report on each article or report chosen. In your report you should include:

- the date and source of each article or report
- description of the main issues of the cases referred to in the articles or reports
- explanation of the reasons the law referred to is a civil matter
- discussion about how the law referred to in each article or report assists in the protection of individuals in the community.

(Total 10 marks)

ASSESSMENT TASK MULTIMEDIA REPORT

Civil courtroom

Prepare a poster or multimedia presentation outlining the pre-trial, trial and post-trial proceedings of a civil case. In your poster or presentation:

- outline the main facts of an actual civil case, or make up a scenario of a civil case
- show pictorially, with diagrams and/or a flow chart, the pre-trial proceedings that would have taken place, the hearing/trial processes and the final decision for the civil case chosen
- show the links between each of the processes to demonstrate your understanding of the processes
- write a report commenting on the purpose of the pre-trial proceedings and the effectiveness of each of the stages of civil law procedures.

(Total 30 marks)



CHAPTER 7

A QUESTION OF RIGHTS

OUTCOME

On completion of this unit you should be able to describe an Australian case illustrating rights issues, and discuss the impact of the case on the legal system and the rights of individuals.

KEY KNOWLEDGE

This chapter is designed to help you to understand the key knowledge of:

- the role of an individual or a group in launching a test case
- the facts and issues central to the case, including the rights in question
- the laws that applied to the case
- the outcome of the case and its impact on the legal system and the rights of individuals
- conflicting attitudes in relation to the issues raised in the case.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about a legal case and issues, using print and electronic media
- describe the role of individuals in bringing about changes in the law through launching test cases
- discuss the impact of a test case on the rights of individuals and the legal system.

WARNING: This chapter contains images of people who are now deceased.

KEY LEGAL TERMINOLOGY

defendant A person against whom a civil legal action is taken in a civil case.

plaintiff A person bringing a civil action.

right An entitlement or permission, usually of a legal or moral nature.

terra nullius Empty land.

test case A case that establishes new legal rights or principles.

RIGHTS

Rights are entitlements or permissions, usually of a legal or moral nature. Rights are of vital importance in how we conduct our lives, and in the fields of law and ethics. For example, we have a right to free speech, but we must ensure that we do not inappropriately damage someone's reputation.

Rights dominate most modern views of what actions are proper and which institutions are just. Rights are widely regarded as fundamental to our governments, the contents of our laws and how we perceive morality.

In some instances, however, the law does not protect the rights of individuals. In these situations, some people would argue that being able to disobey the law is also a right. For example, Mohandas Karamchand 'Mahatma' Gandhi and Martin Luther King Jr used non-violent disobedience of the law to draw attention to the unjust treatment of their people.

Although we have a stable government with laws that are accepted by the majority of people, there are some sections of our community for whom basic human rights are not as readily available. This includes some Indigenous communities and other minority groups such as refugees. Anyone can find that, unbeknownst to them, they have been treated unfairly and denied their rights or exploited by other individuals or groups in society, such as big corporations.

Some people in our community stand out as campaigners for their rights and the rights of others. Eddie Mabo and Bernie Banton are two such extraordinary men who fought hard and sacrificed much for their rights and the rights of others. They have made a difference to the legal system and the lives of many Australians. Some refugees, who have come to Australia under extraordinary conditions, have fought for the protection of the rights of refugees not to be sent to Malaysia for offshore processing.

THE ROLE OF AN INDIVIDUAL OR GROUP IN LAUNCHING A TEST CASE

Everyone has a voice to influence changes in the law. Some people will choose to organise a petition or a demonstration to alert the government to a need for a change in the law.

If a person or group has been treated unfairly, the person or group may be able to fight for the right to be treated fairly through the courts. A court may be able to make a decision that will reverse the unfair treatment.

To make a change in the law through the courts it is necessary to launch a **test case**. A test case establishes new legal rights or principles. The reason for the decision in the test case then acts as a precedent for similar cases in the future.

For a person to take a matter to court, he or she must have **standing**. This means that he or she must be able to show that they were personally affected by the action of another person or group, and suffered as a result.

Caring citizens cannot decide that they wish to take a matter to court unless they have standing. For example, in the case of *John McBain v. The State of Victoria & Ors* (2000), Dr John McBain wanted to influence a change in the law to allow all women access to the IVF program. He took the problem to a court to be resolved. However, he could only do this if he had standing. He was not personally affected by not being able to access the IVF program, so he brought Leesa Meldrum into the court case. Leesa was a single woman who wanted to be part of the IVF program. She could not do this because under the law only married women were able to access IVF services. McBain and Meldrum challenged the Victorian Government, claiming that barring single women from the program was discriminating against single women. They won the case.



Figure 7.1
Leesa Meldrum fought for the rights of single women.

LEARNING ACTIVITY 7.1

Rights and test cases

- 1 What are rights? How do they affect our everyday lives?
- 2 Do you think there is ever a situation where it might be necessary to break the law to fight for your rights? Explain.
- 3 What is a test case?
- 4 What does it mean when a person needs to have 'standing' to take a matter to court? Explain, using an example.

EDDIE MABO'S FIGHT FOR RIGHTS

Edward Koiki Sambo (Eddie Mabo) was an Indigenous Australian and a passionate person who could see the injustices to which his people were subjected. He dedicated his life to fight for the land rights of his people. Indigenous lawyer Sandra Bailey remarked that Indigenous people were 'haunted by the empty land lie'. During her discussions with Indigenous people when she was part of the Royal Commission into Aboriginal Deaths in Custody, conducted between 1987 and 1991, she found that there was a broad consensus that 'the fundamental issue was that of dispossession'.

Facts and issues

Before colonisation

Aboriginal and Torres Strait Islander peoples occupied Australia for at least 40 000 to 60 000 years before the first British colony was established. They spoke their own languages and had their own laws and customs. An essential part of their laws and customs is a strong connection to the land.

After colonisation

In 1788, the British claimed sovereignty over part of Australia and established a colony. In 1889, the British courts applied the doctrine of **terra nullius** to Australia. This meant that the British regarded the land of Australia as 'nobody's land' when it was colonised.



Figure 7.2

An Indigenous school in Queensland in the 1950s

The birth of a campaigner

Edward Koiki Sambo was born on Murray Island on 29 June 1936. He was the fifth child of Robert and Poipe Sambo. His mother died shortly after he was born and he was adopted by his mother's brother Benny Mabo and Benny's wife, Maiga Mabo. By islander law, Edward Koiki became Benny Mabo's son and could inherit Mabo land. He became known as Eddie Mabo.

Benny Mabo was seen as a person of importance and knowledge. People would talk to him about land disputes and landownership.

When Eddie Mabo was growing up, the Torres Strait Islands were administered by Queensland's Chief Protector of Aborigines and the Department of Native Affairs. The department provided every island child with schooling, but this was very limited and it was assumed that no child would progress beyond primary school.

A formative influence on the young Eddie Mabo was Robert Victor Miles, who came to Murray Island as a government teacher. Miles convinced Mabo that for his future's sake, he must learn English.

Mabo became disillusioned with his lack of rights. He started drinking heavily and was exiled from the Torres Strait Islands. Even 15 years later he was not allowed to return.

In the 1960s, Mabo threw himself into the campaign to give Indigenous people the right to be counted in the census. Vigorous campaigning led to increased support for the rights of Indigenous people. In 1967, a referendum was held and was successful in bringing about a change in the Constitution to formally recognise Indigenous people as citizens of Australia.

During the campaign, Mabo initiated a conference in Townsville called the Inter-Racial Seminar. Mabo urged the conference to address issues of employment, housing, education and Indigenous civil rights.

Public support for land rights grew quickly in the late 1960s. The Australian Labor Party, trade unions and churches were behind the demand for change.

The law and the first land rights case

The existing law in Australia was based on the principle of *terra nullius*: that Australia was officially considered an empty land before British settlement. This meant that Indigenous Australians had no property rights. Even though they had occupied the land for many thousands of years, according to Australian law, they did not own their land.

The first land rights case was heard in 1971. In *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 (in the Northern Territory Supreme Court), the Indigenous inhabitants of the Gove Peninsula in Arnhem Land fought against the bauxite mining of their traditional lands without their consent. In this case, Justice Blackburn concluded that the doctrine of native title did not form part of the law of Australia.

Following this case, the then prime minister, William McMahon, responded by promising a policy statement on Indigenous access to land. When this statement was finally released, it did little to further the cause of Indigenous access to land.

Mabo land rights campaign

The election of the Whitlam Labor Government in December 1972 led to increased money for Indigenous programs. Eddie Mabo became involved in the Townsville Aboriginal and Islander Legal Service and the Health Service. He was elected president of Yumba Meta, a housing association that purchased houses in Townsville to be rented by Indigenous people, using Commonwealth funds.

Following this, Mabo became a full-time community activist. He needed money to live so he worked at James Cook University, Townsville, as a gardener. During his time there he spent every spare minute in the university library, reading all he could about his people and country, including the six-volume report on the Torres Strait by the Cambridge Anthropological Expedition. He became very knowledgeable about the Torres Strait Islands and he also had firsthand knowledge, being an Islander himself. He used this knowledge to give lectures on the subject to students at the university.

The Land Rights Conference, 1981

Mabo's real push for land rights began in the 1980s. He attended the Land Rights Conference in 1981 and explained his position on land rights. An extract of his speech at that conference follows.

EXTRACT

Eddie Koiki Mabo: Land Rights in the Torres Strait

I would like to first of all express my sincere thanks to the organisers of this conference: in particular the James Cook University Student Union and the Aboriginal Treaty Committee in Townsville for allowing me to speak at this very important conference. I am also pleased to see so many of our people as delegates, and interested participants from all parts of Australia.

Struggle for land rights has been a major issue in Aboriginal and Islander politics for the last decade. It is interesting to note that our struggle for land rights has attracted so many of our fellow white Australians to join with us. Some larger institutions such as the churches and trade unions have also made public announcements giving their support for Aboriginal and Islander land rights claims. However, it is extremely pleasing to see so many of our white friends here representing organisations and various professions giving us moral and professional support.

Before I address you on the topic which I have been requested to speak on, I want to tell you that I will not be making references to any books, because what I know about my people and our culture did not come from books written by academics. My textbooks were my parents, especially my late mother and father Maiga and Benny Mabo of Las village, and so many other people who contributed to my traditional education, and all my people of the Eastern Torres Strait Islands who unknowingly contributed to the knowledge I now have.

In the Torres Strait, landownership is the same throughout. It is different from Aboriginal landownership on the mainland. Although we have tribal regions, we go much further into the clan area and then to individual or family holdings. This system existed as long as we could remember. When the first white men arrived in our islands they found people as village dwellers who lived in permanent houses and in well-kept villages. They also discovered that we were expert gardeners and hunters.

The land was inherited always by the male descendants just as male children in white societies always retained the family name. The terms we use for the male name-holders are Neai Borom or Neai Lied-Lied. Girls inherited land only in cases where the couple had no male children. In some instances daughters were given land as a wedding present.

Before the father died, or during his lifetime, he would make sure that his family and friends knew his wish as to which one of his sons would be the heir to his land. He would also insist that the heir to his land must not deprive the rest of his sons or daughters of the use of his land. In most instances the decision for the use of their father's land remains at the goodwill of the heir. Such was the case of my father allowing his sisters to garden in the land that I now inherit.

I want to use some examples here so that you may become more aware of our landownership. For instance in Britain you have three distinct areas, Wales to the south, England, and Scotland to the north. I will discuss Scotland because I have a close friend, Brian McLeod, who actually gave me this information.

In Scotland they have different areas of land distinctly belonging to certain clans, such as the McLeod country etc. I also recall there was TV coverage of Mr Malcolm Fraser, who returned to his family castle in Scotland, situated in the Fraser country of Scotland, owned by Mr Fraser's clan. My understanding of the Scots is that Scotland was divided into clan groups, and within each clan grouping you have the individual or family holdings such as the Fraser castle.

On Mer we have the same situation. Let me explain further. The island is divided into three major tribal divisions. These are Meriam Pek, Komet Pek and Dauer Pek. These are divided and subdivided right down to clan groups. The laws relating to land were maintained by the Aet of Mer or Dowar. Whenever there was a dispute over boundaries, the Aet was called upon to settle the disputes in each of their respective islands.

In case you may wonder what the Aet is, it is much the same as you have King of England who was the defender of your Christian faith. In much the same way our Aet was the upholder of our laws, the defender of Malo-Bomai cult and the Au zogo zogo le, the central figure of all the sacred people.

Typically of the colonists, the first Europeans disrupted the Aet system of government by appointing their representatives (known as mammooses). Three mammooses were appointed for Mer and Dowar.

Again in this case, people who were not traditional leaders were appointed as mamoose in order that they would suppress traditional leaders. The people who were appointed as mamoose and police officers were people whom we regard as Zogo kak buai. This term has a variety of meanings and I do not want to explain it here.

In relation to land distribution in the Torres Strait I'm going to use Mer as an example and I want you to know this exists throughout the Torres Strait and I want you to use your own imagination in this case. Murray (Mer) Island is firstly divided into three large tribal divisions. Draw a line from North-West Coast to the South-West Coast of the Island. Within each of the subdivisions of the tribal districts, we have individual, family or clan holdings.

Inside our Piadram tribal subdivision of Las village, I own the land handed down to me by my father, and on the right of my clan (Mabo), I have Sagigi and Kanieu clan and on my left are Sam, Wailu and Dawita clans. The boundaries between us are all distinct and known to us all. From my point of view, we have a similar system to the English, Welsh and Scots. None of the land will ever be sold for cash.

I can see that lots of problems will be created if the Queensland government decides to de-reserve the existing reserves.

I want to make a proposal to all Queenslanders and the Queensland government. This proposal is based on several reasons.

Torres Strait has been a lost paradise in the State and in the Commonwealth. Since the boom in plastics and decline of pearl and trochus industries, we have been the non-productive area of the State, and according to the State Department of Aboriginal and Island Advancement we have been a liability to the State government. This is unmistakably untrue. It is a deliberate attempt to mislead the people of Queensland on how well we are looked after.

The only area in which the State contributes is a means of travel to and from Thursday Island on the *MV Melbidir*. Little tin and fibro cottages which would cost no more than \$1000 in southern markets have been provided for us to live in as family homes, all of which are not much more than an average chicken coop. But nevertheless most of these are paid for by the Islanders on a long-term loans basis.

I myself and my colleagues of the Torres Strait Land Council fail to see any good reason for Torres Strait to remain as part of Queensland. Our wish for the area to be transferred to the Commonwealth has gradually caught on in the Islands themselves. Problems associated with our wellbeing in the area of health, education, housing and industrial development are all lacking attention from the State. Whatever services are being provided are inadequate compared to the standards on the mainland. Education and health are the prime examples of Queensland's lack of interest in the area and its black people. This race will either die out or be made into zombies as a result of VD [venereal disease] and lack of attempts to eliminate the disease.

What we actually want is real help, not patronising colonial rule anymore; more advanced help from our prosperous white Queenslanders to enable us to stand on our own feet and be able to exercise our rights as Australians and 'Members of the British Empire' as stated by Douglas at the time of annexation of Torres Strait by Queensland. We do not want to remain as your poor neighbour anymore. The only real help we want from Queensland is to transfer the area to the Commonwealth, to be under the Department of Home Affairs and the Department of Aboriginal Affairs for financial assistance.

Here is the draft summary of the proposal for the transfer of the Torres Strait Islands to the Commonwealth, extension of democracy and elimination of colonial rule of Queensland in the Torres Strait area:

- (1) Transfer all islands north of the Cape York Peninsula from Boigu in the west to Bramble Cay in the east, from Queensland to the Commonwealth government.
- (2) Declaration by the Commonwealth of the area as an autonomous region within the Commonwealth of Australia.
- (3) Election to be conducted to elect a Constituent Assembly on an adult franchise basis.
- (4) Drawing up of the Constitution of the Torres Strait by the Constituent Assembly.
- (5) Members of Commonwealth government and members of the legal profession to be appointed as advisers to assist in (4) above.
- (6) All rights of marine industries currently exploited by foreign companies, and all other natural wealth including seabed rights be reserved exclusively for the Torres Strait Islanders with heavy penalties to outsiders infringing on these rights.
- (7) Financial assistance to this region and appointment of other necessary advisers who would assist in the implementation of administrative machinery, technical and business enterprises to the democratically elected Assembly and the people of Torres Strait.

Australia already has Norfolk Island existing as an autonomous region. Declaration of Torres Strait as an autonomous region would not be new to the Commonwealth government.

While we the Islanders would be involved in deciding our constitution for the area, we would want the Commonwealth government to police the area by permanently employing three naval patrol vessels; one to be stationed in the Western Islands, one in the Central and one in the Eastern Islands. These patrol vessels would be aided by the employment of three Canberra bombers to be stationed at Horn Island air base. Employment of these naval vessels and the aircraft would provide on-the-job training for our young men to be involved in the defence of Australia's most northerly point and protection of their internal rights within the Torres Strait region.

Source: Eddie Mabo's address to the Land Rights Conference, 1981. The conference was called *Land Rights and the Future of Australian Race Relations*.

Those at the Townsville conference sensed that it was time to launch a test case in the courts. Islanders Eddie Mabo, Flo Kennedy and David Passi were prepared to take it on. They became the plaintiffs in the original case. Lawyers Greg McIntyre, Barbara Hocking and Garth Nettheim backed the idea. Doctor 'Nugget' Coombs and anthropologist Nonie Sharp, from the Aboriginal Treaty Committee, were also part of the original team of people to start the ball rolling.

After the Townsville conference, things began to move quickly. McIntyre, who worked at the Aboriginal Legal Service in Cairns, was engaged as solicitor for the Islanders. Hocking, a Melbourne barrister and long-time advocate for Indigenous people's rights, was briefed to advise the plaintiffs, and to consult other barristers with expertise in customary land cases. Ron Castan QC was selected to argue the case for the Murray Islanders. A short time later, the legal team was further strengthened with the recruitment of barrister Bryan Keon-Cohen.

Claiming customary ownership

In 1982, Mabo and four other Islanders filed a writ in the High Court of Australia. They claimed customary ownership of their ancestral lands on Murray Island. In doing so, they challenged the doctrine of terra nullius.

Mabo believed it was not the role of the white government to withhold rights to traditional Indigenous land. Mabo was under no illusion about the scale of the task; he and his co-plaintiffs were facing the combined resources of the Queensland and Commonwealth governments.

The most important ingredient that was missing was money. Mabo often had to rely on the benevolence of family members and friends to help him to attend court or hold meetings to raise support for their cause. As the work intensified, so did the search for funding. The breakthrough came with a \$50 000 Commonwealth Government grant, just as the statement of claim was ready to be filed.

Over the next decade, the plaintiffs and their lawyers would face the constant pressure of never enough money. The case could not have continued without the help of lawyers who were prepared to work for nothing. Mabo was unable to work because he was required to attend conferences, make statements and go around the country trying to raise money. Mabo gave his all, financially and physically, to the needs of his case.

The Mabo case in the Supreme Court of Queensland

In February 1986, Chief Justice Gibbs of the High Court of Australia ordered that the Supreme Court of Queensland conduct the hearings into the Mabo case on its behalf. Justice Moynihan, of the Supreme Court, was appointed to hear all the evidence, determine the facts and report back to the High Court in Canberra.

On 13 October 1986, proceedings commenced in Brisbane and Eddie Mabo was called to give evidence. He was questioned by his barristers, Keon-Cohen and Castan. He then faced 10 days of gruelling cross-examination by the Queensland Government's well-briefed lawyers. His evidence became the focus of the attack by the Queensland Government.

Justice Moynihan of the Supreme Court described the case in the following terms:

... the case pleaded and particularised was claims by the various individual plaintiffs in respect of very specific pieces of land or areas of sea or reef. And their claims, their individual claims, were founded on chains of descent ... for example, 'I'm Eddie Mabo, I claim this piece of land which is situated here, which has this description and I claim it because I was adopted into a particular family and there is a line of descent'. And in that sense it was almost a series of mini cases in respect of each piece of land claimed by each plaintiff ...

The Murray Islander witnesses explained Meriam custom and the sacred laws, which underpin both their traditional rights and obligations to land and sea. The Meriam people are the people of the Torres Strait Islands.

The Meriam people's laws relate to occupation of the land and trespass and inheritance. These laws are fundamental to their traditional system of ownership. They hoped this evidence would establish the Murray Islander claim to those areas of land, sea and reef specified in the court documents.

The islanders had to fight two entrenched principles of the Australian legal system. These were the concept of terra nullius and the principle of sovereignty over all the land of Australia, which it was claimed abolished any native title rights that may have existed before colonisation.

There were 27 witnesses ranging from one man aged over 80 to young men and women.

In May 1989, the Supreme Court of Queensland visited Murray Island to hear evidence. By later that year, Mabo and James Rice were the only plaintiffs left and Rice was under pressure to withdraw as a plaintiff. Celuia Salee had died shortly after the claim had been filed. The Reverend David Passi and his brother Sam Passi both withdrew as plaintiffs.

The Supreme Court case hearings were completed in Brisbane on 6 September 1989, and Justice Moynihan then faced a formidable task. His task was to decide on the facts surrounding the Murray

Islanders' claims. He had to sort through the conflicting evidence of 44 witnesses, which, together with the submissions from both sides, generated 3464 pages of transcript. There were also more than 330 exhibits.

Justice Moynihan's task was to report back to the High Court and his decision in the Supreme Court of Queensland was handed down on 16 November 1990, more than four years after Mabo first entered the witness box. He found that Mabo's claims were denied.

This finding was somewhat shattering to Mabo's morale, but it did pave the way for taking the case back to the High Court.

The Mabo case in the High Court

The High Court hearings concluded in May 1991. Mabo made the long, 36-hour trip south by bus from Townsville to Canberra to be present for the final hearing.

The High Court justices retired to consider their verdict and write their judgments. It took many months before the decision was finally announced in June 1992. The journey through the courts had taken 10 years and it had taken its toll on Eddie Mabo.

All of the judges, except Justice Dawson, agreed that:

- there was a concept of native title at common law
- the source of native title was the traditional connection to or occupation of the land
- the nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs, and
- native title could be extinguished by the valid exercise of governmental powers provided a clear and plain intention to do so was manifest.

The order of the court was a declaration which, in part, reads as follows:

- (2) that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer except for that parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have been validly appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of Meriam people under native title;
- (3) that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.



Put simply, the decision said that **under Australian law, Indigenous people have rights to land, that these rights had existed before colonisation and still exist**. This right is called **native title**.

The long journey to the conclusion justified Eddie Mabo's, and others', dedication to their cause. By a majority of **six to one**, the High Court ruled that native title to land is recognised by the common law of Australia. This finding threw out the notion that when the land was 'discovered' by Captain Cook in 1788 it was terra nullius, an empty or uncivilised land.

Figure 7.3
Eddie Mabo

**Figure 7.4**

Left to right: Greg McIntyre, Ron Castan QC, Eddie Mabo and Bryan Keon-Cohen at the High Court in Canberra

EXTRACT

Mabo v. Queensland (No. 2)

Mabo v. Queensland (No. 2) ('Mabo case') (1992) HCA 23; (1992) 175 CLR 1 (3 June 1992)

HIGH COURT OF AUSTRALIA

MABO AND OTHERS v. QUEENSLAND (No. 2) (1992) HCA 23; (1992) 175 CLR 1
F.C. 92/014

Aborigines – Constitutional Law – Real Property

High Court of Australia

Mason C.J. (1), Brennan (2), Deane (3), Dawson (4), Toohey (5), Gaudron (3) and McHugh (1) JJ.

Catchwords

Aborigines – Native title to land – Whether extinguished by annexation by Crown – Reception of common law in Australia – Effect on native title – Terra nullius – Whether doctrine applicable in Australia.

Constitutional Law (Q.) – Reception of common law in settled colony – Effect on title of indigenous people – Annexation of territory by colony – terra nullius – Whether doctrine applicable in Australia – Power of Parliament of Queensland to extinguish native title.

Real Property – Tenures and estates – Application on settlement of New South Wales – Effect on native title – Land over which native title exists – Whether Crown land – *Land Act 1962* (Q.), s. 5 – 'Crown land.'

Hearing

Canberra, 1991, May 28–31; 1992, June 3. 3:6:1992

Decision

MASON C.J. AND McHUGH J. We agree with the reasons for judgment of Brennan J. and with the declaration which he proposes.

2. In the result, six members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland. The main difference between those members of the Court who constitute the majority is that, subject to the operation of the *Racial Discrimination Act 1975* (Cth), neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J. supports the conclusion of Brennan J. and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.
3. We are authorised to say that the other members of the Court agree with what is said in the preceding paragraph about the outcome of the case.
4. The formal order to be made by the Court accords with the declaration proposed by Brennan J. but is cast in a form which will not give rise to any possible implication affecting the status of land which is not the subject of the declaration in par.2 of the formal order.

BRENNAN J. The Murray Islands lie in the Torres Strait, at about 10 degrees S. Latitude and 144 degrees E. Longitude. They are the easternmost of the Eastern Islands of the Strait. Their total land area is of the order of nine square kilometres. The biggest is Mer (known also as Murray Island), oval in shape about 2.79 kms long and about 1.65 kms across. A channel about 900 m. wide separates Mer from the other two islands, Dauar and Waier, which lie closely adjacent to each other to the south of Mer. The Islands are surrounded for the most part by fringing reefs. The people who were in occupation of these Islands before first European contact and who have continued to occupy those Islands to the present day are known as the Meriam people. Although outsiders, relatively few in number, have lived on the Murray Islands from time to time and worked as missionaries, government officials, or fishermen, there has not been a permanent immigrant population.

Anthropological records and research show that the present inhabitants of the Islands are descended from the people described in early European reports. The component of foreign ancestry among the present population is small compared with most communities living in the Torres Strait.

The Meriam people of today retain a strong sense of affiliation with their forbears and with the society and culture of earlier times. They have a strong sense of identity with their Islands. The plaintiffs are members of the Meriam people. In this case, the legal rights of the members of the Meriam people to the land of the Murray Islands are in question.

The Meriam people were in occupation of the Islands for generations before the first European contact. They are a Melanesian people (perhaps an integration of differing groups) who probably came to the Murray Islands from Papua New Guinea. Their numbers have fluctuated, probably no more than 1000, no less than 400.

Source: High Court judgment, *Mabo & Ors v. The State of Queensland (No. 2)* (1992)

The High Court said native title could continue if the following conditions existed:

- where Aboriginal and Torres Strait Islander people had maintained their connection with the land through the years of European settlement – native title was extinguished if the Aboriginal clan or group had ceased to acknowledge traditional laws and lost its connection to the land
- where native title had not been extinguished by valid acts of state or Commonwealth parliaments

- where the content of native title could be determined according to the traditional laws and customs of the Aboriginal and Torres Strait Islander people.

Plainly, it meant that where Indigenous people had continued living on their land and their customs showed a traditional attachment to their land, they could claim ownership of the land under native title. The exception to this is where valid Australian law meant the land was legally owned, or used by others, for example private land for housing.

The death of Mabo

Sadly, Eddie Mabo died on 21 January 1992, just five months before the High Court's final decision was handed down. For 10 years his passion, intelligence and commitment had driven the case forward, from its beginning through to the final arguments put to the High Court. The claim could not have been pursued without him.

The Australian newspaper selected Eddie Mabo as Australian of the Year on 26 January 1993.

NOTE

More information can be found in the ABC documentary *Mabo – Life of an Island Man* (1997).

The impact of the test case on the rights of individuals and the legal system

The High Court's Mabo decision had a profound effect on the whole nation, which still continues today. According to Justice Michael Kirby (formerly High Court justice), the basic principles of the Mabo decision are:

- our system of real property law accommodates native title
- native title may be extinguished
- it may be extinguished in a number of ways either by the Crown or by the Indigenous people themselves, and
- where it has been extinguished there may (or may not) be a right to compensation.

The High Court's rejection of terra nullius, and recognition of native title, has led to legislation being passed to clarify the situation and protect property interests. It has generated intense political debate and vast amounts of academic writing. Media attention was enormous at the time and the case still creates lively interest.

The decision fundamentally altered the legal, political and social relations between Indigenous and non-Indigenous people. In recognising the traditional rights of Murray Islanders, the case has recognised the rights of all Indigenous people who have a continued connection to their land. The decision changed Australia and the Australian legal system forever.

The Native Title Act 1993

The Commonwealth Parliament passed the *Native Title Act* in December 1993. The Act established the Native Title Tribunal and confirmed the Mabo decision. The Act protects people's homes and businesses by validating titles granted after 1975.

The purposes of the *Native Title Act* are:

- to provide for the recognition and protection of native title, and to set down some basic principles in relation to native title
- to establish ways in which future dealings affecting native title may proceed and be protected
- to establish a mechanism for determining claims to native title
- to provide for a range of other matters, including the establishment of a National Aboriginal and Torres Strait Islander Land Fund.

The *Native Title Amendment Act 2009* (Cth) gives the Federal Court a central role in managing native title claims and expands provisions for mediation of native title claims.

The Wik decision

The Mabo decision and the subsequent *Native Title Act* did not resolve the issues of native title on pastoral leases and native title to the seas. The pastoral lease issue was decided by the High Court in its 1996 Wik decision.

Pastoral leases are a form of land tenure unique to Australia created by the British Colonial Office after concern by British officials over the massive land grab by squatters in the 1830s and 1840s. The British authorities explicitly stated the leases did not grant squatters exclusive tenure, but that the land was owned on behalf of the Australian public by the government.

In the Wik case, the governments argued that the mere granting of a pastoral lease last century extinguishes native title, even though the land was never developed.

The High Court decided that native title rights could coexist with the rights of pastoralists on cattle and sheep stations. The court also said that when pastoralists and Indigenous rights were in conflict, the pastoralists' rights would prevail, giving pastoralists certainty to continue with grazing and related activities.

The pastoralists wanted native title wiped out completely on pastoral leases. Conservative leaders backed their demands. The then Howard Government followed the Wik decision with the *Native Title Amendment Act 1998* (Cth). This Act contained a 10-point plan for native title. The plan not only effectively extinguished native title on pastoral leases, but also on other types of landholdings such as Crown land (government land), waterways and airspace.

Some sections of the Act required the suspension of the *Racial Discrimination Act 1975* (Cth), which would have prevented some racially specific provisions from operating.

The National Indigenous Working Group on Native Title (NIWG) launched a major campaign against the 10-point plan. NIWG put forward a plan for negotiation with Indigenous Australians to achieve coexistence. The Australians for Native Title and Reconciliation (ANTaR) gathered support from the broader Australian community. This support continued to grow.

The United Nations Committee for the Elimination of Racial Discrimination asked Australia to explain its native title changes.

Since this time, a number of changes have been made to the *Native Title Act* to improve its effectiveness and make it fairer for Indigenous Australians.

Conflicting attitudes

Despite the impact of this case on the legal system and the rights of individuals, there are conflicting attitudes and different responses to the Mabo case.

Sections of the mining and pastoral industries, and conservative politicians, reacted angrily to the High Court's 1992 decision and urged the Commonwealth Government to overturn it by legislation. They conducted a massive fear campaign against the newly established land rights of Indigenous Australians.

Indigenous land councils and other Aboriginal organisations throughout Australia lobbied the Commonwealth Government to legislate to protect any native title that had survived 200 years of colonisation. At the same time, sections of the mining and pastoral industries and conservative politicians lobbied the Commonwealth Government to overturn the Mabo decision.

In 2004, a study seeking public opinion towards Mabo found that not everyone was in favour of land rights for Indigenous people. The Australian Election Study was based on information obtained

from surveys. Twenty-five per cent of the respondents in the 2004 survey felt that change in Aboriginal land rights had not gone far enough. Almost twice that many considered that change had gone too far. And about one-third of the respondents were of the view that change had been to the right extent. In other words, most of the respondents were either satisfied with the progress in land rights or were of the view that the progress had gone too far.

The study found that those with fewer years of education, working class background, homeowners and those who felt 'very proud' to be Australian were more likely to report that the changes to Aboriginal land rights over the years had gone too far.

Australians' once-hard attitudes against Indigenous people have softened remarkably over the past two decades, election research shows.

In 2011, one in three voters believed Indigenous Australians received too much help from governments, when almost twice as many had that attitude in 1990.

The proportion of voters who felt Indigenous Australians' land rights were excessive fell between 1996 and 2010, from 61 per cent to 35 per cent.

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK CASE STUDY

Eddie Mabo

- 1 What does initiating a test case involve? *(2 marks)*
- 2 Describe one benefit to individuals and groups if a test case is brought to court. *(2 marks)*
- 3 Who is Eddie Mabo? Where was he born? *(2 marks)*
- 4 Explain the legal position relating to ownership of land by Indigenous people before the Mabo decision. *(3 marks)*
- 5 What is native title? How did it come into existence? *(2 marks)*
- 6 Explain the life and actions of Mabo which led him to lodge a land rights claim in court. *(3 marks)*
- 7 What help did Mabo receive in making his claim through the courts? *(2 marks)*
- 8 Why do you think the Queensland Government objected to the extinguishment of terra nullius? *(3 marks)*
- 9 Explain the decision in the Mabo case. How did this decision improve the rights of Indigenous people? *(6 marks)*
- 10 How do you think this case changed the landscape of the Australian legal system? *(2 marks)*
- 11 When did Mabo die? What is significant about the time he died? *(2 marks)*
- 12 Explain one conflicting attitude with respect to the Mabo decision and Indigenous land rights. *(3 marks)*
- 13 What occurred as a result of the Mabo decision? *(2 marks)*
- 14 'Two hundred and four years after the British flag was planted on Australian soil, the High Court of Australia's 1992 Mabo decision established that native title is recognised under Australian law.' Discuss this statement in terms of what it says about the courage and tenacity of Mabo and how people can be effective in bringing about a change in the law. *(6 marks)*

15 Investigation

Investigate the Mabo decision and other articles written about the Mabo case. Write a short report. In your report include:

- two quotes of significance from judges in the Mabo case. *(2 marks)*
- an outline of one argument put forward in favour of Mabo and an argument in favour of the Queensland Government *(4 marks)*
- a description of one article found on the Internet that refers to the Mabo case, including the date, source and a summary of the article. *(4 marks)*

(Total 50 marks)

BERNIE BANTON'S FIGHT FOR RIGHTS

Facts and issues

Bernie Banton was born in Sydney in 1946. He began his career at the Camellia plant of Australian building products giant James Hardie & Co Pty Ltd. From 1968 to 1974 he worked as a lathe operator, shaping blocks of asbestos for use in power stations and making asbestos pipe sections.



Figure 7.5 Rights campaigner Bernie Banton during an interview on the ABC

Bernie Banton and asbestos

Asbestos is a naturally occurring heat- and flame-resistant crystalline mineral. It was widely used in the manufacture of many products such as wall and roof sheeting, insulation and cladding.



Figure 7.6

Asbestos removal requires head-to-toe protective clothing.

Asbestos fibres are exceedingly fine and can become airborne if disturbed. This could be while mining asbestos, in manufacturing of asbestos products, in the use of asbestos products and in the disposal of those products.

If the fibres are inhaled, they can cause a variety of life-threatening diseases, including asbestosis (scarring of the lung tissue that restricts breathing) and mesothelioma (cancer of the pleural lining that is almost always fatal). Mesothelioma may take up to 40 years to develop.

Asbestos was banned in 1987. The Asbestos Diseases Foundation of Australia estimates that there could be up to 40 000 cases of asbestos-related lung cancer by 2020.

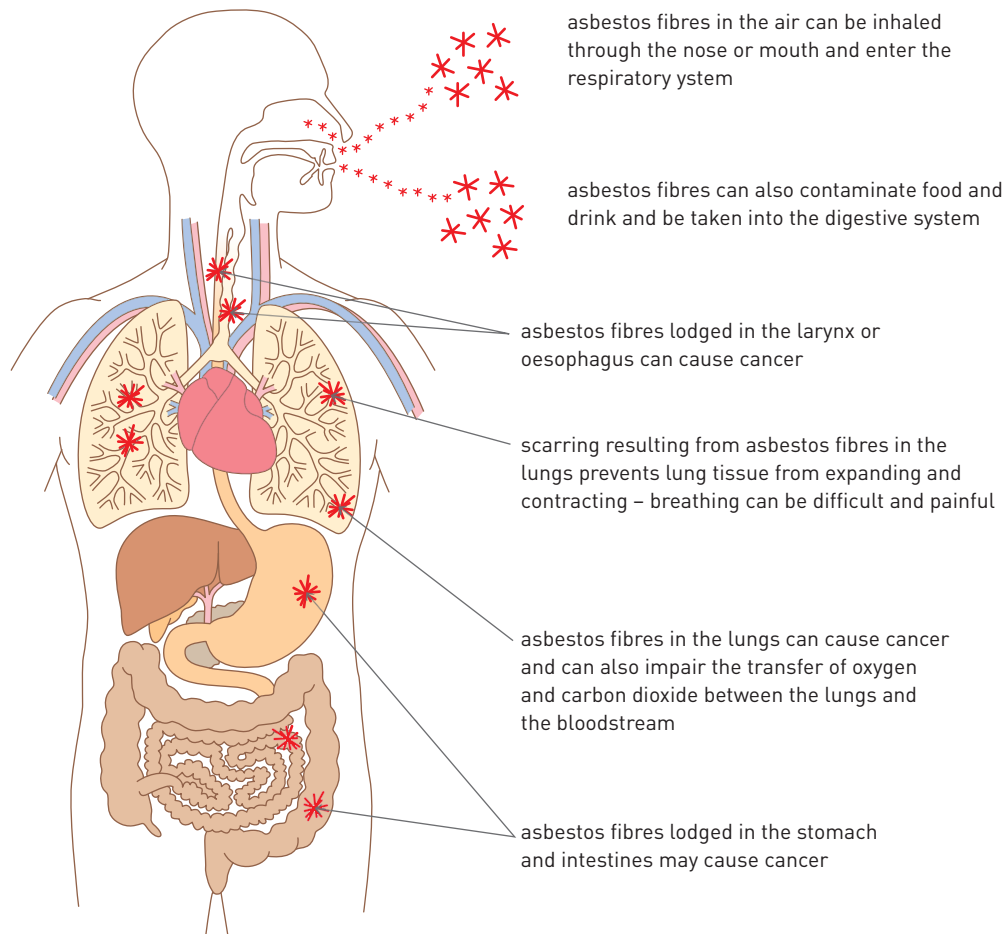


Figure 7.7
Some effects
of asbestos
contamination

Bernie Banton the campaigner

As a past employee of the James Hardie company, Bernie Banton became a campaigner for the right of workers to receive compensation from James Hardie. The company knew of the dangers of asbestos many years before they ceased to use it in their plants and yet they continued to expose their workers to its dangers, continually working without protective clothing.

Banton was diagnosed with asbestosis in 1999 after experiencing breathing difficulties during a family ski trip in 1998.

Banton sued James Hardie for negligence in 2000. His was one of an estimated 12 500 claims made against the company for asbestos-related diseases. Originally claims were heard in the NSW Supreme Court. In 1989, these claims were moved to the Dust Diseases Tribunal, which was set up under the *Dust Diseases Tribunal Act 1989* (NSW). The purpose of this tribunal was to take the pressure off the courts and speed up the process of hearing the asbestos-related cases.

Figure 7.8

Bernie Banton after the 2000 win over the James Hardie company



Banton was awarded \$800 000 in an out-of-court settlement, paving the way for many other claims. The settlement was reached on the morning of the trial before any evidence was taken.

In 1996, the *Dust Diseases Tribunal Act* was amended to allow plaintiffs to claim provisional damages; that is, claim damages for the conditions they now suffer from while preserving the right to claim further damages should they contract another disease in the future.

Banton continually campaigned to bring the plight of people with asbestos-related diseases to the notice of the public. He spoke at rallies, on radio and on television. The trade unions got behind his campaign.

In 2004, a NSW special commission of inquiry was formed to look into the James Hardie company and asbestos, and Banton often attended their hearings. Banton became more and more outraged about what had happened to his fellow workers. He was articulate and passionate, and an ideal spokesperson and representative to battle against big business.

Banton was appointed by the then NSW premier Bob Carr in 2004 to help negotiate a settlement with James Hardie and, as a result, Banton helped secure compensation for thousands of sufferers with asbestos-related diseases. He received an Order of Australia award in 2005 for his tireless work on behalf of those affected by asbestos.

Banton lobbied for the palliative-care drug Alimta for mesothelioma sufferers to be subsidised by the government and organised a petition to the government. The then health minister Tony Abbott did not attend a pre-arranged meeting to receive the petition and later referred to the petition as a publicity stunt.

In December 2006, James Hardie agreed to a \$4 billion compensation package for sufferers of asbestos-related diseases. This involved conferences and negotiations day in and day out over a number of years.

Banton was shattered to learn in August 2007 that he had contracted a further asbestos-related disease. For Banton it was a 'triple whammy' (asbestosis, asbestosis-related pleural disease and peritoneal mesothelioma, an abdominal cancer). He vowed to fight on. His lawyers filed a compensation claim on the fund which he fought to set up for the company's asbestos victims.

The second hearing was held in the Dust Diseases Tribunal. It was settled out of court on the third day of the hearing. Banton gave evidence from his bedside in the Concord Hospital. He died just three days later. It was the death of a great campaigner.

EXTRACT

Banton v. Amaca Pty Ltd

Banton v. Amaca Pty Ltd (2007) NSWDDT 29 (15 November 2007)

Last Updated: 26 November 2007

NEW SOUTH WALES DUST DISEASES TRIBUNAL

CITATION: Banton v. Amaca Pty Ltd (2007) NSWDDT 29

PARTIES:

Bernard Douglas Banton (Plaintiff)

Amaca Pty Ltd (Defendant)

MATTER NUMBER(S): 7255 of 2007

CATCHWORDS: Dust Diseases Tribunal:- Asbestosis – Provisional damages awarded in 2000 – Plaintiff develops mesothelioma in 2007 – Claim for further damages – Whether further damages limited to compensatory damages – Whether exemplary damages may be claimed as further damages

LEGISLATION CITED:

Dust Diseases Tribunal Act 1989, Section 11A

Dust Diseases Tribunal Rules, Rule 5 (8)

Interpretation Act 1987

Supreme Court Act 1981 (UK)

CASES CITED:

CORAM: O'Meally P

DATES OF HEARING: 15 November 2007

DATE OF JUDGMENT: 15 November 2007

EX TEMPORE DATE: 15 November 2007

LEGAL REPRESENTATIVES

J T Rush, QC with B R Quinn instructed by Turner Freeman appeared for the Plaintiff

D J Russell, SC with J C Sheller instructed by Ellison Tillyard Callanan appeared for the Defendant

JUDGMENT:

RULING

O'MEALLY P

1. This is an application by Amaca Pty Ltd which requires me to consider whether aggravated and exemplary damages are available to Bernard Douglas Banton in an application he has made for the award of further damages pursuant to **s 11A** of the ***Dust Diseases Tribunal Act 1989*** (the Act).
2. On 16 November 1999 Mr Banton issued a statement of claim against James Hardie & Coy Pty Ltd. James Hardie & Coy Pty Ltd is now Amaca Pty Ltd. In that Statement of Claim he sought an award of provisional damages in respect of the conditions of asbestos related pleural disease and asbestosis. Certain other consequences of asbestos exposure were recited in par 7 of the Statement of Claim, but for present purposes they are not relevant. In accordance with the rules he sought an order that he have the right to claim further damages should he develop any of mesothelioma, asbestos induced carcinoma or lung cancer.
3. Paragraph 8(c) of the statement of claim filed on 16 November 1999 made a claim for aggravated and exemplary damages. The paragraph cited that '*full particulars relating to that claim would be supplied prior to trial.*' Some particulars, I am informed, were filed.

4. On 26 July 2000 his action was settled for the sum of \$800 000. Relevantly, the terms of settlement contained the following:

By consent and without admission of liability:

- (1) *Verdict and Judgment for the Plaintiff as against the Defendant in the sum of \$800 000 in respect of the Plaintiff's claim for provisional damages as particularised in paragraph 8(a) of the Statement of Claim filed on 16 November 1999. Said verdict and judgment is to include the Plaintiff's claim for costs.*
5. An Order for Judgment was filed in court at the same time. It was in these terms:
 1. *That the Defendant pay to the Plaintiff the sum of \$800 000 in respect of the Plaintiff's claim for Provisional Damages under Section 8(a) [sic] of the Dust Diseases Tribunal Act and as particularised in paragraph 13 of the Further Amended Statement of Claim [sic].*
 2. *The dust related conditions in respect of which an award of further damages may be made are:*
 - (a) *Lung cancer;*
 - (b) *Mesothelioma;*
 - (c) *Asbestos induced carcinoma.*
6. The reference in par 1 of the Order for Judgment to s 8(a) should, of course, be a reference to **s 11A** of the Act, and it should also be noted that the reference to par 13 of the Further Amended Statement of Claim is a reference to a document that does not exist. No point is taken in respect of either error.
7. On 20 August 2007 Mr Banton filed a Statement of Claim against Amaca Pty Ltd, the new corporate name of James Hardie & Coy Pty Ltd. In that Statement of Claim he sought further damages in respect of peritoneal mesothelioma. He also made and maintains a claim for aggravated and exemplary damages.

Source: NSW Dust Diseases Tribunal

The impact of the test case on the rights of individuals and the legal system

Bernie Banton and his campaign have had a profound impact on those individuals that have suffered from asbestos disease. It has brought the issue to the public notice and given sufferers hope that they too may be able to claim compensation. The case has also helped in changing the opinions of governments and influencing changes in the law.

Individuals seeking justice

Since Bernie Banton's case, several individuals have launched their own cases against Amaca Pty Ltd (formerly James Hardie) and other companies, seeking compensation for their own loss or harm caused by asbestos-related diseases. These include:

- Mr John Booth, who succeeded in his claim against Amaca Pty Ltd in the Dust Diseases Tribunal and subsequently the Court of Appeal in NSW, was awarded damages of \$326 000.
- Mr William Abel, who worked for Atco, which built transportable buildings made of asbestos cement fibro sheets that were manufactured and supplied by James Hardie, succeeded in his claim and was awarded \$155 967 in the District Court of South Australia.
- Mr Robert Berengo, who contracted mesothelioma mainly from hugging his father, a painter in the 1960s, settled his case against Amaca for \$2 million.

Impact on the legal system

Victims of asbestos-related claims, as well as their families, have been pushing for new legislation to be passed, particularly in New South Wales, which would enable plaintiffs to claim for damages within a 12-month period from the time a person dies from an asbestos disease. This is because in some circumstances people do not realise that the disease is related to asbestos until after death.

These changes in the law have already been passed in South Australia, Western Australia and Victoria.

Conflicting attitudes

All people who have been injured as a result of someone's negligence should be entitled to compensation. The person or company that has been negligent, causing injury or loss to other people, should compensate the victims of their negligence. Making people or companies liable also helps to ensure that they are more careful in their actions that could potentially harm others. Bernie Banton's protests made the public and the lawmakers aware of the problem. Through the courts, James Hardie are being made to compensate the people they have harmed.

One of the biggest issues with asbestos-related diseases is that often the symptoms do not present themselves until much later on in life. Once symptoms do present themselves, it may take a while to diagnose the illness and determine that the illness in fact relates to a negligent act by a company. This can be difficult for companies that are in financial distress, as they cannot take into account the financial implication such a claim can have on them if they are not aware of the claim in the first place. It can also be difficult for insurers to make decisions on claims that can go as far back as 30 years ago.

James Hardie would argue that they did not realise the extent of the harm asbestos could cause. The problem for the company that has been negligent is whether it can continue to operate its business with the excessive burden of making payouts to many people. People have lost their jobs as a consequence of shutting down the asbestos mines and the financial restraints the company has suffered as a result of having to make large payouts.

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK CASE STUDY

Bernie Banton

- 1 What is asbestos? What was it used for and how widespread are these uses? *(2 marks)*
- 2 What problems can it cause? *(2 marks)*
- 3 What role did Bernie Banton play in fighting for the rights of people with asbestos-related diseases? *(3 marks)*
- 4 What impact did he, and his fight for rights through the courts, have on the rights of others and the legal system? *(6 marks)*
- 5 What did the James Hardie company do that was seen as negligent? *(2 marks)*
- 6 Explain what you think may be conflicting attitudes to this case. *(4 marks)*

7 Investigation

- a Find two articles about Bernie Banton and write a report on each article. In your report include the date and source of the article, and a summary of the details contained in the article. *(6 marks)*
- b Investigate another case in which an individual or group is fighting for rights by bringing a case through the courts. Write a report on your findings. In your report explain:
 - the facts of the case
 - the rights they were fighting for
 - the outcome of the case.

Make a presentation to the class. *(5 marks)*

(Total 30 marks)

THE RIGHTS OF REFUGEES

In recent years, a few thousand people in the Asia–Pacific region have embarked on dangerous boat voyages to seek safety in Australia. Australia provides protection for asylum seekers who either:

- meet the United Nations definition of a refugee, as defined in the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol (**Refugee Convention**), or
- are owed protection under other international human rights treaties and conventions which give rise to complementary protection obligations.



Figure 7.9

Signing of the UN 1951
Refugee Convention

Australia is one of the few countries in our region that has signed the Refugee Convention. The 1951 Convention relating to the Status of Refugees is the key legal document that defines who is a refugee, their rights and the legal obligations of states. This means Australia has voluntarily agreed to be bound under international law to protect people fleeing persecution and to treat all those seeking asylum equally.

Both major Australian political parties are concerned about the number of refugees who come to Australia by boat. It is very dangerous, people have lost their lives, and many people believe it is giving advantage to those people who can afford to pay people smugglers.

In an endeavour to reduce the number of refugee boats coming to Australia, both parties have endorsed policies of offshore processing of refugees; that is, diverting the boats to other countries for processing to decide if the passengers are genuine refugees. Nearly all of the people arriving by boat are found to be refugees fleeing war, terror and violence.

The United Nations body responsible for protecting refugees and overseeing adherence to the Refugees Convention is the United Nations High Commissioner for Refugees (UNHCR).

Who is a refugee?

According to the Refugee Convention, a refugee is:

Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of that country.

The Refugee Convention is used by the Australian Government to determine whether our country has an obligation to individuals seeking protection. If a person is found to be a refugee, Australia is obliged under international law to offer support and ensure that the person is not sent back to his or her country of origin unwillingly. International law derives from customs, treaties and general principles of law.

The law in Australia

In Australia the law relating to asylum seekers is contained in the *Migration Act 1958* (Cth). Previously, under this Act, asylum seekers who arrived by boat at offshore places, such as Christmas Island and Ashmore Reef, or are intercepted at sea, without a valid visa, could be held in immigration detention until they were granted a visa or removed from Australia. It was the Commonwealth Government's policy to hold these asylum seekers in mandatory detention.

Section 198A of this Act (which no longer exists) provided for the transfer of asylum seekers who arrived in Australia (or Australian waters) by boat (known as offshore entry persons) to be transferred to another specified country.

The Malaysia agreement

Under the Malaysia agreement of April 2011, the Commonwealth Government agreed to transfer a maximum of 800 people who had arrived in Australia, or had been intercepted at sea, seeking international protection to Malaysia for refugee status determination. In exchange the Commonwealth Government would accept and resettle 4000 refugees currently residing in Malaysia. Malaysia has over 100 000 refugees seeking resettlement.

Actions taken

The Refugee and Immigration Legal Centre executive director, David Manne, was a key person in the four dramatic weeks leading up to the High Court decision relating to the proposal to send refugees to Malaysia. It all began with a phone call on the evening of 6 August 2011. An asylum seeker needed help. According to what Manne heard, he had 24 hours to stop a plane that would fly several Afghan men from Christmas Island to Malaysia.



Figure 7.10
Refugees in Malaysia

On 7 August 2011, David Manne, who represented 42 people facing deportation to Malaysia, won a temporary reprieve for the refugees. A High Court judge ordered a 24-hour interim injunction to stop the immigration department's plans to expel 16 single adult men to Malaysia on 8 August. An **interim injunction** is a court order stopping an action from being taken until there has been a trial. These refugees had arrived in Australia by boat and they would have been the first of the 800 refugees to be sent to Malaysia. The injunction was later extended to 22 August.



According to Bill Frelick, refugee program director at Human Rights Watch, the Malaysian deal was 'highly informal' because Malaysia was not a party to the United Nations Refugee Convention and thus not bound by the same obligations to protect refugees as Australia is.

Manne told *Green Left Weekly* the refugees were 'in extremely difficult circumstances, highly distressed and petrified of being expelled to Malaysia. They have very strong fears of facing mistreatment'.

Manne said that the refugees he was representing wanted the immigration minister's claim that they will be protected in Malaysia scrutinised.

Figure 7.11 David Manne

High Court decision

In August 2011, a case was brought before the High Court for the protection of the rights of refugees not to be sent to Malaysia for offshore processing. A key aspect of the legal challenge was the declaration by the Minister for Immigration and Citizenship that Malaysia was a suitable place to expel the refugees to, on the basis that it had adequate procedures, protection and human rights standards.

The High Court made a landmark decision in this case, finding that it was unlawful for refugees to be sent to Malaysia. The Court held, with a six-to-one majority, that under S198A of the *Migration Act 1958* (Cth) the immigration minister could not validly declare a country as a country to which asylum seekers can be taken for processing, unless that country is legally bound to meet three criteria. The country must be legally bound by international law or its own domestic law to provide:

- access for asylum seekers to effective procedures for assessing their need for protection
- protection for asylum seekers pending determination of their refugee status
- protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country.

In addition to these criteria, the *Migration Act* requires that the country meet certain human rights standards in providing that protection. The High Court noted that Australia could not be certain of maintaining protections that Australia is bound by in Malaysia because Malaysia was not a signatory to international human rights laws.

On the facts in this case, the High Court held that Malaysia did not meet the criteria required as a country to which asylum seekers can be sent for processing.

The court also held that the immigration minister has no other power under the *Migration Act* to remove from Australia asylum seekers whose claims for protection have not been determined.

EXTRACT

High Court of Australia judgment summary

HIGH COURT OF AUSTRALIA 31 August 2011

Plaintiff M70/2011 v. Minister for Immigration and Citizenship

Plaintiff M106 of 2011 by his litigation guardian, plaintiff M70/2011 v. Minister for Immigration and Citizenship

(2011) HCA 32

Today the High Court held invalid the Minister for Immigration and Citizenship's declaration of Malaysia as a country to which asylum seekers who entered Australia at Christmas Island can be taken for processing of their asylum claims. After an expedited hearing before the Full Bench, the Court by majority made permanent the injunctions that had been granted earlier and restrained the Minister from taking to Malaysia two asylum seekers who arrived at Christmas Island, as part of a larger group, less than four weeks ago.

The Court also decided that an unaccompanied asylum seeker who is under 18 years of age may not lawfully be taken from Australia without the Minister's written consent under the *Immigration (Guardianship of Children) Act 1946* (Cth). The Court granted an injunction restraining the Minister from removing the second plaintiff, an Afghan citizen aged 16, from Australia without that consent.

The Court held that, under s 198A of the *Migration Act 1958* (Cth), the Minister cannot validly declare a country (as a country to which asylum seekers can be taken for processing) unless that country is legally bound to meet three criteria. The country must be legally bound by international law or its own domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country. In addition to these criteria, the *Migration Act* requires that the country meet certain human rights standards in providing that protection.

The Court also held that the Minister has no other power under the *Migration Act* to remove from Australia asylum seekers whose claims for protection have not been determined. They can

only be taken to a country validly declared under s 198A to be a country that provides the access and the protections and meets the standards described above. The general powers of removal of 'unlawful non-citizens' given by the *Migration Act* (in particular s 198) cannot be used when the *Migration Act* has made specific provision for the taking of asylum seekers who are offshore entry persons and whose claims have not been processed to another country, and has specified particular statutory criteria that the country of removal must meet.

On the facts which the parties had agreed, the Court held that Malaysia is not legally bound to provide the access and protections the *Migration Act* requires for a valid declaration. Malaysia is not a party to the Refugees Convention or its Protocol. The Arrangement which the Minister signed with the Malaysian Minister for Home Affairs on 25 July 2011 said expressly that it was not legally binding. The parties agreed that Malaysia is not legally bound to, and does not, recognise the status of refugee in its domestic law. They agreed that Malaysia does not itself undertake any activities related to the reception, registration, documentation or status determination of asylum seekers and refugees. Rather, the parties agreed, Malaysia permits the United Nations High Commissioner for Refugees ('UNHCR') to undertake those activities in Malaysia and allows asylum seekers to remain in Malaysia while UNHCR does so.

The Court emphasised that, in deciding whether the Minister's declaration of Malaysia was valid, it expressed no view about whether Malaysia in fact meets relevant human rights standards in dealing with asylum seekers or refugees or whether asylum seekers in that country are treated fairly or appropriately. The Court's decision was based upon the criteria which the Minister must apply before he could make a declaration under s 198A.

Source: High Court summary of judgments

Following the High Court decision, the Commonwealth Government made a commitment to still accept the 4000 refugees from Malaysia as agreed to in the deal, even though no 'swap' would take place, but they would not be additional to Australia's annual refugee intake.

The impact of the test case on the rights of individuals and the legal system

The test has resulted in protecting the rights of the refugees who were destined to be sent to Malaysia; a country with a record of human rights abuse. The immediate impact of the case was to save 42 Afghan and Pakistani asylum seekers from the dangers they believed they faced if the Australian Government plan had gone ahead. The 42 were the reluctant vanguard of 800 the government wanted to expel, in return for accepting 4000 refugees whose asylum claims had already been assessed in Malaysia.

Those to be transferred to Malaysia would have been at risk of detention or arrest because there are regular raids and arrests carried out in the refugee camps. They could also have been subjected to ill-treatment in Malaysian detention centres or jails.

In response to this case, the Commonwealth Parliament passed the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. This Act repealed S198A of the *Migration Act*, meaning it no longer exists as law.

However, this new legislation inserted new sections into the *Migration Act* dealing with what is known as 'regional processing'. The new S198AB of the *Migration Act* allows the minister to designate that a country is a 'regional processing country'. Section 198AD allows an officer to take an unauthorised maritime arrival from Australia to a regional processing country. To do so, the officer is able to place the person on a vehicle or vessel, restrain them, remove them from the place at which they are detained or use such force as is necessary and reasonable.

EXTRACT

*Migration Act 1958 (Cth)***198AD Taking unauthorised maritime arrivals to a regional processing country**

- (1) Subject to sections 198AE, 198AF and 198AG, this section applies to an unauthorised maritime arrival who is detained under section 189.

Note: For when this section applies to a transitory person, see section 198AH.

- (2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

Powers of an officer

- (3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:
- (a) place the unauthorised maritime arrival on a vehicle or vessel;
 - (b) restrain the unauthorised maritime arrival on a vehicle or vessel;
 - (c) remove the unauthorised maritime arrival from:
 - (i) the place at which the unauthorised maritime arrival is detained; or
 - (ii) a vehicle or vessel;
 - (d) use such force as is necessary and reasonable.
- (4) If, in the course of taking an unauthorised maritime arrival to a regional processing country, an officer considers that it is necessary to return the unauthorised maritime arrival to Australia:
- (a) subsection (3) applies until the unauthorised maritime arrival is returned to Australia; and
 - (b) section 42 does not apply in relation to the unauthorised maritime arrival's return to Australia.

Ministerial direction

- (5) If there are 2 or more regional processing countries, the Minister must, in writing, direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.
- (6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.
- (7) The duty under subsection (5) may only be performed by the Minister personally.
- (8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.
- (9) The rules of natural justice do not apply to the performance of the duty under subsection (5).
- (10) A direction under subsection (5) is not a legislative instrument.

Not in immigration detention

- (11) An unauthorised maritime arrival who is being dealt with under subsection (3) is taken not to be in *immigration detention* (as defined in subsection 5(1)).

Meaning of officer

- (12) In this section, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Source: *Migration Act 1958* (Cth)

In September 2012, the Rudd Government designated the Republic of Nauru as a regional processing country, followed by Papua New Guinea in October 2012. Manus Island, in northern Papua New Guinea, has a detention centre where detainees are currently kept.

In September 2013, the Abbott Government announced it would continue with offshore processing, along with other policies designed to prevent the arrival of refugees by boats, including the controversial 'turn-back policy', involving boats being turned away.

An asylum seeker has since challenged the decision to designate Papua New Guinea as a processing country. The matter will be heard by the High Court, which will need to determine whether section 198AD of the *Migration Act* is invalid on the grounds that the Commonwealth Parliament had no constitutional power to make the law.

This case demonstrates that the legal system in Australia is capable of standing up for the rights of refugees. It has also demonstrated that if an area of law is not supporting human rights, then the High Court will respond, as will parliament.

Conflicting attitudes

The case and the broader issue about refugees and asylum seekers have resulted in many different and conflicting responses from a number of groups and individuals.

Various rights groups and campaign bodies, including the Refugee Action Coalition (RAC) and Amnesty International welcomed the decision by the High Court.

The RAC believes that it is unconscionable for Australia to send refugees to other countries to face potentially worse conditions than those they would have faced in the country from which they were fleeing.

Amnesty International has developed a campaign intended to engage with Australians about the facts surrounding asylum seekers who arrive by boat to Australia in an attempt to reconsider any policies that result in sending refugees offshore. Amnesty International expressed its grave concerns about offshore processing to both the prime minister and the opposition leader. The government and opposition, though they have different policies, have both indicated an intention to establish offshore processing policies. However, neither political party has adequately explained how it would implement its policy in order to avoid some of the serious human rights abuses that occurred under the Howard Government's 'Pacific Solution'.

Former prime minister Julia Gillard said the safeguards under the deal with Malaysia addressed concerns that some Australians may have. She stated, 'Those sent to Malaysia will be treated with dignity and respect in accordance with human rights.'

The Australian Human Rights Commission president, Catherine Branson, said in June 2011 that there is a risk that sending asylum seekers to Malaysia could breach international treaties including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child or the Convention against Torture. She further stated, 'We are also concerned that transferring anyone who has a family member already in Australia could breach their right to family unity.'

Prime Minister Tony Abbott has refused to contemplate a resurrection of the government's Malaysia agreement. He said, while in opposition, 'We think that Malaysia is a bad deal, so does everyone except the prime minister and the immigration minister, so as far as I am concerned, Malaysia is out.'

The former Gillard Government said it believed that the Malaysia refugee swap offered the best deterrent against people-smuggling.

The Greens have consistently lobbied against the use of offshore detention and have vowed to close down the Manus Island and Nauru detention centres if they have the chance to do so. The Greens insist that they will also close down Australian detention centres and create laws that allow refugees to live in the community.

The Australian Human Rights Commission said on 21 September 2011, ‘The government should not seek to undermine our international obligations under the Refugee Convention by sending asylum seekers to third countries, particularly vulnerable groups such as families, unaccompanied minors and survivors of torture and trauma.’

Community views on the issue vary. Some parts of the community believe that an offshore processing policy is harsh and is not consistent with Australia’s commitment to refugees. Other parts of the community believe that asylum seekers and refugees who arrive by unlawful means should not be allowed to remain in Australia.

The UNHCR released a statement on 25 July 2011 in relation to the Australia–Malaysia arrangement. It stated that its preference has always been an arrangement that would enable all asylum seekers arriving by boat to be processed in Australia. It has, however, indicated that the critical test will be how such an arrangement is implemented, particularly whether or not the protection safeguards for asylum seekers are maintained.

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK CASE STUDY

Rights of refugees

- 1 Explain the purpose of the Refugee Convention. (2 marks)
- 2 If you were working for the immigration department, how would you decide who is a refugee? Make a list of the requirements to be assessed as a refugee. (4 marks)
- 3 Where would you find the law relating to asylum seekers? (1 mark)
- 4 Look back at the information relating to the Malaysia agreement and answer the questions.
 - a What was the Malaysia agreement? (2 marks)
 - b How did David Manne fight for the rights of refugees? What was the initial outcome of his actions? (2 marks)
 - c A test case was launched in 2011 relating to Malaysian offshore processing. Explain the High Court decision in *Plaintiff M70/2011 v. Minister for Immigration and Citizenship* and *Plaintiff M106 of 2011 by his litigation guardian, plaintiff M70/2011 v. Minister for Immigration and Citizenship* (2011). (4 marks)
 - d What was the impact of this test case? What changes in the law did the High Court case result in? (3 marks)
 - e Explain conflicting attitudes to the outcome of this case. (3 marks)
 - f How has the law changed under the Abbott Government? (2 marks)
- 5 Read the case study ‘Operation Sovereign Borders and bid for freedom’ and answer the questions.
 - a What are the problems facing asylum seekers on Manus Island? (2 marks)
 - b What is the purpose of the actions by the Abbott Government? (1 mark)
 - c Explain the actions of Jay Williams to assist the asylum seekers. (2 marks)
 - d In the court case it was claimed that the detention of asylum seekers on Manus Island was unlawful. Explain what arguments were used to support this claim. (3 marks)
 - e What was the outcome of this case? Give your opinion about this case. (3 marks)

Operation Sovereign Borders and bid for freedom

Operation Sovereign Borders was launched in September 2013. Its aim is to stop the boats carrying asylum seekers to Australia via Indonesia and stop people drowning at sea. In order to achieve this aim, the Abbott Government is prepared to turn back the boats. According to the immigration minister, Scott Morrison, this has the desired effect and there have been no successful people-smuggling ventures since 19 December 2013.

An ABC news report stated that the practice of turning back the boats contravenes the 1974 International Convention for the Safety of Life at Sea, which means Australian vessels are obliged to render assistance to those in danger at sea.

Many of the refugees that have come by boat are being housed and processed on Manus Island, Papua New Guinea (PNG). There have been numerous protests and self-harm attempts because of the conditions in which the asylum seekers live. On 16 February 2014, asylum seekers on Manus Island were told they would never be allowed to settle in Australia and their only option for resettlement was PNG. Following this announcement, tensions built and the inmates of the detention centre rioted. An asylum seeker was brutally killed and scores of others injured.

In March 2014, some of the asylum seekers facing indefinite detention on Manus Island launched a new legal bid for freedom. Sydney barrister Jay Williams initiated the challenge at the Lorengau District Court on behalf of these detainees.

The challenge argued that the asylum seekers' detention was unlawful because they were deported from Australia to PNG against their will; that their detention is arbitrary and indefinite; and that conditions in the centre are inhumane and degrading.

The High Court rejected this challenge, stating that the detention was not illegal and it was not in breach of the Constitution.

In May 2014, the Australian Human Rights Commission expressed its concerns about changes to the *Migration Act* that would keep refugees in detention indefinitely.



Figure 7.12
Asylum seekers on
Manus Island

6 Investigation

Go to the Australian Human Rights Commission (HREOC) website. Click on 'Our Work' and select 'Asylum Seekers and Refugees'. Write a summary of the latest developments in relation to asylum seekers and refugees. (6 marks)

(Total 40 marks)



CHAPTER 8

CONTRACT LAW

OUTCOME

At the completion of this unit you should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- legal principles relevant to the selected area of law
- a contemporary issue for the selected area of law
- the capacity of the legal system to respond to demands for change
- methods and institutions for resolving disputes arising under the selected area/s of law.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

KEY LEGAL TERMINOLOGY

acceptance Written or oral statement or act that indicates that the person is willing to accept the offer made.

commercial agreement An agreement made in the course of business that is intended to be legally binding.

consideration Something of value that passes from one party to the other at which time a contract is complete; can also be a promise to pay.

contract An agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced by the law.

defendant A person against whom a civil legal action is taken.

domestic agreement An agreement made between family members or friends that is not intended to be legally binding unless the circumstances indicate otherwise.

duress Unlawful pressure put on a person to persuade that person to perform an act that he or she would not ordinarily perform.

intention to create legal relations A principle of contract law requiring the parties to intend to create obligations that are legally binding and enforceable.

invitation to treat Not an offer, but an indication of a person's willingness to negotiate a contract (usually the seller will make an offer to sell the goods at an agreed price).

offer Written or oral statement or act that indicates the person is willing to buy or sell goods or services.

on the balance of probabilities The standard of proof in a civil case.

plaintiff A person bringing a civil action; this person has the burden of proving the case.

void contract The contract no longer exists (also referred to as an invalid contract).

voidable contract A contract that can be rejected by one party because of some error in the contract or the making of the contract.

INTRODUCTION TO CONTRACT LAW

Contract law is law that deals with issues relating to contracts, also known as agreements. Contracts can be oral or written, and made between two or more parties. Common examples of contracts include contracts to sell and buy property, employment contracts and insurance agreements. Everyday examples of contracts include buying a ticket to see a movie, buying a coffee and engaging a person to clean your house.

Not all agreements form contracts. A legally binding contract is formed when there is **intention to create legal relations**. A domestic agreement is not a contract and is therefore not binding.

Domestic agreement

A domestic agreement is an agreement between husband and wife, relatives or friends under which it is presumed that there is no intention to create legal relations unless the circumstances indicate differently. For example, if your parents said they would pay you a specified amount for mowing the lawn, and after you had mowed the lawn they changed their minds because you would not do your homework, they would not be bound by the promise to pay you for the mowing. There was no intention to create legal relations.

If, however, you agreed to mow someone else's lawn for a specified amount, and the other person had accepted your offer and promised to pay you the specified amount, a contract would exist. You and the other person would have intended your agreement to be binding on both parties. If the other

person decided not to pay you after you had mowed the lawn, they would have broken the contract. This would be a **legal problem** and the contract to mow the lawn would be a commercial agreement. The main differences between these two situations are the intention of the parties to be bound by the promise, and the nature of the relationship between the two parties.

Commercial agreement

A commercial agreement is an agreement made in the course of business. When a commercial agreement is made, there is an intention to create legal relations, and therefore a commercial agreement is a legally binding contract. An example of a commercial agreement is where one company agrees to purchase the goods of another business for a set price.

ELEMENTS OF A CONTRACT

The principles of contract law in Australia can be found in common law (law made by the courts) and Acts of parliament. A contract is an agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced by the law.

A contract can be written or oral. We all make oral contracts frequently. Each time you buy something from a store, or even something as simple as a cinema ticket, you are making a contract.

There are certain features that distinguish a non-legal arrangement from a binding contract.

The main features of a binding contract include:

- offer
- acceptance
- consideration
- certainty of terms.



Figure 8.1

Contracts can be either written or oral.

Offer

An offer can be a written statement, an oral statement or an act which indicates that an offer is made. The person making the offer (the **offeror**) is bound by an offer when it is accepted. For example, if you offer to buy a television for \$1000 from Expenso Electronics and they accept your offer, then both parties (you and Expenso Electronics) are bound by the offer you have made. Expenso Electronics cannot then offer to sell the television to someone else for \$1100 until such time as your original offer is rejected. An offer of this nature is usually confirmed in writing, or by a part-payment, but can be verbal as long as the offer has been clearly made and accepted.

For an offer to be binding it must be clearly communicated to the **offeree** (the person to whom the offer is being made). If the offeror had made an offer to buy the television for between \$900 and \$1000, the exact cost is not clear and the offer is therefore not binding. An offer can be withdrawn before acceptance as long as the withdrawal is clearly communicated.

In normal situations the shopper, in indicating a desire to buy merchandise, is doing no more than offering to buy. The shopkeeper then decides whether they want to sell the goods and accept the offer.

A price tag on goods is not an offer to sell the goods at that price. It is merely an **invitation to treat**. An invitation to treat is requesting people to make an offer for the goods. A supermarket is therefore not bound to sell goods at the price marked on the label, although it often will, even if the goods have been wrongly priced, to keep good relations with their customers (and to avoid

penalties they may face in other laws relating to consumers, such as false advertising).

If Expenso Electronics in the example above put an advertisement in the newspaper for the television with a price of \$1000, they are not bound by the price of \$1000; it is merely an invitation to treat (although it could be seen as false advertising if they were not prepared to sell at that price).

An offer can be said by the offeror to be **open for a certain period of time**. For example, a car yard may offer to sell you a car for \$6000 and give you until 2 pm the following day to accept the offer. After this time the offer will lapse. If no time limit is given, the offer will lapse after a reasonable period of time.

An offeror may **revoke** (withdraw) an offer before it has been accepted, but the revocation must be communicated to the offeree, although not necessarily by the offeror.



Figure 8.2

Every time you buy something you make a contract with the seller. The prices on the supermarket shelves are an invitation to treat.

Offer to the public at large

An offer can be made to the public at large if some means of acceptance of the offer is indicated when the offer is made. An advertising brochure that comes through the mail is not an offer to the public at large because there is no means of accepting it. You need to go to the shop (or phone them) and make an offer to buy the goods at the price in the brochure. Technically, the shop could decide not to accept your offer but this is unlikely, unless the wrong price was shown in the brochure. The advertising brochure is an invitation to treat.

An offer to the public at large has to include a means of acceptance. An example of this is if a company agrees to pay \$100 to a consumer if they get the flu after using the preventative medication sold by the company. The acceptance would be when a consumer used the product according to the instructions. For an offer to the public at large to be revoked, the revocation must be in a similar form to the offer.

CASE STUDY

Carlill v. Carbolic Smoke Ball Company

In *Carlill v. Carbolic Smoke Ball Company* [1839] (UK), a promise that appeared in a newspaper advertisement was deemed to be an offer. The Carbolic Smoke Ball Company was advertising a carbolic smoke ball which, if used correctly, they said, would stop people getting influenza. In the advertisement the company offered to pay £100 to anyone who used the carbolic smoke ball as instructed and was not protected from catching influenza.

A woman used the carbolic smoke ball as instructed and still caught influenza. She asked the company for £100. The company told the woman that it was not an offer to pay the sum of money, it was merely an advertising 'puff', and was not intended as an actual promise. The woman won the case because the court decided that an offer can be made to the public at large, and in this case, by using the carbolic smoke ball as instructed, she was in fact accepting the offer.

For this offer to be revoked, Carbolic Smoke Ball Company would have to communicate the revoking of the offer in the same manner as the offer was made, for example, by an advertisement.

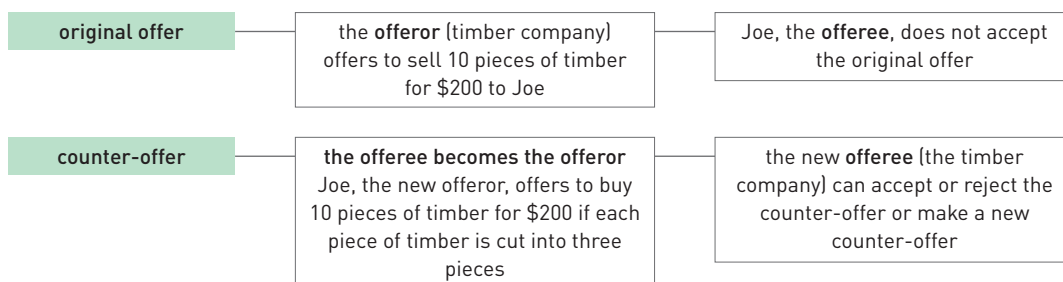


Figure 8.3

Carbolic Smoke Ball Company offer

Counter-offer

If an offer is made, rather than accepting the offer, a person may choose to make a **counter-offer**. This often occurs in bargaining situations. For example, a timber company offers to sell Joe 10 pieces of timber for \$200. If the offeree will only accept the timber if each piece of timber is cut into three pieces, then the original offer is not accepted because the offeree has put a new condition on the acceptance. Therefore it is a counter-offer. The offeree becomes the offeror. The new offeree (the timber company) can either reject or accept the offer (or make a subsequent counter-offer).



Acceptance

An acceptance is an oral statement, written statement or act indicating acceptance of an offer. An offer is accepted when acceptance is conveyed to the offeror either orally, in writing or by an act indicating acceptance. For example, a bid at an auction is an offer and the auctioneer's acknowledgement of the final bid is the acceptance. A bid at an auction cannot be withdrawn.

The acceptance must be in exactly the same terms as the offer. If it differs, it is seen as a counter-offer.

If a person offers to sell a house to another person and that offer is accepted **subject to finance being obtained**, there is no contract until the finance is obtained. If the buyer did not manage to get finance (because, for example, their application was rejected by the banks) then the vendor is no longer bound by the contract. There are rules relating to auctions of houses that mean that acceptance of the offer cannot be subject to finance.

A contract is formed when the acceptor does something to indicate that the acceptance is made, for example stating clearly that the offer is accepted. In the case of *Carlill v. Carbolic Smoke Ball Company* the acceptor accepted the offer by using the carbolic smoke ball in the manner instructed.



Figure 8.4

Acceptance of an offer

Posted acceptance

When an acceptance is **posted** through the mail, the offer is seen in law to be accepted when the letter is placed into the post box for posting to the offeror. If a person wishes to withdraw an offer by post, the withdrawal only becomes effective when it is received by the offeree.

A person making an offer (the offeror) can specify a certain way in which the acceptance should be made. For example, they may say that the acceptance has to be in writing within seven days. If a particular mode of acceptance is specified, then the acceptance must be received in the manner specified. When a time has been specified, the acceptance has to be actually received within that time (the act of posting the acceptance is not seen as acceptance when a time limit has been given).

Silence is not acceptance

The offeror cannot specify that acceptance will be assumed if the offeror does not hear from the person to whom the offer has been made (the offeree). **Silence cannot be assumed as acceptance.** Acceptance is therefore not effective until it is actually communicated to the offeror, although there are exceptions to that rule. In the *Carlill v. Carbolic Smoke Ball Company* case, the mere act of using the smoke ball as instructed was seen as sufficient for acceptance of the offer.

CASE
STUDY*Felthouse v. Bindley* (1862) 11 CBNS 869

The English case of *Felthouse v. Bindley* is one of the oldest cases dealing with silence not being acceptance. Paul Felthouse was a builder living in London. He wanted to buy a horse from his nephew. After a letter from the nephew referring to a previous discussion about buying the horse, the uncle wrote to the nephew saying, 'If I hear no more about him, I consider the horse mine at £30.15s'.

The nephew did not reply. He told William Bindley, the man running the horse sales, not to sell the horse, but by accident Bindley did. Felthouse sued Bindley. Bindley argued that the nephew did not communicate any acceptance of Felthouse's offer and therefore there was no contract.

The court ruled that acceptance must be communicated clearly and cannot be imposed due to the silence of one of the parties. Therefore, there was no contract between the uncle and the nephew.

The courts in Australia have followed this precedent, which states that silence cannot be assumed as acceptance.

Offer of reward

If an offer of a reward is made, the offer is only binding if the person who finds the item for which the reward is offered is aware of the reward. For example, a person who loses a dog and offers a reward for its return will not be required under contract law to pay the reward to a person who finds the dog and brings it home, if they did not know about the reward. If they knew about the reward, then their act of bringing the dog home is the acceptance of the offer of the reward. If they were not aware of the offer of a reward, then they cannot claim to be accepting the offer.

Consideration

Consideration is something of value that passes from one party to the other (usually money or goods). Each party to the contract gives up something and can therefore enforce the contract. For example, **A** offers to buy a car from **B** for \$2000. **A** gives up the money he uses to buy the car and receives a benefit in exchange, the car. **B** gives up the car and receives a benefit in exchange, the money.



Consideration – promise to pay

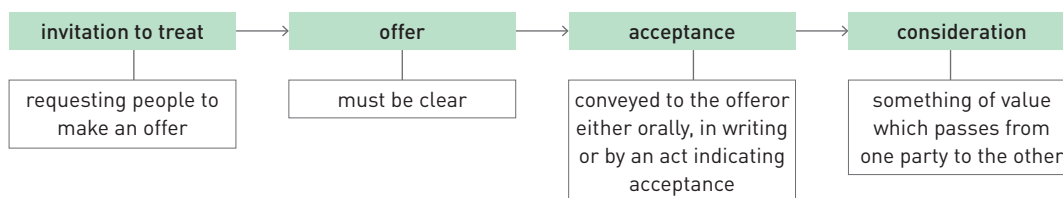
The consideration in a contract can be the **promise to pay**, or the promise to give up something. For example, **A** offers to buy a car from **B**. **A** promises to pay the money when the car is delivered. **B** promises to deliver the car on a certain date. Both parties have given up something of value, which binds them to the contract.



Consideration in the form of a promise must be clear and certain. For example, a promise by **A** to keep a book to sell to **B** sometime in the future, when **B** needs it, would be seen as too vague and not a real promise to sell the book, and therefore not legally binding.

Consideration – something in the past

Consideration cannot be something in the past. For example, you are not feeling very well and a person you know comes to help clean your house. If, afterwards, you say 'I will give you \$30 for cleaning the house', this offer cannot be enforced. The reason for this is that the consideration – the act of cleaning the house – took place before the offer to pay was made.



Certainty of terms

For a contract to exist, the terms of the contract must be clear and precise. The person making the offer and the person accepting the offer must be certain about what they are agreeing to under the contract. A contract cannot be in general terms. For example, a contract does not exist if a person offers to sell a car without clearly stating which car they are referring to and the price at which it is to be sold.

LEARNING ACTIVITY 8.1

Elements of a contract

- 1 What is a domestic agreement?
- 2 Why is a domestic agreement usually not a contract?
- 3 Read the following situations and state whether you think a domestic or commercial agreement exists. Give reasons.
 - a You went to a car yard, saw a car you wanted to buy, and gave the car yard salesperson a deposit.
 - b Timothy asks Fiona to go to a concert with him. She agrees, so Timothy purchases the tickets.
 - c Costa agrees to pay his son \$10 per week for keeping the swimming pool clean.
 - d An elderly couple persuaded their son to sell his house and come and live with them, and look after them, on the condition that when they died they would leave their house to him.
- 4 What is the difference between an offer and an invitation to treat? Give an example of each.
- 5 Look back at the case study *Carlill v. Carbolic Smoke Ball Company* and answer the questions.
 - a In what situation would an offer to the public at large be a binding offer and in what situation would an offer to the public be an invitation to treat?
 - b How can an offer be revoked? In what way could the offer to the public at large be revoked?
- 6 What is a counter-offer?
- 7 Look back at the case study *Felthouse v. Bindley* and explain why the court decided that there was no acceptance. What precedent did this case create?
- 8 Read the following situations and state what you consider to be the offer and the acceptance. Give reasons.
 - a Simon went to the supermarket, picked up a block of chocolate marked \$2, and went to the cashier. The cashier asked for \$2 and Simon gave it to him.
 - b Cynthia told Robert he could buy her car for \$5000. Robert refused, but said he would give her \$4500 plus his CD player. Cynthia agreed to the deal.

- c William walked into a furniture shop. He noticed a sofa he liked the look of. It had a price tag of \$3500. William said he wanted to buy it at that price. The salesman agreed to sell the sofa to William.
- 9 In the following scenario, at what stage is Timothy's offer accepted? Timothy offered to sell his car to Joshua for \$8000. Joshua said he would have to find out whether he could afford it. He said he would let Timothy know by post before the end of the week. Two days later Joshua wrote to Timothy and told him he would like to accept his offer. Timothy received the letter the next day.
- 10 What is the consideration in the following situations?
 - a Scott sold his car to David for \$1000.
 - b Chia promised to give Linda a washing machine in return for one week's work on the farm.
 - c Jane promised to give Belinda \$100 for mowing her lawns.
- 11 In the following situation, can the promise to pay \$40 be enforced? Give reasons for your answer. Jacqueline mowed Jeffrey's lawn. Jeffrey then thanked Jacqueline and promised he would pay her \$40 for mowing the lawn.
- 12 What is meant by 'certainty of terms'? Give an example.
- 13 Read the case of *Holwell Securities Ltd v. Hughes* and answer the questions.
 - a What offer was made by Dr Hughes?
 - b What did the developer do to accept the offer?
 - c Was there ever a contract between Hughes and the developer? Give reasons.
 - d Under contract law, when is a contract made by post considered complete – when the acceptor posts their letter of acceptance, or when the offeror receives it?
 - e In this case, why did the court decide that acceptance was not made?
 - f Do you think that the court would have made a different decision if it had not been specified that notice had to be in writing? Give reasons.

Holwell Securities Ltd v. Hughes [1974] 1 All ER 161

Dr Hughes owned and worked in a dilapidated old building that was in a prime position. He was approached by a developer who wished to purchase the building. He granted an 'option to buy the building' to the developer. Under the option, Hughes offered to sell the building to the developer and gave the developer six months in which to accept the offer. It was specified that the acceptance must be 'in writing to Dr Hughes at any time within six months from 19 October'.

On 14 April, the developer wrote to Hughes saying that he wished to exercise the option and accept the offer. The letter was posted to Hughes but was never received.

When Hughes did not receive the acceptance, he was relieved because he had second thoughts about moving and decided that his patients would be better served if he remained in the old building. The developer said that he had taken up the option and accepted the offer made by Hughes to sell the building because the acceptance was made at the time the letter was posted.

The court decided that when no mode of acceptance is specified, the time of acceptance is when the letter accepting the offer is posted. When a mode of acceptance is specified (in this case 'the acceptance must be in writing'), the person who has made the offer must receive the acceptance in writing.

Hughes won the case. Notice in writing accepting the offer was not received, therefore there was no contract.

CASE STUDY

14 Read the case study 'Making an offer' and answer the questions.

- a Identify the following by picking out the words that indicate each:
 - i invitation to treat
 - ii intention to create legal relations
 - iii offer
 - iv counter-offer
 - v consideration
 - vi acceptance
 - vii breach of contract
 - viii vagueness of terms.
- b Was Jassi's first letter to Matilda an offer or an acceptance? Give reasons.
- c Was Jassi's second letter an acceptance? Was Matilda bound by this acceptance? Explain. Identify a case that illustrates this point.
- d Did Matilda revoke her offer? Explain.
- e Has Matilda breached her contract to Jassi? Explain.

CASE STUDY

Making an offer

Matilda put an advertisement in the paper to sell her LCD TV (two months old and still under warranty) for \$300. She gave a post office box number as her contact details. Jassi saw the advertisement and wrote to Matilda saying 'she would take the LCD TV at the price advertised'.

Matilda received a number of letters expressing interest. On 8 March she wrote to Jassi and told her that she now wanted \$350 for the LCD TV and would keep her offer open for one week.

Jassi received the letter on 9 March and wrote back to Matilda saying she would accept the offer. She posted the letter on 10 March. Unfortunately Matilda did not receive the letter until 16 March.

On 10 March Matilda met her cousin Meika and discussed the LCD TV. Meika told Matilda she would really like the TV but could not afford the full price. Matilda told Meika she could have the system for \$250 if she would look after Matilda's children on Saturday nights.

BINDING CONTRACT

In addition to the above elements, there are also other factors that make a contract binding.

Capacity to contract

A minor (under the age of 18 years) is bound by a contract if the contract is for employment or **necessities** (goods necessary for the child's life and requirements, such as food and medicine). A court will, however, only enforce a contract with a child if it is for the minor's benefit.

A child would be expected to pay a reasonable price for necessities. A minor is not bound by a contract for luxury items. For example, a boy or girl of 15 who bought some expensive sound equipment for \$6000 could not be sued for damages if he or she failed to pay the sum of money after the equipment was delivered. On the other hand, if the minor had paid the money and the retailer had not delivered the goods, the minor would be able to recover the money.

Consent

For a contract to be valid there has to be real consent between the parties, although in some instances the parties can choose to proceed with the contract if they wish. If there is a **mistake** as to the nature of the contract, or **misrepresentation**, or **duress and undue influence**, the contract is **voidable** (the parties can choose to refuse to carry out the contract) because there has not been real consent. If there is a mistake as to the fundamental nature of the contract, then the contract is said to be **void** or invalid; that is, of no legal effect.

mistake	misrepresentation	duress and undue influence
Consent may not be real if the parties made a mistake about the goods being contracted. For example, a person buys a Falcon believing that he or she is buying a car and instead a bird is delivered.	A representation is a statement made by one party to the other party to encourage the second party to enter the contract. A misrepresentation is an untrue representation. The misrepresentation may be fraudulent (when the person knowingly lied), innocent or negligent.	Duress occurs when a person is forced into a contract under threat of harm. Undue influence is when a person enters into a contract because of the influence of another, such as a parent or spouse. If it can be proved that the contract was entered into under duress or undue influence, the contract is not valid as there has not been real consent.

Legality

A contract that is not within the law is not enforceable through the courts. For example, if you contracted to buy stolen goods the contract would not be valid, and would therefore not be enforceable.

LEARNING ACTIVITY 8.2

Binding contract

- 1 Read the case of *Simons & Anor v. Zartom Investments Pty Ltd* and answer the questions.
 - a How did the builder misrepresent the home unit in the contract?
 - b What effect did the misrepresentation have on the contract?
 - c Do you think that the court's decision was a just outcome? Discuss.

Simons & Anor v. Zartom Investments Pty Ltd [1975] 2 NSWLR 30

Simons and his wife bought a home unit from a set of plans. A pamphlet describing the home showed that they were entitled to a garage. On the plan they saw numbered rectangular squares completely enclosed by thin lines on the parking level.

They agreed to buy the home unit and signed a contract for 'all that home unit premises known as No. 12 and garage 17 described in the attached pamphlet'.

From this description Simons expected a lock-up garage. As work on the unit progressed, Simons and his wife inspected the premises, which were nearly completed. They found that only undercover parking was provided. Simons and his wife complained that they wanted a garage. The builder stated that they were entitled to the yellow area on the plan where there was plenty of room for a car.

CASE STUDY

The court decided that Simons and his wife were entitled to rescind (cancel) the contract. The inaccurate description of the garage was an important misrepresentation because they might not have entered into the contract if they had known only undercover parking was provided.

2 Read the case study 'The Baby M case' and answer the questions.

- a What contract was entered into between Bill Stern and Beth Whitehead?
- b Why did the United States Supreme Court hold that the contract was not enforceable?

CASE STUDY

The Baby M case

An American, Bill Stern, entered into a surrogacy agreement with Beth Whitehead. Mrs Whitehead agreed to be artificially inseminated with Mr Stern's sperm, to carry the child and to give the child to Stern and his wife when it was born. Whitehead agreed to renounce parental rights and allow the Sterns to adopt the baby. In return she would receive \$10000.

When the baby was born, Whitehead did not want to give her up. She and her husband had two other children, had financial problems and some marital discord. The Sterns both held doctoral degrees and led quiet, respectable lives.

The United States Supreme Court held that the surrogacy contract was illegal because it contravened state laws outlawing the sale of babies. The contract was, therefore, not enforceable. The court, however, decided to leave the baby with the Sterns because it thought that she would have a better quality of life with them.

3 Read the following situations and answer the questions.

- a Dominic was not working well at school. His father said to him that if he worked very hard and passed all his exams he would give Dominic a CD player. Dominic passed all his exams. Did a contract exist between Dominic and his father? Give reasons.
- b Fred, who was on holiday in Perth from Melbourne, wished to buy a four-wheel drive vehicle from Wood Outback Motors in Perth. He saw a particular vehicle he liked. Wood Outback Motors offered to sell him the vehicle for \$42000. They said they would hold the vehicle for him until Friday at noon. Fred went home to Melbourne to arrange the finance. When everything was arranged he wrote to Wood Outback Motors accepting the offer. He posted the letter on Wednesday afternoon at 3 o'clock. At 2.30 pm on Friday, George offered to buy the vehicle from Wood Outback Motors. Their mail, which usually arrived at 11 am, had been delayed and had not yet been received. Can Wood Outback Motors accept George's offer, or does a contract already exist between Wood Outback Motors and Fred? Explain.
- c Christina sold antique furniture from her shop in Merimbula. Gregory saw a table which was just what he wanted for \$500. He could not believe how cheap it was and decided to buy it immediately. Christina explained to him that the table had been wrongly labelled. The price was actually \$5000. Was the price tag an offer? Does Christina have to sell the table to Gregory for \$500? Explain.
- d Samantha and Andrew had left their suitcase on the side of the road. They put a notice in the local paper stating that they were willing to pay a reward of \$200 for the return of their suitcase. Trent found the suitcase. Samantha's and Andrew's names and address were on the label on the suitcase. He returned it to them the next day. He had not seen the offer of the reward. Are Samantha and Andrew obliged to pay Trent the reward? Explain.

- e Boots Chemists in England used a cash register for the payment of goods as customers left the store. They sold certain medicines which, at that time, were only able to be sold under supervision by a chemist. The chemist was present at the cash register. The courts had to decide if the offer to sell was made at the cash register under the supervision of the chemist, or earlier. The case was brought to court by the Pharmaceutical Society of Great Britain, which alleged that as the offer was made by the price tag on the goods, and the acceptance was made by taking the goods off the shelves, no chemist was present when the sale was completed. At what stage do you think the offer is made: when the buyer sees the price tag shown on the goods and accepts the offer by taking the goods off the shelf, or when the buyer offers to pay the price shown on the price tag at the cash register and the person on the checkout accepts the offer? (*Pharmaceutical Society of Great Britain v. Boots Cash Chemist Ltd* [1952] 2 QB 795)
- f Luke agreed to buy some stamps from Sean. After he had received the stamps, he found out that they had been stolen. He refused to pay Sean. Is the contract enforceable? Explain.
- g Nicky was told that a necklace was made of diamonds and that it was worth \$2000. Nicky offered to buy it at that price. Michael accepted this offer. He handed over the necklace. Before Nicky had paid for the necklace she discovered that the necklace was made of zircons (imitation diamonds). She refused to pay the \$2000. Michael said that she had examined the necklace and had agreed to pay that sum. Is the contract enforceable? Explain.
- h Christine offered to sell her house to Stephen for \$250 000. Stephen accepted the offer, but said his acceptance was subject to finance being obtained. Does a contract exist at the time the acceptance is made? At what stage is a binding contract made?
- i Simon promises to buy an MP3 player from James for \$100, to be paid before the end of the month. James accepts this offer and promises to deliver the MP3 player to Simon immediately. Does a contract exist? If so, what is the consideration?
- j Jennifer goes to Frank to ask him for advice regarding the financial investment of a sum of money she has just inherited. Frank tells her about some good investments. She follows his advice and during the next two months her invested money increases. She tells Frank how grateful she is for his advice, and tells him she will pay him the sum of \$200 for his time in advising her. Is Jennifer bound to pay this sum to Frank under contract? Give reasons for your opinion.

TERMS OF A CONTRACT

Contracts, whether written or oral, include **express terms**. These are the words that clearly define the item/s in the contract and are legally binding. For example, when buying a new car the express terms would be the make and model of the car, the year, the colour and the price.

The main terms of a contract are known as the **conditions** of the contract. If one of these conditions is broken (breached), then the party who has suffered as a result of the breach is entitled to treat the contract as no longer valid (**voidable**). For example, if you contracted to buy a Ford car and the car yard said they no longer had that Ford, and could only supply you with a Holden, then you (as the injured party) are entitled to treat that contract as no longer valid.

Many workers have employment contracts that protect their wages and working entitlements as specified in the contract.

Warranty

A **warranty** is a term of the contract that is not the main part of the contract. For example, a condition of a contract may be that you are to be supplied with a Ford car, while the warranty may be that the supplier will replace any faulty parts for one year after the car's purchase. If a warranty is breached, you can claim damages for any loss, but you are not entitled to treat the contract as at an end (**void**).

Guarantees and warranties are often supplied in the box of goods that have been purchased. As they are often not seen until after the goods have been purchased, it may be difficult to prove that they are part of the contract of sale.

Consumers are often asked to buy an extended warranty, which may not be needed because it does not offer anything over and above what consumers already get for free under the guaranteed rights in the Australian Consumer Law.



Figure 8.5

A breach of warranty allows a party to seek damages, but does not necessarily mean that the contract is void.

CONSUMER AFFAIRS INVESTIGATION

In May 2013, Consumer Affairs Victoria was asked to investigate the National Warranty Company Grand Warranty Plan, which is sold to some consumers when they are buying a new or used car. Under the Australian Consumer Law, consumers are entitled to a refund or replacement if a product (including a motor vehicle) is faulty or unsafe, or does not work or appear as it should.

LEGISLATION GOVERNING CONTRACTS

Contract law is largely based on common law or judge-made law. Laws relating to offer, acceptance and consideration have mostly been developed through cases and precedent. However, there is parliament-made law which governs the terms of contracts and, in particular, whether the terms of a contract may be void.

Schedule 2 of the *Competition and Consumer Act 2010* (Cth) sets out the **Australian Consumer Law**, which is a comprehensive law containing provisions relating to unfair contracts.

COMPETITION AND CONSUMER ACT 2010 (CTH)

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection. The *Competition and Consumer Act 2010* replaces the *Trade Practices Act 1974* (Cth).

The Act outlines the types of consumer contracts and terms the law will and will not apply to, and who can take action. The Act also explains the factors the court must take into account when deciding if a contract is unfair.

The **Australian Consumer Law** provides:

- a single, national consumer law for Australia based on the consumer provisions of the *Trade Practices Act 1974* (repealed) and drawing on best practice in state and territory consumer laws
- a national law covering unfair contracts that will apply to standard-form business-to-consumer contracts

- a new national product safety law and enforcement system
- a new national law guaranteeing consumer rights when buying goods and services, which replaces existing laws on conditions and warranties
- new enforcement powers for Australia's consumer agencies, including substantiation notices, infringement notices and public warning notices – able to be enforced by all Australian courts and tribunals
- new civil penalties for breaches of the Australian Consumer Law, including civil pecuniary penalties and disqualification orders
- new powers for courts to order a remedy for consumers affected by breaches of the law.

The *Australian Consumer Law and Fair Trading Act 2012* (Vic.) repealed the *Fair Trading Act 1999* (Vic.) and provides a comprehensive law for Victoria, following the lines of the Commonwealth Australian Consumer Law. The law in Victoria is referred to as the Australian Consumer Law (Victoria). The aims of the *Australian Consumer Law and Fair Trading Act 2012* include promoting and encouraging fair trading practices and a competitive and fair market, protecting consumers, regulating trade practices and applying the Australian Consumer Law.

Guaranteed consumer rights

Guaranteed consumer rights are implied terms. Under the Australian Consumer Law, which provides protection to consumers, some terms of all contracts are implied rather than being actually expressed in the contract.

In most circumstances, the Australian Consumer Law defines a consumer to be a person (or business) who purchases:

- goods or services under \$40 000
- goods or services over \$40 000 that are ordinarily acquired for personal, domestic or household purposes
- a vehicle of any value designed for transportation on public highways.

These implied rights are not expressly agreed by the parties, but are assumed by the law to be operating in the background, either because of specific legislation or because the contract does not make sense without them.

All contracts for the sale of goods include certain implied terms about their quality. It is implied that all goods should be **'fit for the purpose for which they are intended'** and should be **'in accordance with the description of the goods or demonstration of a sample'**. For example, if a car is sold to you without an engine, then it is not fit for the purpose for which it was intended. If you purchase a leather chair and find that it is made of vinyl, then it is not in accordance with its description. Similarly, if a person saw a gadget demonstrated, and decided to buy one, he or she would expect the gadget to do the same as the demonstration model.

Contract law provides a structure for the orderly operation of commercial transactions. Both parties to a contract agree to the express terms in the contract. When an issue arises relating to the contract, implied terms are read into the contract. A court will decide what a reasonable person would have done in the circumstances. In this way, the courts set guidelines for settling disputes.

When a consumer buys goods or services, the Australian Consumer Law provides that the consumer will have **guaranteed rights** that:

- the supplier has **the right to sell the goods**; that is, they must own the goods and can legally transfer the ownership rights

- the goods are **fit for any purpose** that the consumer makes known to the supplier
- the goods are of **acceptable quality**; that is, they are fit for their purpose and safe to use, free of faults or defects for a reasonable time after purchase, and acceptable in appearance or finish. When deciding if the goods are of acceptable quality the law considers the type of goods purchased, the price paid, the description on the packaging or labels and other relevant information
- the goods **match their description or demonstration model** or, if sold by sample, they match closely to the sample and are of acceptable quality
- the repairs and spare parts are reasonably available
- the services are carried out with reasonable care and skill
- the services are completed within a reasonable time.

LEARNING ACTIVITY 8.3

Terms of a contract

- 1 What is the difference between an express term and an implied term in a contract?
- 2 Give an example of an express term.
- 3 What is the difference between a condition and a warranty in a contract?
- 4 Where can you find the Australian Consumer Law?
- 5 What can occur if a condition is breached? How does this differ from the breach of a warranty?
- 6 The Australian Consumer Law protects consumers when making a contract. Describe what is meant by a consumer.
- 7 Explain the guaranteed rights under the new Australian Consumer Law. How will these rights provide better protection?
- 8 Write a scenario of circumstances where someone's guaranteed rights have been breached. Explain which rights have been breached.
- 9 **Investigation**
Look up the online Australian Consumer Law publication *Consumer guarantees: A guide for businesses and legal practitioners*, and answer the questions.
 - a Summarise the consumer guarantees with respect to goods.
 - b Summarise the consumer guarantees with respect to services.
 - c What can you do when goods or services do not meet a consumer guarantee?
 - d Make up a scenario relating to a faulty product or inadequate service and explain the rights of the consumer in relation to your scenario.

BREACH OF CONTRACT

When a contract is made, an agreement is reached between the parties to carry out a service or supply goods for payment. If one of the parties fails to fulfil the agreement, then the party can be said to be in breach of the contract. Breach of contract can also occur if there has been a breach of the guaranteed consumer rights (or implied conditions), such as providing a defective service or supplying defective goods.

A breach of contract can occur when one of the parties fails to pay for the goods or service on time, or fails to deliver the goods or service on time. Failure to fulfil any terms and conditions of the contract can lead to a breach of contract.

A breach of a contract can lead to the contract being void (declared to no longer exist) or voidable (the wronged party can decide to opt out of the contract), or a claim for damages. For example, if an employment contract is breached by the employer, the employee could make a claim for damages. In some cases, a court will give the defendant an order of specific performance, which requires the defendant to complete the contract. This occurs rarely.

Defences to breach of contract

If you were being sued for breach of contract (breaking the agreement made under the contract), your defence could be either that:

- there was no valid contract – in other words one or more of the elements of a valid contract did not exist; or
- you had not breached the contract – you had fulfilled the conditions of the contract.

A person could also argue that he or she did not have the capacity to form a contract, that consent was not freely given or that the contract was not legal.

One party may argue that he or she is not bound by a contract because the other party has broken the conditions of the contract. The other party may argue that their actions were merely a breach of a warranty, not a breach of a condition of the contract, therefore the contract would still be in force. For example, a person wishing to get out of their obligations under a contract may say they do not want the car supplied because the electrical system of the car is faulty. The car supplier may say that the fault in the car is only a breach of a warranty and not a main condition of the contract. They would therefore be obliged to fix the electrical system, but would not be obliged to accept the return of the car.

In arguing that a contract does not exist, a person may state that the implied terms under legislation are not fulfilled. For example, the goods sold were not fit for the purpose for which they were intended, or were not in accordance with the description of the goods.

Causation

To be successful in claiming damages, the plaintiff must prove that the breach of contract has caused financial loss. For example, if a person contracted to buy a house at \$920 000 and then did not fulfil the contract, the house would still belong to the seller. However, if the seller was unable to sell the house for that price, and eventually resold the house for \$900 000, the original purchaser (who did not fulfil the contract) would be liable for the shortfall of \$20 000. The financial loss was caused by the breach of contract by the original purchaser.

The defendant could argue that his or her conduct did not cause the loss or damage. In the above situation, if the seller had two subsequent offers to purchase the house, one of which was for \$900 000 and the other for \$920 000, but preferred to sell it to the purchaser who offered the lower price, the defendant could argue that it was the seller's conduct that caused the loss.

Remoteness of damage

The person who has not fulfilled the contract is only liable for the financial loss that could be reasonably contemplated as likely to result from the failure to perform the contract. If the financial loss is too remote from the wrongful act, the wrongdoer will not be liable.

For example, in the above scenario, it could be reasonably assumed that if the original purchaser did not complete the contract, he or she would be liable for any shortfall if the seller was unable to sell the property for the original price. On the other hand, if the seller took the house off the market for a year before deciding to sell it, and then received a lower price, this financial loss would be seen as too remote.

Parties to a contract cannot make a claim for worry or anxiety that may have been caused by the failure to perform the contract. However, in some instances they are able to claim loss of enjoyment; for example, when there is a contract with a travel agency and the holiday goes horribly wrong.

Remedies

The principal remedy for breach of contract is **damages**. Orders for specific performance or injunctions are rarely used. A person who enters a contract and then breaches it has a choice: to perform the contract or pay damages.

CASE STUDY

Gwam Investments Pty Ltd v. Outback Health Screenings Pty Ltd (2010) SASC 37

A decision by the Full Court of the Supreme Court of South Australia has highlighted the extensive damages award that can follow the supply of equipment that is not fit for the purpose contemplated by the buyer.

Outback Health Screenings Pty Ltd (OHS) operated a health service business for remote mining communities. In July 2006, Gwam Special Vehicles (Gwam) was asked by OHS if they could construct a mobile drug-testing unit attached to the rear of a four-wheel drive vehicle. Gwam stated that they were experts in designing and constructing similar custom-made units for customers.

OHS entered into a contract with Gwam to fit the testing unit at a cost of \$82 000. Although there was no written contract, OHS accepted the quotation after having seen concept drawings of the unit to be constructed.

For the construction to take place, OHS needed a four-wheel drive vehicle. After consultation with Gwam, OHS spent \$67 000 on an Isuzu.

When the unit was fitted to the Isuzu, the combined weight of the vehicle and the unit exceeded the maximum loaded mass for the Isuzu of six tonnes. This meant that the vehicle could not be driven on public roads legally and was therefore not able to be operated.

After it became apparent that the mobile unit could not legally be operated on the back of the Isuzu, OHS traded the Isuzu for \$40 000 and purchased a Hino truck for \$96 000.

OHS sued Gwam for breach of contract. Gwam argued that OHS should not be entitled to recover the difference between the price of the Isuzu and the Hino truck as clearly, given the weight of the unit, OHS was always going to need a heavier and more expensive vehicle. In essence OHS eventually bought what it should have purchased initially and thus there was no loss.

Alternatively, Gwam argued that OHS ended up owning a much more valuable vehicle and that any award of damages for the difference in price between the Hino vehicle and the Isuzu vehicle would amount to unjustified betterment.

The Full Court rejected both these arguments and found that OHS was entitled to recover damages for breach of contract because Gwam had breached:

- an implied term of the contract that the vehicle and its custom-made unit would be fit for the purpose contemplated – namely to drive on public roads
- its duty of care to ensure that the vehicle purchased by OHS was suitable.

Damages were awarded for:

- the loss of \$27 500 suffered when the Isuzu was traded in for much less than its original purchase price

- \$9500 being the cost of transferring the unit from the Isuzu to the Hino truck
- \$18000 being interest paid by OHS pursuant to its financing arrangements for the Isuzu
- a further \$29000 being the difference between the cost of the Isuzu and the cost of the alternative Hino truck.

LEARNING ACTIVITY 8.4

Breach of contract

- 1 Look back at the case study *Gwam Investments Pty Ltd v. Outback Health Screenings Pty Ltd* and answer the questions.
 - a There was no written contract in this case. Explain the acceptance of the offer in this case.
 - b Identify the implied term in this contract that was breached. Explain how it was breached.
 - c Present the arguments for the plaintiff, OHS, and the arguments for the defendant, Gwam.
 - d Was there causation in this case? Explain why causation is a necessary element of claiming damages when a contract has not been fulfilled.
 - e What was the decision of the Full Court of the Supreme Court in this case?
 - f Do you agree with the damages awarded in this case? Explain.
- 2 Read the case study 'Mel B blocked from *Australia's Got Talent* role' and answer the questions.
 - a What occurred in this case?
 - b Explain how Mel B had allegedly breached the contract.
 - c Describe the remedy that was awarded in this case.
 - d Conduct some research into this case. What eventually happened to the contract and to Mel B?

Mel B blocked from *Australia's Got Talent* role

Stephanie Gardiner, *The Sydney Morning Herald*, 18 April 2013

Spice Girl Melanie Brown will not appear on Channel Nine's *Australia's Got Talent*, with a judge ordering an injunction preventing her from working for any Australian network other than Seven.

Channel Seven took legal action after rival network Nine poached Brown as a judge for their talent show. Seven argued Brown had breached her *X Factor* contract with them and was granted an injunction in the NSW Supreme Court to prevent the singer from working for other networks until the end of January next year.

'This matter concluded that Seven is entitled to injunctive relief,' Justice David Hammerschlag said on Thursday.

'Seven was keen, and I accept remains keen and willing, to employ Mel in the manner originally contemplated. The problem is with Mel,' the judge said. 'Under the agreement, Mel has an obligation to provide her exclusive services to Seven and Seven is entitled to her performance of this obligation.'

'I see no reason why she should not be ordered to keep her word that she would not work for anyone but Seven in Australia in 2013.'

CASE STUDY

During the hearing, Seven's head of production, Brad Lyons, said he first learned Brown would not be returning to *The X Factor* in January when her husband and agent, Stephen Belafonte, told him she was having custody issues that would prevent her from bringing her children to Australia.

The court heard that Brown had decided to pull out of *The X Factor* because comedian Eddie Murphy – with whom she has one child – refused to sign a consent form which would have allowed the child to get an Australian visa.

Another father of one of her children also refused to allow the child to come to Australia, the court heard.

A lawyer from Seven's production department, Jane Oswald, said that Mr Belafonte had told her he 'wasn't interested' in paying the costs of taking Mr Murphy to court.

'He [Mr Belafonte] said that unless [Channel Seven executive] Brad Lyons was willing to bankroll the case he wasn't interested in going to court to try and get Mr Murphy to sign the [consent] documents,' Ms Oswald said.



Figure 8.6 Mel B

Seven did not bankroll the case and the documents were not signed, leading Ms Brown to pull out of *X Factor*'s 2013 season.

Mr Lyons said he and Mr Belafonte had at first spoken amicably through a series of phone calls and emails about the possibility of another role for Brown in *The X Factor*, and the need to keep her departure under wraps.

Mr Belafonte told the Seven executive, 'Buddy, we're Seven people through and through', the court heard.

He allegedly told Mr Lyons he would 'absolutely' not reveal the celebrity's plans.

The costs hearing will be held at a later date.

- 3 How does remoteness of damage relate to the failure to fulfil a contract?
- 4 What defences can be used in a breach of contract case? Explain.
- 5 Read the case study *Baltic Shipping Co. v. Dillon* and answer the questions.
 - a What occurred in this case?
 - b What was the finding in the original case?
 - c Contract law generally only covers economic loss. Why do you think the High Court decided to allow an award of damages for loss of enjoyment of Ms Dillon's trip?
 - d Explain the causation in this case.

CASE STUDY

Baltic Shipping Co. v. Dillon (1993) 176 CLR 344

The appellant, Baltic Shipping Company, was the owner of a ship (the *Mikhail Lermontov*) which sank on 16 February 1986. The respondent, Ms Joan Dillon, was a passenger on the ship when it sank off the New Zealand Sounds. The ship was approximately nine days into a 14-day cruise.

Dillon sought the return of the fare to the extent that she had not received value for money and damages for loss of enjoyment of her holiday. As a general rule, contract law does not allow for compensation for distress or disappointment.

The judge at first instance found in favour of Dillon. The damages awarded were for the restitution of the balance of the fare not used (about \$1500), as well as compensation for disappointment and distress and for the loss of enjoyment (about \$5000).

The shipping company appealed to the Court of Appeal, but was unsuccessful. The shipping company was then granted leave to appeal to the High Court. The High Court considered whether the full fare should be refunded and whether damages should be awarded for loss of enjoyment, which was contrary to the traditional rule of contract law.

In this case, the contract had the object of providing enjoyment or relaxation, so Dillon should be able to recover damages for anxiety flowing from the breach of contract. The High Court decided that Dillon was not entitled to claim the return of her fare. However, the court decided that she was entitled to damages of \$5000 for disappointment and distress for the loss of enjoyment of her trip.

STANDARD-FORM CONTRACTS

Many contracts signed in the course of business are standard-form contracts. These are contracts written in advance with the details added in later, such as the name of the customer and the price agreed to. The use of standard-form contracts saves time for businesses that require similar written contracts for many of their customers.

Things a court must take into consideration when deciding if a contract is a standard-form contract include whether one party:

- has all or most of the bargaining power
- prepared the contract before the parties had any discussion relating to the transaction
- had to accept or reject the terms of the contract in the form in which they were presented
- was given an opportunity to negotiate the terms of the contract
- was specifically referred to in the terms of the contract, before signing it.

Standard-form contracts are generally used for the supply of goods and services to consumers in many industries and areas including real estate and car sales, gym memberships, telecommunications, travel and finance, and for other major purchases and transactions.

Consumer organisations have been concerned about standard-form contracts for many years, because they are drawn up by the supplier to suit the supplier's needs, and can be unfair to the consumer. Their clauses are thus imposed on one side by the other, rather than being a true 'meeting of minds' in a mutual agreement.

The Australian Consumer Law has a section that can result in unfair terms in a standard-form contract being struck out. However, many standard-form contracts are now in plain English, so they are easier for consumers to understand, despite the unwieldy length of some contracts.

The onus is on the parties entering into the contract to read the contract carefully and to make sure they are aware of all the conditions in the contract. For example, if you sign an insurance contract which states that the insurers are not liable for any damage to your property caused by a storm, you cannot claim under the insurance policy for damage caused by a storm.

Unfair terms

The Australian Consumer Law poses restrictions on the use of standard-form contracts. It states that a term of a consumer contract is void if the term is unfair and the contract is a standard-form contract.

Unfair terms include:

- terms that cause significant imbalance in the parties' rights – for example, a term that permits one party (but not another party) to terminate the contract
- terms that are not reasonably necessary to protect the legitimate interests of the party who would be advantaged by them – for example, terms that are unnecessary and can cause confusion
- terms that would cause detriment (whether financial or otherwise) to a party if they were applied or relied on – for example, a term that permits one party to unilaterally vary the characteristics of the goods or services to be supplied.

The protection provided under the Australian Consumer Law does not apply to terms that define the main subject matter of a consumer contract, terms that set the up-front price payable under a contract, or terms that are expressly permitted or required by the Commonwealth, state or territory law.

Exemption clauses

Some contracts contain **exemption clauses**, which are clauses exempting (or freeing) the parties from liability in certain circumstances. When both parties sign a contract, the parties are usually bound by the exemption clauses in the contract.

In a situation where no signed contract exists, an exemption clause must be clearly visible to the parties before the contract is entered into. For example, large car parks often have notices warning customers that the proprietors of the car park take no liability for any loss or damage caused to cars while parked. For these notices to be part of the contract they must be seen by the motorist before entering the car park. The car park users then understand that these exemptions are part of the contract, before parking their cars and taking the risk.



Figure 8.7 Parking signs often contain exemption clauses.



Figure 8.8 Dry-cleaners use exemption clauses.

Many dry-cleaners have clauses on the back of their dry-cleaning tickets, exempting themselves from liability for loss or damage to the clothes dry-cleaned.

In cases where the parties have not signed an agreement, the courts will judge each case on its merit and will enforce the exemption only when it is thought that a reasonable person would have thought that such an exemption would be part of the agreement. The party entering into the contract must be aware of the exemption clause before entering into the contract.

Recreational services

The *Competition and Consumer Act 2010* (Cth) allows recreational services operators to include terms in a contract that exclude liability if a person is injured when voluntarily participating in sport, such as football, or leisure activities, such as skiing.

The law makes people responsible for any obvious risk associated with their participation in these activities if the activities are done for recreation, enjoyment or leisure. An obvious risk is one that an ordinary person would have expected. Companies who engage in misleading, deceptive or careless conduct will still be liable for any injuries.

Public liability

Under the *Wrongs Act 1958* (Vic.), consumers can sign a waiver, when participating in a risky activity, which means they accept responsibility for injuries. The waiver is not legal if the operator is grossly negligent or makes a false statement in relation to the waiver. For example, a person accepts an obvious risk and cannot sue if they hire rollerblades and injure themselves in a fall. However, if the rollerblades were poorly maintained and this contributed to the fall then the company may still be liable.

METHODS AND INSTITUTIONS FOR RESOLVING DISPUTES

Consumer Affairs Victoria can give advice relating to consumer contracts. Consumer Affairs can help the parties to a dispute understand their rights and can organise conciliation between the parties to try to reach a resolution if the subject matter of the complaint falls within Consumer Affairs's jurisdiction. Conciliation is not binding, although an agreement reached can be confirmed in writing.

The Victorian Civil and Administrative Tribunal can hear disputes relating to consumer contracts and other types of disputes relating to contracts.

The Magistrates' Court, County Court and Supreme Court can hear disputes relating to contracts. The plaintiff to a case would decide which court to take the case to according to the amount being claimed and the seriousness of the situation. Decisions of courts and tribunals are binding.

Alternative methods of dispute resolution could be appropriate for disputes relating to contracts, such as mediation. Some contracts relating to the workplace may stipulate that if a dispute arises between the employer and employee, the parties agree to go to arbitration for the dispute to be resolved.

LEARNING ACTIVITY 8.5

Standard-form contracts and dispute resolution

- 1 What are standard-form contracts and when are they likely to be used?

- 2 Explain two considerations of a court when deciding if a contract is a standard-form contract.
- 3 Give an example of a term that may be regarded as unfair in a standard-form contract.
- 4 What are exemption clauses? Give an example.
- 5 Read the following situations and answer the questions.
 - a Janice parked her car in a city car park. As she was walking out of the car park, she saw a sign that said the proprietors of the car park did not accept any liability for any loss or damage to cars while they were parked in the car park. She had not seen the notice on entering the car park. If her car was damaged, would she be able to make a claim on the proprietors of the car park for its repair? Explain.
 - b In the standard-form contract for house insurance there is a clause that exempts the insurance company from any liability for damage caused by fire or flood. If the customer signing the contract had not read this clause before signing it, would the insurers be liable in the case of damage by fire? Explain.
 - c Ronald had a silk shirt that needed dry-cleaning. He asked the dry-cleaner if he accepted liability for any damage to clothes he dry-cleaned. The dry-cleaner said that he did not accept liability and drew Ronald's attention to a large notice above the counter that said 'No liability is accepted for loss or damage of clothing'. Ronald was in a hurry and decided to leave his shirt anyway. The shirt was returned with a large stain on it. Would the dry-cleaners be liable? Explain.
- 6 Explain three options you would have to obtain a resolution if you had a dispute relating to a breach of contract.

ISSUE – CONSUMER CREDIT CONTRACTS

A consumer credit contract involves a person taking out a loan or obtaining credit from an institution such as a bank. An ongoing problem is the issue of unfair consumer credit contracts. People may not be aware of their rights under the Australian Consumer Law. According to the Australian Consumer Law (which applies to Victoria and the rest of Australia), an unfair term in a contract is one that causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

The Brotherhood of St Laurence was concerned about people living on limited incomes entering into inappropriate consumer credit contracts. The law school at Griffith University and the Brotherhood of St Laurence undertook a survey to explore the issue of social justice in relation to consumer credit.

The survey found that some people:

- were not sure about the interest they were paying, although they were aware how much they had to pay each week or fortnight; for example, one person who ended up paying about \$190 on a \$100 loan realised that she was paying \$90 in interest but did not understand what interest rate that represented
- were unsure of the consequences of not repaying a loan on time
- signed a contract that they thought was unfair because of limited options and a feeling of powerlessness; one woman said she felt so vulnerable she would have been willing to sign anything
- found the length of the contract were barriers to understanding the contents of the contract and they were not sure whether what had been discussed was actually in the contract; comments made were that it was a lot to read and there was too much information
- felt they had a good relationship with the lender and did not expect them to act on harsh clauses.

Some standard-form credit contracts include an acceleration clause that states: 'If you fail to make a payment when it falls due, the lender will give you 30 days to pay and will then be entitled to demand repayment of the full loan amount.' This clause does not make it clear that borrowers have a right to be served with a notice of default, with a certain period to remedy the default before the acceleration clause can operate.

Consumer Affairs Victoria found problems existed with small-amount lenders. The average small-amount cash loan is for less than \$300 (not including fees, charges and interest) and is often repayable within four to six weeks. These loans are usually for essential household expenses. For example, buying goods from a retail store where no payment is required upfront.

There is often considerable confusion by borrowers about the nature of the agreement they are entering into, especially the costs involved in the transaction and the ability to buy the goods at the end of the transaction. Consumer Affairs found that many people who take out small-amount loans have difficulty in resolving payment problems or disputes.

Consumer Affairs considers terms under which consumers acknowledge that they have read and understood the contract to be unfair because it cannot be known if a consumer has understood the terms of the contract, and because by acknowledging that they have read and understood the contract, they are forgoing their right to assert that a clause of the contract was not explained to them.

The capacity of the legal system to respond to demands for change

There are many consumer groups that have made demands of state and federal governments on behalf of consumers and in the pursuit of justice for people who wish to use consumer credit.

Choice

Choice, formerly known as the Australian Consumers Association, has over 200 000 subscribers to its information products, and is the largest consumer organisation in Australia. Its aim is to tackle the issues that really matter to consumers, arming them with the information they need to make confident choices and lobbying for change when consumers are getting a raw deal.

In April 2009, Choice issued a response to the consultation paper on consumer policy law and framework by the former Minister for Competition Policy and Consumer Affairs, Chris Bowen. Choice strongly supported the introduction of national laws excluding unfair contract terms and conditions from standard-form consumer contracts.

Consumers' Federation of Australia

The Consumers' Federation of Australia (CFA) is the national peak body for consumer groups in Australia. It has over 100 members, including legal centres, health rights groups, local consumer organisations and public interest bodies. CFA's role is to put the view of its member organisations to government and industry, and advocate on behalf of consumers.

This group has made many submissions to government on unfair terms in contracts and the need for a central body.

The CFA asked for:

- a ban on unfair terms in consumer contracts
- adequate remedies to consumers who have signed a contract with unfair terms
- enforcement of the ban on unfair terms, by allowing regulators to take action in respect of individual contracts and classes of contracts

- national consumer credit legislation that applies to all consumer credit
- licensing of all credit providers that regulate and enforce standards
- easily accessible external dispute resolution for the industry
- better regulation of practices by credit providers and other businesses (e.g. telecommunications) to reduce overcommitment.

Many of these demands have been met by the **Australian Consumer Law**. If a term in a consumer credit contract is assessed as unfair, it will be void. This means that term will be treated as never having existed. The contract will continue to bind the parties, but only as far as it is able to exist without the unfair term.

Changes in the law

The *Credit (Commonwealth Powers) Act 2010* (Vic.) was passed by the Victorian Parliament to refer power over consumer credit to the Commonwealth. This Act, along with similar Acts in the other states, enables the Commonwealth Parliament to adopt national credit protection legislation.

National Credit Code

The *National Consumer Credit Protection Act 2009* (Cth) includes the National Credit Code in Schedule 1 of the Act. This code replaces previous state-based consumer credit codes and the Uniform Consumer Credit Code, and it continues to apply to the conduct of Australian credit licence holders.

Under the Act, lenders and credit providers of consumer credit must be registered with the Australian Securities and Investments Commission (ASIC), and a national licensing regime for credit providers and providers of credit-related services and advice was established. ASIC became the sole regulator of consumer credit and introduced general conduct requirements for credit providers and providers of credit-related services and advice, including responsible lending obligations.

Lenders have to assess loans to ensure the loan is suitable for the consumer and whether the consumer has the ability to repay the loan. Consumers are provided with a guide to their rights in relation to consumer credit early in a transaction. Lenders have to tell consumers upfront about fees and charges they will need to pay before the loan is entered into.

In October 2011, there were further changes. These included:

- the banning of **exit fees** on home loans for contracts entered into after 1 July 2011
- the banning of **over-the-limit fees** on credit cards
- the introduction of a **key facts sheet** for home loans and credit cards, which is a one-page information sheet that enables consumers to more easily compare credit products with similar credit products from other credit providers
- the banning of credit providers sending **unsolicited invitations to consumers to increase their credit limit**
- a requirement that **payments are allocated to the closing balance** shown in the last account statement to which the highest rate of interest applies
- a requirement that all credit providers put a **warning on their account statements about the consequences of only making minimum repayments**.

Unjust contracts

Sections 76 and 77 of the National Credit Code allows a court to grant relief to debtors from the consequences of entering into an unjust transaction; that is, one that is unconscionable, harsh or oppressive.

Unconscionable interest charges

A court can reduce or annul any change in the annual percentage rate, establishment fee or fee charged on early termination of a credit contract if it can be shown that the change in the rate was unreasonable in relation to the advertised rate, or the change discriminates against the debtor compared to other similar debtors.

Financial hardship

Financial hardship can occur for a variety of reasons, such as job loss or illness. Borrowers are encouraged to seek financial counselling to discuss available options. A borrower suffering from financial hardship can apply to have the terms of their credit contract varied.

EXTRACT

Media release: New laws give credit providers access to more of your information

Wednesday 12 March [2014] marks the introduction of a new credit reporting system, which will collect far more information about Australians' credit history. The extra information is supposed to help credit providers make a better assessment of someone's ability to afford credit and help them lend more responsibly, but Consumer Action Law Centre fears credit providers will also use the new data to improve their bottom line.

'Currently you won't end up with a "black mark" on your credit report unless you are over 60 days late in missing a payment. But under the new system, the *Repayment History Information* [collected for consumer credit contracts] on your credit report can show that you were late in making a payment on a consumer credit account if you were only five days late,' said Gerard Brody, CEO of Consumer Action.

'We already know that finance companies collate a lot of data in the context of consumer lending – they use this to identify new or current customers that are likely to be profitable. With late credit payments now available on credit reports, it will be open to lenders to respond by charging consumers higher interest rates where they deem a consumer to be a 'bad risk' – that's a common practice overseas where this information has been available on credit reports.'

'But just because you've been late with the odd credit card repayment, that doesn't mean it's fair that you should be charged a higher rate on your mortgage,' said Gerard Brody, CEO of Consumer Action.

Mr Brody encouraged consumers to get on the front foot with potential late payments.

'Repayment history information will stay on your credit report for two years, even after you have made the late payment. That's why it is now more important than ever to get in touch with your lender sooner rather than later if you're going to have trouble paying a loan instalment.'

Mr Brody also voiced concerns about lobbying by the credit industry to expand the range of data on credit reports, even before the new laws have come into effect.

'In the last week, we've seen the credit industry say that credit reports should include repayment history information not only for credit cards and other loans, but for essential services like your utility or telco bill', said Mr Brody. 'Many households struggle to make repayments on essential services, and they should not be disadvantaged further by allowing this information on credit reports'.

Source: Consumer Action Law Centre, 11 March 2014

Dispute resolution mechanism

Under the *National Consumer Credit Protection Act 2009*, there is a three-tier system for consumers to resolve disputes:

- Consumers are able to access the licensee's **internal dispute resolution process**.
- If they are dissatisfied with the outcomes of the internal process, consumers may access the licensee's **external dispute resolution scheme** approved by ASIC. Membership of an ASIC-approved external scheme will be compulsory for registration and licensing.
- Consumers retain **access to the courts to seek redress**. Neither the internal nor the external process will remove a consumer's right to seek redress directly from the Federal Court and the courts of the states and territories or tribunals.

Consumers will also be able to use streamlined processes to resolve consumer credit disputes such as those involving applications for hardship variations or postponement of enforcement actions.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Consumer credit contracts

- 1 Consider the law of contract and the case study 'Buying a greyhound' and then answer the questions.
 - a Explain the four elements of a contract and discuss how each of them applies in this case. (4 marks)
 - b At what age could the boys make a legally binding contract? Are there any exceptions to these age limits? Explain. (2 marks)
 - c Would it make any difference if:
 - the dealer had stolen the animal?
 - the dealer told the boys the dog was a champion, but in fact it had never won a race? Explain. (2 marks)
 - d Describe the defences to contract law. Would they apply in this case? Explain. (2 marks)

Buying a greyhound

On a day's outing to the local racetrack, John, 17, and his brother, Michael, 19, decided to buy a racing greyhound for \$3000. They paid a \$200 'deposit' and made a deal to pay the rest in three days' time. The owner insisted on a quick sale as he was moving interstate. The boys' parents were not happy with the deal. They did not want the dog at their place and Michael could not take the dog because he lived in a one-bedroom flat. The boys decided to tell the owner that they did not want to go through with the deal.

- 2 Describe the Australian Consumer Law and explain the extent to which you think the lawmakers have responded to demands for changes in the law. (6 marks)
- 3 Explain four ways that contract law protects the rights of people wishing to borrow money. (4 marks)

- 4 Describe three problems that consumers have experienced in the past in relation to entering into a credit contract. (3 marks)
- 5 Explain two examples of unfair terms in a contract. (2 marks)
- 6 Read the mock unfair credit contract below and answer the following question. What advice would you give the person who is about to sign this contract? Explain your reasons. In your explanation, point out all the problems that are evident in this contract. (3 marks)

MOCK UNFAIR CREDIT CONTRACT

between _____ Credit provider ('we')
and _____ Borrower ('you')

- 1 From time to time we may:
 - a change the amount of or basis for calculating any fee or charge, change the interest or fee charging cycle, or both, and, except during any fixed interest rate period of the loan, change any interest rate margin, any link to a reference interest rate and the basis for calculating interest
 - b impose and debit to the loan account any new fee or charge
 - c change the frequency of repayments
 - d change the way we describe any interest rate and
 - e change any other terms and conditions.
- 2 In the event of default we may terminate this agreement, require payment of all monies then due and owing under this agreement, and exercise our rights over security property provided by you in accordance with clause 13.
- 3 As continuing security for the payment of all of your debts, liabilities and obligations to us, you grant a security interest to and in favour of us over all of your present or after acquired personal property and proceeds therefrom.

Source: Coming to grips with credit contracts: steps to protect vulnerable borrowers, Griffith University, November 2008

- 7 Read the short-form personal loan contract below and discuss the advantages and problems associated with this contract. (4 marks)

SHORT-FORM PERSONAL LOAN CONTRACT

- 1 You are borrowing \$ _____ to be advanced on _____
- 2 You are being charged an annual interest rate of _____% calculated each day, but payable as part of your fortnightly repayment of \$ _____
- 3 You will pay a loan approval fee of \$ _____
- 4 The terms of this loan may be varied by the lender without your consent.
- 5 If you fail to make a payment when it falls due, the lender will give you 30 days to pay and will then be entitled to demand repayment of the full loan amount.
- 6 You will receive a statement from the lender every 6 months and will need to pay between \$3 and \$14 for an additional statement should you require it.

(Note that loan size, date, interest rate, fortnightly repayment rate and application fee are completed by hand at the interview.)

Source: Coming to grips with credit contracts: steps to protect vulnerable borrowers, Griffith University, November 2008

- 8 Look back at the extract 'Media release: New laws give credit providers access to more of your information' and discuss the advantages and disadvantages of this proposed new law. (4 marks)

9 Investigation

Investigate one consumer group that has lobbied for changes in the law relating to consumer credit contracts. Write a short report. In your report include:

- the name of the group
- the role of the group
- some action that the group has taken to try to influence changes in the law in relation to consumer credit contracts.

(6 marks)

10 Read the case study 'Key facts sheets were being ignored' and answer the questions.

- What problems are key facts sheets trying to overcome? *(2 marks)*
- What did Choice discover through its investigation? Why do you think this is a problem? Discuss. *(3 marks)*

Key facts sheets were being ignored

Key facts sheets were introduced under the Australian Consumer Law to help consumers to better understand the contents of their credit contract, and to make it easier for consumers to compare credit products with similar credit products from other credit providers. Choice investigated 18 bank and credit union branches and discovered that bank staff had little knowledge of the existence of key facts sheets.

As a result of the Choice Better Banking campaign, banks are required to provide consumers with key facts sheets when they apply for a home loan. However, this is not done as a matter of course, they need to ask for one.

Choice conducted a survey using shadow shoppers. Each shopper enquired about a loan and asked for information that they could use to compare loans from other institutions. Out of the 18 branches visited, only one was able to provide the key facts sheet that provided this information.

11 Identify three different methods of dispute resolution in relation to consumer credit contracts that are now available under the new national legislation. *(3 marks)*

(Total 50 marks)

ASSESSMENT TASK REPORT

Insurance contracts – group investigation

Split up into groups. Investigate problems in insurance contracts. Write a report on your findings. In your report include:

- an explanation of the law relating to contracts
- an explanation of problems that can occur with insurance contracts
- investigations that have been carried out
- recommendations that have been made
- people who may have suffered as a result of problems with insurance contracts, such as Black Saturday bushfire victims
- groups that have been involved in trying to influence changes in the law
- changes in the law that have taken place to alleviate problems with insurance contracts
- types of dispute resolution used.

Prepare a submission to parliament calling for changes in the law.

Present your findings to the class together with your submission.

(Total 20 marks)



CHAPTER 9

FAMILY LAW

OUTCOME

At the completion of this unit you should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- legal principles relevant to the selected area/s of law
- a contemporary issue for the selected area/s of law
- the capacity of the legal system to respond to demands for change
- methods and institutions for resolving disputes arising under the selected area/s of law.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

KEY LEGAL TERMINOLOGY

joint proprietor On death, the property passes automatically to the other proprietor/s.

marriage The union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

monogamy Being married to one person.

no-fault divorce Dissolution of marriage where there is no need to prove fault by either party. All that has to be proved is that the marriage has irretrievably broken down and the parties to the marriage have been separated for 12 months.

parenting plan A written agreement that is made between the parents of a child and deals with who the child should live with, times of contact, maintenance and any other aspects of parental responsibility.

serial monogamy Entering into a monogamous marriage more than once in a lifetime (but not at the same time).

spousal maintenance A party to a marriage is liable to maintain the other party, to the extent that they are reasonably able, if, and only if, the other party is unable to support him or herself adequately.

tenants in common Each person owns a share of a property and it does not pass automatically to the other on death.

TYPES OF FAMILIES

The **Australian Bureau of Statistics** (ABS) defines a **family** as ‘two or more persons who live in the same household and are related to each other by blood, marriage or adoption’.

The most common forms of families in today’s society are **nuclear families** and **one-parent families**. The original concept of the nuclear family has, however, changed to include other types of families such as unmarried couples living together with their children, or same-sex couples bringing up children. Many couples are choosing not to have children. The single-parent family has become more common and acceptable in our society. Extended families include several generations of relatives living under the same roof or close by.



Figure 9.1
Extended family:
grandparents, parents
and children

nuclear families

- domestic partners (including married couples, de facto couples and same-sex couples)
- domestic partners with children

Some couples who are not able to have children may be able to adopt children or enter into a surrogacy arrangement. A **surrogate mother** is a woman who bears a child for another person, often for pay, either through artificial insemination or by carrying until birth another woman's surgically implanted fertilised egg.

Surrogate mother

Kim Graham agreed to carry a baby for her brother Shane and his wife Katherine, through IVF treatment (in-vitro fertilisation). Katherine has cystic fibrosis, a chronic lung disease that means she cannot safely carry a pregnancy despite being fertile. Kim and her husband have two children. All surrogacy arrangements in Victoria must be altruistic and approved by the Patient Review Panel. The panel approved their application for Kim to begin IVF treatment.

CASE STUDY

THE LEGAL PRINCIPLES OF FAMILY LAW – MARRIAGE

The Commonwealth Parliament makes laws in relation to marriage and divorce, and its laws apply nationwide. The *Marriage Act 1961* (Cth) provides guidelines for people who want to marry. The *Family Law Act 1975* (Cth) outlines the rules for divorce when the marriage has irretrievably broken down.

When people enter into a contract of marriage, it is usual for the couple to:

- maintain and support each other
- maintain, support and educate the children of the marriage up to a minimum age
- agree to joint ownership of property unless special circumstances exist
- be seen as next of kin when either partner undergoes medical procedures
- have property transferred to their spouse and/or children on death (particularly in the absence of a will)
- be able to bring proceedings in contract or in tort against the other party.

Definition of marriage

Marriage was first defined in the case of *Hyde v. Hyde and Woodmansee* [1866] UK LRP&D 130 as a 'voluntary union for life of one man and one woman to the exclusion of all others'. Until 2004, the *Marriage Act 1961* (Cth) contained no actual definition of marriage. The Commonwealth Government amended the Act to include a formal definition of marriage that is similar to the definition in *Hyde v. Hyde*. Under the *Marriage Amendment Act 2004* (Cth), the definition of marriage is the **union of a man and a woman to the exclusion of all others, voluntarily entered into for life**.



Figure 9.2 Marriage was first legally defined in the English case of *Hyde v. Hyde and Woodmansee*.

The definition of marriage has four elements:

- **union of a man and a woman** – The *Marriage Act* does not recognise a union between a man and another man or a woman and another woman. The concept of marriage being a union between a man and a woman has caused a dilemma for the law in cases involving transgender marriages.
- **exclusion of all others** – Marriage in Australia is monogamous. Monogamy is the practice of being married to one person at a time. A person who marries again without ending the first marriage commits the crime of bigamy. Adultery or an extramarital affair is not a crime in Australia. Many people marry, divorce and remarry. Serial monogamy refers to entering into a monogamous marriage more than once in a lifetime.
- **voluntary** – Both parties must enter into the marriage of their own free will and sign a declaration to say the marriage is voluntary.
- **entered into for life** – It is assumed that when people marry it will be ‘until death do us part’. However, circumstances do change and couples sometimes drift apart, which often results in divorce.

BELIEVE IT OR NOT!

On 19 December 1922, Theresa Vaughn told a court in Sheffield, England, that since 1917, she had married 61 men (in addition to her first) in cities in Europe, South Africa and England, without ever having obtained a divorce from any of them.

CASE STUDY

Corbett v. Corbett [1970] UK

Marriage is the union of a man and a woman. George Ashley was born a man. By the age of 16 he had realised he wanted to be a woman. He worked in a Paris nightclub as a transvestite in 1955. In 1960 he became one of the first men to have a sex change. He became April Ashley. April married Arthur Corbett. They separated after two weeks. Arthur Corbett sued for an annulment of the marriage on the grounds that April was a person of the male sex.

The courts decided that the marriage was void because a man who had undergone a sex change was still legally a man, and therefore could not marry another man. As a consequence of this case, other marriages involving people who had sex changes were deemed null and void.

In *Kevin v. Jennifer (Attorney-General for the Commonwealth v. Kevin and Jennifer and the Human Rights and Equal Opportunity Commissioner as Intervener (Re Kevin))* [2003] FamCA, it was decided that a person's sex is not solely determined from biological factors but also from other considerations such as the person's social persona, self-perception and sex reassignment surgery.

Requirements for a valid marriage

A marriage that does not comply with the requirements for a valid marriage under the *Marriage Act 1961* (Cth) is considered **null and void**. Where the parties require proof that the marriage does not exist, they can apply for a decree of nullity from the Family Court. This is different to a decree of dissolution of marriage, which is usually issued in divorce proceedings. The next few sections outline the requirements of a valid marriage.

Parties are free to marry

The marriage must be between a man and a woman. The parties must prove that they are not married (that is, they are single, divorced or widowed) at the time of the marriage.



Figure 9.3

Marriages can take place in many different settings.

Parties are of marriageable age and/or have consent to marry

The marriageable age is the age at which individuals are free to marry without any restrictions or requirement for parental consent. The marriageable age for both men and women is **18 years**. In exceptional cases, a court may grant a person who is 16 or 17 permission to marry someone who is of marriageable age. Parental consent is usually required in these cases.

Parties are not in a prohibited relationship

The marriage must not be between a person and his or her:

- **ancestor or descendant** (including mother, father, grandmother, grandfather, son, daughter, granddaughter, grandson)
- **brother or sister** (including adopted relations and half-relations but not step-relations).

Marriage between cousins is not prohibited.

Parties have given real consent

Consent to marry must be given **voluntarily and knowingly**. It is not real consent if obtained under duress or fraud, if a person was mistaken about the identity of the other party or the nature of the ceremony, or if a person did not have the mental capacity to understand proceedings.

Duress usually involves an element of force, constraint or threat of violence. However, it can include pressure from family – particularly those with strong cultural or religious beliefs.

In the Marriage of S [1980] FamCA 42 FLR 94

A young Egyptian girl's family betrothed her to a young man against her wishes. She went through with the marriage ceremony in the Coptic Orthodox Church because of family and religious pressure. The couple lived together for four days and the marriage was not consummated (that is, made the marriage legally complete and fully valid by having sexual intercourse). The marriage was declared void because consent was obtained under duress.

**CASE
STUDY**

Fraudulent intent was involved in the Family Court of Australia case *In the Marriage of Deniz*.

CASE STUDY

In the Marriage of Deniz [1977] 31 FLR 114

A Turkish man married a young Lebanese Australian woman so that he could obtain permanent residency in Australia. The young woman left school to marry him. He had no intention of fulfilling the responsibilities of marriage and the marriage was not consummated. The man's application for residency was denied and he returned to Turkey leaving the young woman distraught. The woman applied to have the marriage declared null and void because divorce is not readily accepted in Lebanese culture.

To give **real consent** a person must understand the nature of the ceremony performed. It is not a valid marriage if the person is not mentally capable of understanding the ceremony or they are mistaken about the nature of the proceedings or the identity of the other person. This might apply if one party is extremely drunk or drugged, or pretends to be someone else or pretends that the ceremony is something other than a marriage ceremony.

CASE STUDY

Ngo & Ngo [2010] FamCA 1053

A 23-year-old Vietnamese woman was asked by a family friend to go to an immigration agent with a 19-year-old student to sponsor him so that he could stay in Australia. Her mother agreed that she should help him. The conversations with the agent were held in Vietnamese because the young man was not fluent in English. At a second meeting, two days later, she was asked to sign a marriage certificate, which she thought was an agreement that could be cancelled.

The woman asserts that she did not understand all that was said at these meetings, there was no mention of marriage and she did not participate in a marriage ceremony, exchange marriage vows or rings. When she phoned the agent, three days later, to tell him she did not want to go through with the agreement she was shocked to hear that she was already married. The Family Court allowed her application to have the marriage declared null and void on the grounds that her consent was obtained by fraud and that the woman was mistaken as to the nature of the ceremony.

Search the AustLII database at www.austlii.edu.au for further details about this case.

Witnesses

For a valid marriage, there must be **two witnesses over 18 years of age** to witness the ceremony in person. These are usually friends or family of the couple to be married.

The marriage is properly solemnised and registered

A **minister of religion** (from a recognised denomination) can solemnise a marriage, and this usually involves a church ceremony. A **state registrar of marriages** can perform the ceremony at the State Registry Office, or a **civil marriage celebrant** can perform the ceremony at a place of the couple's choosing as long as it is within Australia or Australian waters. The celebrant must be 18 years of age or older, have appropriate training and qualifications, and be a fit and proper person.

Marriage by civil celebrant

It is the responsibility of the marriage celebrant to ensure that the correct forms and procedures are completed and that the couple is told about the availability of pre-marriage education programs. They also issue the couple with a marriage certificate and ensure details are noted in official registries.

For the marriage to be valid the couple must:

- **complete a 'notice of intention to marry' form** – This notice must be given to the marriage celebrant at least one month and no more than 18 months before the marriage.
- **show each person's birth certificate as proof of age and place of birth** – If a person is not of marriageable age, the appropriate court order and parental consent are also required. Other identity documents (overseas passport) may be accepted in special cases where a person does not have access to their birth certificate.
- **declare that they are free to marry** – A person must produce a decree absolute if divorced or a death certificate if widowed.

A couple who are married by an unauthorised person are still legally married as long as they honestly believed at the time that the person was an authorised marriage celebrant.



Figure 9.4
Marriage by a civil celebrant

BELIEVE IT OR NOT!

- The world's youngest parents lived in China and were aged eight and nine when their child was born around 1910.
- A British man awoke from a triple bypass heart operation to find that, despite his best efforts to stagger their visits, all three of his wives had turned up together.

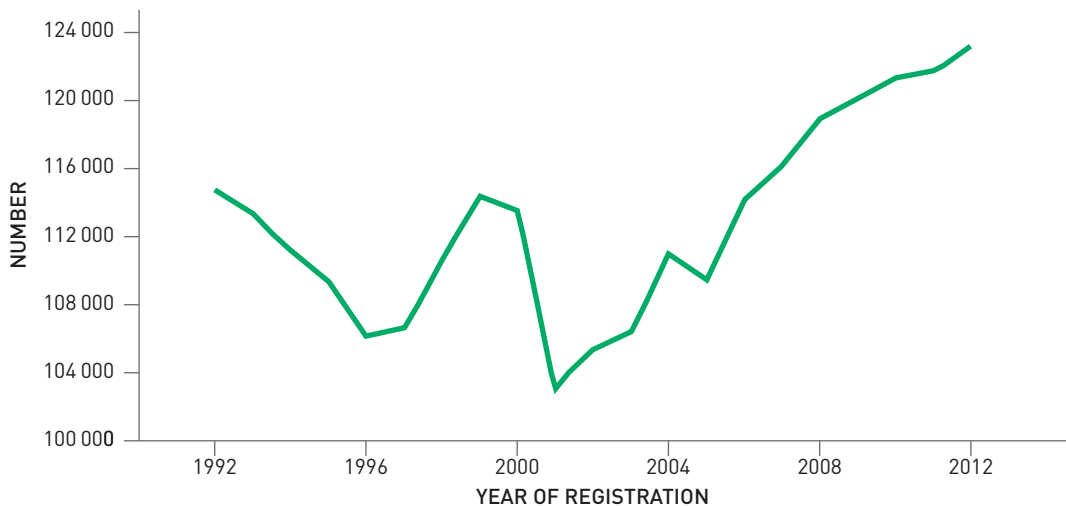


Figure 9.5
Total number of marriages per year in Australia, 1992–2012
Source: ABS cat. no. 3310.0

LEARNING ACTIVITY 9.1

Marriage

- 1 To what extent do you think the legal definition of marriage is relevant in today's society?
- 2 What is the legal definition of marriage established in the case of *Hyde v. Hyde and Woodmansee* [1866] UK? When was a similar definition inserted into the *Marriage Act 1961*?
- 3 Explain the requirements of a legal marriage.
- 4 Look back at the case study 'Surrogate mother'. What is a surrogate mother? What restrictions are placed on surrogacy? What occurred in this case?

- 5 Look back at the case study *Corbett v. Corbett*. What was the impact of this case on the common-law definition of marriage? How was the case of *Kevin v. Jennifer* relevant to the definition of marriage?
- 6 Look back at the case studies *In the Marriage of S* and *In the Marriage of Deniz*. Explain why each marriage was declared void.
- 7 Read the case study *Robert & Golden*. Do you agree with the Family Court's decision in this case? Explain.

CASE STUDY

Robert & Golden [2011] FamCA 443

A man applied to the Family Court to annul his marriage on the grounds of duress. The man's wife did not attend court, nor did she challenge his evidence. When the man told his girlfriend that he did not want a serious relationship she told him she was pregnant. He asked her to terminate the pregnancy because neither wanted to have a child. The girlfriend would not terminate the pregnancy unless he first married her because she believed they were meant to be together and she did not want him to leave her.

He tried, over several weeks, to get her to change her mind. He went through with the marriage because he felt he had no other choice. The pregnancy was terminated soon after. The couple lived together for a brief time but then separated. Approximately six months later, the Family Court granted the man a declaration of nullity.

Search the AustLII database at www.austlii.edu.au for further details about this case.

- 8 Look back at the case study *Ngo & Ngo*. What facts point to the fraudulent nature of this marriage and/or a lack of consent?
- 9 Provide legal advice to each of the following couples.
 - a Paulo and Paula are in a steady relationship. They are both 16 and want to get married. Their parents have expressed approval for the marriage.
 - b Tim and Rachel were shocked to read a newspaper article about a fake civil marriage celebrant who conducted several unauthorised marriages. The man was the marriage celebrant at their wedding a year ago.
 - c John wants to divorce his wife Jenny and marry her mother instead.
 - d Linda, 26, and Lenny, 30, are cousins and they want to marry.
 - e Roula's father did not like her boyfriend Rex. Her father threatened to kill Rex if she did not go through with an arranged marriage to another man.
 - f Maree and Christine (both 32) are a same-sex couple who want to exchange marriage vows.
- 10 Look at Figure 9.5 and consider the marriage statistics from 1992 to 2012. Discuss how you would interpret these figures.

DID YOU KNOW?

In general, overseas marriages are considered valid in Australia if the marriage is recognised as valid in the country in which the marriage ceremony was performed and the marriage would also have been considered valid under Australian law had the marriage taken place in Australia. While the marriage is recognised, it cannot be registered in Australia.

ISSUE – SAME-SEX MARRIAGE

As community expectations and values change, so does the law. In a democratic nation the law should reflect the will of the people. Marriage laws are a federal matter and any change to these laws is generally made by the Commonwealth Parliament. While community support for the concept of same-sex marriage has slowly grown over the last decade, the issue still raises considerable community debate.

Before 2011, the Labor Party was committed to establishing state-based relationship registers as long as they did not resemble marriage. However, at the 2011 Australian Labor Party Conference, the party agreed to support the concept of same-sex marriage on the proviso that its parliamentary members are given a conscience vote on the matter. Senator Penny Wong, who has a same-sex partner, spoke at the conference in support of the change, arguing that same-sex couples ‘want the same opportunities that others have; that is, to make a commitment to another person and to have it recognised and respected without the relationship being treated as less’. The Labor Party Bill bringing in same-sex marriage was defeated during its passage through parliament.

The Australian Greens and the Australian Democrats support same-sex marriage, while the Liberal Party of Australia does not. A change to a federal Liberal government in 2013 was seen as a setback for the gay rights lobby. Prime Minister Tony Abbott had, as opposition leader, spoken out against same-sex marriage and reminded his fellow parliamentarians that they were elected on a platform that said marriage was only between a man and a woman.

Parliamentarian Bob Katter publicly declared that the idea of same-sex marriage should not be treated seriously and ‘deserved to be laughed at’. A Katter’s Australian Party television advertisement on the issue was labelled offensive and homophobic by gay rights activists. In response to Katter’s stance against same-sex marriage, his gay half-brother spoke out in the media saying that such comments and actions were both damaging and inappropriate.

A 2013 Nielsen poll found that 65 per cent of voters were in favour, while 28 per cent were against the idea of same-sex marriage, and that support was greater among women and younger people. Those in favour of legal change would argue that a ban on same-sex marriage is out of date. Social trends show that the traditional family is no longer prevalent, with a growth in the acceptance of single-parent families, de facto couples and same-sex relationships. These have become legitimate alternatives to the traditional family.

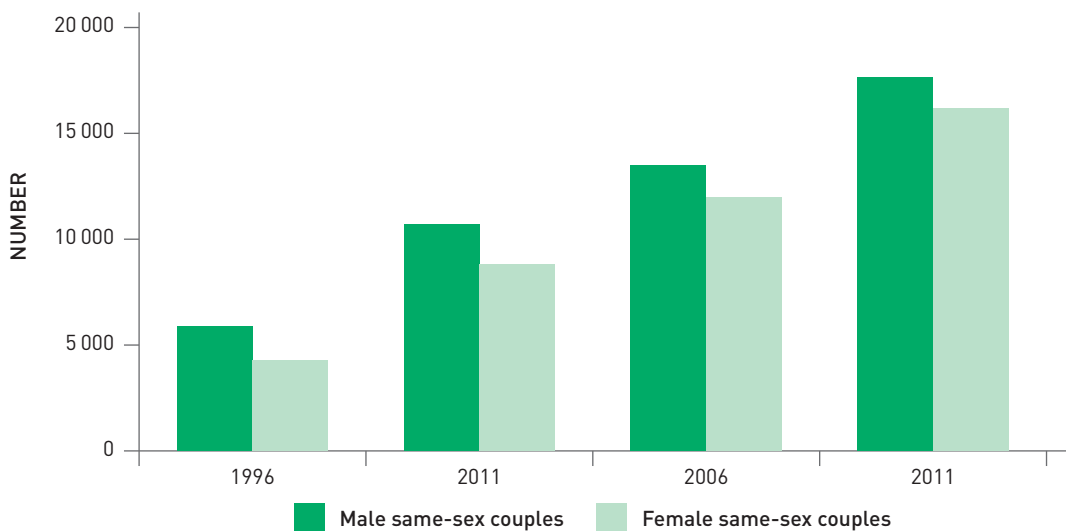


Figure 9.6
Number of same-sex couples in Australia, 1996–2011

Source: ABS
cat no. 4012.0

Figure 9.7

Trailblazers: Sir Elton John and David Furnish were one of the first couples in the United Kingdom to become civil partners in December 2005.



The ban on same-sex marriage is supported by the Catholic Church and a number of other Christian organisations. In an open letter to Sydney parishioners, the Catholic Church urged followers to send a clear message to parliamentarians that marriage is a sacred institution which must be protected. The Australian Christian Lobby vowed to contact all Coalition parliamentarians to ensure they remain committed to their election promise.

Not all clergy are against homosexuality or gay marriage. A group of clergy, known as the 'Revs', marched in the Sydney Gay and Lesbian Mardi Gras to personally acknowledge that churches, in general, have not been welcoming

places for gay, lesbian, bisexual and transgender (GLBT) people. The 'Revs' believe there is a difference between a civil marriage and a Christian marriage and that lifelong gay relationships ought to be recognised through a civil marriage.

The Christians4Equity group also support same-sex marriage and urged other Christians to contact local parliamentarians in support of law reform. Father Bob McGuire, a Catholic priest, stated he was willing to perform gay civil union ceremonies, but not in a church. He also speculated that his superiors would not support his unconventional views.



Figure 9.8 Two gay lobby groups, Equal Love and Australian Marriage Equality, continue to organise mass rallies to protest the ban on gay marriage. They use their websites to provide positive information about same-sex marriage and to encourage people to petition parliamentarians to change the law. They believe that 'for many Australians, marriage is a profoundly meaningful way to demonstrate love and commitment. Denying anyone that right because of their gender or sexuality is simply not fair. Most Australians pride themselves on our nation's commitment to a fair go for all'.

Prominent Australians have also spoken out both in favour of and against a change in the law. Former High Court judge Michael Kirby, who announced he was gay while serving on the High Court, criticised the federal government for inaction on the issue of same-sex marriage.

In contrast, tennis legend Margaret Court attracted criticism from other tennis stars for her religious views on same sex-marriage. Court claimed that she did not regret speaking out against the issue. 'I say what God says and that's why I've spoken out,' she said. 'I believe marriage is between a man and a woman.'

Guy Pearce said, 'It makes me sad and frustrated that we see marriage as the right of some and not others'.

Same-sex marriage	
arguments in favour	arguments against
• The ban is based on homophobia: people do not like what they do not understand. • The ban fuels intolerance and inequality. • Why does society allow divorce if the institution of marriage needs to be protected? • The ban undermines family values because it denies homosexuals the ultimate expression of their commitment. • If marriage is essentially about procreation, why are people who choose not to have children allowed to stay married? • Having gay parents has no bearing on whether a child will grow up as a homosexual. Most gay people have grown up with heterosexual parents. • Countries such as the Netherlands and Belgium have given full legal status to same-sex marriages.	• Gay relationships are unnatural, immoral and contrary to many different religious edicts. • A ban protects the institution of marriage. • Marriage is essentially about procreation and raising children; gay couples cannot have children naturally. • Children raised in gay households may become confused about their sexuality or they may be bullied at school. • Once legal, churches would have no choice as to who they can marry. • Making same-sex marriage legal could lead to a push to legalise other forms of marriage such as polygamy. • A civil register for same-sex couples is a viable alternative to same-sex marriage.

SAME-SEX MARRIAGES IN OTHER COUNTRIES

The following countries either issue same-sex marriage certificates or recognise same-sex marriages: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Israel, Mexico, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United Kingdom (England and Wales) and Uruguay.

The United States federal government does not recognise same-sex marriage; however, unlike Australia, individual states in the USA can decide issues related to marriage. The federal District of Columbia (including the US capital, Washington) and the following states, either through legislation or court rulings, recognise same-sex marriages: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island and Vermont.

Capacity of the legal system to respond to demands for change – domestic relationships and same-sex marriage

In Victoria, the law has slowly recognised different types of domestic relationships. Living together in a de facto relationship is no longer taboo. The stigma of 'living together in sin' and the social prejudice against children born out of marriage are mostly considered a thing of the past. The community has

also become far more tolerant of homosexual activity. Victoria decriminalised homosexuality in 1980; however, it took another decade for it to be decriminalised in all Australian states (see table 9.1). It has taken several more decades for public opinion polls to show a change in community attitude in support of same-sex marriage.

A major problem with law reform in the area of domestic relationships is that under the *Commonwealth Constitution of Australia Act 1900* (UK), the Commonwealth Parliament only has legislative power with respect to marriage, divorce and matrimonial causes. As de facto and same-sex relationships do not fall under this jurisdiction, it has been left to each Australian state to deal with these issues without uniformity.

In 2004, the Victorian Parliament **referred its power over property and other financial matters** arising out of the breakdown of de facto relationships to the Commonwealth Parliament. This allowed the Family Court, which dealt with disputes arising from separation and divorce, to uniformly deal with all issues to do with children and the division of property including superannuation entitlements. However, the Commonwealth Parliament did not accept this referral of power for same-sex couples until 2008. Therefore the state courts dealt with financial disputes arising from the breakdown of de facto relationships before 2004 and same-sex relationships before 2008.

Before 2011, both Liberal and Labor governments opposed the concept of same-sex marriage. In 2004, the Howard (Liberal) Government amended the *Marriage Act 1961* (Cth) to define marriage as ‘**a union between a man and a woman voluntarily entered into for life**’ and to stipulate that same-sex marriages from overseas are not recognised in Australia. The then prime minister, John Howard, instigated this Act to promote and strengthen the institution of marriage and to stop the courts adopting a more liberal interpretation of the meaning of marriage.

In 2006, when the Australian Capital Territory (ACT) tried to give people in both de facto and same-sex relationships equal status to married couples, the Howard Government quashed the law. The federal government argued that the proposed same-sex civil unions were in contravention of the definition of marriage being between a man and a woman. As a compromise, the ACT then passed legislation allowing same-sex couples to register their relationship without a formal ceremony.

Bills to legalise same-sex marriages have been put to the Commonwealth Parliament in 2006 and 2008. The 2008 Bill defined marriage as ‘the union of two persons, regardless of their sexual orientation or gender identity, voluntarily entered into for life’. These Bills were not successful, but they did keep the issues in the public spotlight and did bring the issue to the scrutiny of the federal government.

Despite their reluctance to allow same-sex marriage, the Howard and Rudd governments, in 2004 and 2008 respectively, introduced laws to remove discrimination and financial disadvantage for same-sex couples in the areas of superannuation, taxation, social security, worker’s compensation, health, age care, employment and veteran entitlements. Social values were changing, providing same-sex couples with similar rights to de facto couples. It was evident that Australians supported equal **financial rights** for same-sex couples but were divided on the question of same-sex marriage and the related issues of allowing same-sex couples access to adoption and IVF procedures.

Table 9.1 Decriminalisation of homosexuality in Australia

STATE	YEAR
South Australia	1972
Australian Capital Territory	1976
Victoria	1980
Northern Territory	1983
New South Wales	1984
Western Australia	1989
Queensland	1990
Tasmania	1991

CHANGES IN THE LAW

Statute Law Amendment (Relationships) Act 2001 (Vic.)

This Act amended over 40 Acts, which led to improvements in rights for domestic partners with respect to wills and inheritance, accessing insurance and being treated as next of kin in case of an emergency. It recognises the financial commitment and entitlements of 'domestic partners' in over 50 statutes since 2001.

Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth)

This Act amended over 80 Commonwealth Acts of parliament to remove discrimination against same-sex couples and their children. In federal matters, a person is regarded as a 'couple' as long as she or he is married, in a registered relationship under state or territory law, or living in a de facto relationship (opposite-sex or same-sex). The Act was in response to a Human Rights and Equal Opportunity Commission (HREOC) report entitled *Same Sex: Same Entitlements*, which highlighted over 50 different federal laws that contravened human rights for either same-sex couples or their children.

Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008 (Cth)

This Act amended approximately 15 other Acts of parliament to make it easier for same-sex partners and their children to qualify as dependents or claim entitlements under various superannuation schemes.

In 2004, the Howard (Liberal) Government changed superannuation laws to allow same-sex couples to claim benefits as dependents. This was not automatic. Claimants had to demonstrate 'interdependency'; that is, a close personal relationship, cohabitation and the provision of financial support, domestic support or personal care. The HREOC report suggested that the interdependency provision was discriminatory because de facto couples were not required to demonstrate interdependency when accessing similar entitlements.

Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)

This Act extends the jurisdiction of the *Family Law Act 1975* (Cth) to financial matters arising out of the breakdown of de facto relationships. A de facto relationship can include both heterosexual and same-sex relationships. All couples (regardless of gender or marital status) who separate after 1 March 2009 can apply to the Family Court to divide property and apply for maintenance. Same-sex couples who separated before this date must make their application to a Victorian court.

Registration of same-sex relationships

Tasmania was the first Australian state to introduce a relationship registry in 2004. The Australian Capital Territory and Victoria followed suit in 2008, with New South Wales and Queensland soon after in 2010 and 2011 respectively. These registries recognise the partnership of **any** couple who cannot, or do not wish to, marry. These registries were never intended to replicate marriage.

RELATIONSHIP REGISTRIES

In 2007, Victoria's first relationship declaration registry was launched by the City of Melbourne so that heterosexual and same-sex couples could formally declare their relationships.

A statewide scheme was established under the *Relationships Act 2008* (Vic.). Registration of a domestic partnership allows a couple to demonstrate their commitment to one another and makes it easier to prove the existence of the relationship in the event of a relationship breakdown or in resolving other matters involving health issues, taxation obligations and welfare or superannuation entitlements.

Victorian couples (either same-sex or heterosexual) may register their relationship with the Registrar of Births, Deaths and Marriages. Once registered, the couple will be given a certificate. On registration, any children of one partner will be considered a stepchild of the other partner in the relationship. Registration can be revoked on the death or marriage of a partner or on application of one of the partners.



Figure 9.9

Rodney Cruise and Jeff Chiang with their son Ethan sign a relationship declaration register at Fitzroy Town Hall, 7 May 2007.

Continued push for same-sex marriage

Gay and lesbian lobby groups continue to fight for one more right – equality in marriage.

Between 2010 and 2012, three marriage equality private member Bills were tabled in the Commonwealth Parliament and subsequently considered by parliamentary committees. In its submission to a Senate committee, the Human Rights and Equal Opportunity Commission supported these Bills and surmised that ‘a human rights analysis based on the principle of equality supports the recognition of same-sex marriage’. While these Bills did not have bipartisan support, they kept the issue in the political arena. Over several years, similar Bills were tabled in the Victorian, New South Wales, South Australian, Western Australian and Tasmanian parliaments with little success.

During the 2013 federal election campaign, prime minister Kevin Rudd changed his stance on the issue. He promised to introduce a marriage-equality Bill within 100 days if Labor were re-elected and launched the ‘It’s time’ social media campaign in support of gay marriage. However, the Liberal–National Coalition won the election. The new government, led by Tony Abbott, had a more conservative approach to the issue.

In October 2013, the Australian Capital Territory's (ACT) Legislative Assembly tried, once again, to legalise gay marriage. It passed the *Marriage Equality (Same Sex) Act 2013*. The Abbott Government immediately launched a High Court challenge on the basis that the territory did not have the right to make laws about marriage. The Abbott Government could have asked the Commonwealth Parliament to strike out the law but it did not want to risk a potential block in the Senate.

The ACT government argued the new law was different to and therefore not inconsistent with federal law. The difference was that the *Marriage Equality (Same Sex) Act* allowed same-sex marriage, while the Commonwealth's *Marriage Act 1961* restricted marriage to the opposite sex. It believed both laws could operate side by side and refused to delay the implementation of the new law. Over 40 same-sex couples submitted marriage applications and several same-sex marriages were solemnised in Canberra during the first week of December 2013.



Figure 9.10

ACT celebrant Sharyn Gunn officiates at Australia's first legal same-sex marriage between Alan Wright (left) and Joel Player, at one minute past midnight on Saturday, 7 December.

Later that month, the High Court declared the ACT's law invalid, negating the legal status of any marriage that had occurred. It ruled that the Commonwealth Parliament had the power to make law about all types of marriage including same-sex marriage and that the territory's law could not operate at the same time as the federal law because they were, in fact, similar.

The decision was a blow to gay marriage activists who vowed to continue the fight. The deputy leader of the federal opposition, Tanya Plibersek, announced at a press conference that she would reintroduce a similar Bill in 2014. She asked for bipartisan support and a conscience vote on the issue.

Greens senator Sarah Hanson-Young also said she would reintroduce a Bill into the Commonwealth Parliament to recognise same-sex marriages in Australia.



Figure 9.11

Foreign Affairs Minister Julie Bishop greets Deputy Opposition Leader Tanya Plibersek, who wants to bring a Bill on same-sex marriage before parliament if Coalition MPs are allowed a conscience vote. Ms Bishop is the target of a campaign to get 70 Coalition ministers to change their minds on the issue.

Had the High Court approved the *Marriage Equality (Same-Sex) Act*, it would have facilitated the passage of similar laws in other states and put pressure on the Commonwealth Government to enact its own reform.

EXTRACT

Reactions to the High Court decision on same-sex marriage laws in the ACT

Christian Lobby happy with ruling

[T]here were plenty of people who welcomed today's High Court decision, with protesters and couples coming face to face outside the court.

Lyle Shelton from the Australian Christian Lobby told ABC1's 7.30 that he wants a referendum to kill off same-sex marriage once and for all.

'If you redefine marriage you're saying yes to the proposition that it's OK for some children to be denied their natural mother and father,' he said. 'I think that's an injustice.' He says same-sex couples should give up on marriage.

'They've pretty much exhausted all avenues through the democracy and the courts and I think it's time to move on,' he said.

Federal Attorney-General George Brandis says irrespective of people's views on same-sex marriage, it is in Australia's interests to have a nationally consistent marriage law.

He says he is pleased the High Court has taken that position today.

'The Commonwealth welcomes this decision. The basis upon which the decision was reached by their honours was the supremacy of the marriage power in section 51.21 of the constitution,' he said.

Greens to keep fighting for same-sex marriage

Greens leader Christine Milne says the High Court's decision is a blow for same-sex couples, but her party will ensure that same-sex marriage laws are introduced nationwide.

'What the court has decided has made it very clear that the Federal Parliament has the power to legislate for marriage equality,' she said.

'I want to say to those couples and to the whole Australian community that the Greens are going to make sure we have marriage equality in this country.

'It's devastating for the people concerned and for their families and friends, but it is also a clarion call for everyone in the country who supports marriage equality to now put pressure on the Federal Government and the Federal Parliament to change it.'

Greens Senator Sarah Hanson-Young added: 'We will win this fight. Love will win, and it will be in this place in the Federal Parliament.'

Meanwhile, constitutional lawyer Anne Twomey says one good thing about today's verdict is that it sends the issue back to the Federal Parliament. She says that is where it should be decided.

'I think most people would not want to turn our system into the American Supreme Court where all decisions on social issues are ending up in the High Court,' she said.

'It's much better that the elected representatives of the people are the ones who get to decide on those sorts of issues.

'That's the appropriate forum for this, not the High Court.'

Source: ABC News, 12 December 2013

Same-sex weddings in Australia for British nationals

Following changes to the law in Britain, from June 2014, Australians will be able to marry in Australia at a British embassy, as long as one of the partners has British citizenship. A spokesman for Attorney-General George Brandis confirmed the Australian Government had ‘informed the British High Commission it has no objections ... if at least one person of the marrying couple is a British national’.

High Court ruling on gender recognition

In April 2014, in a landmark decision, the High Court recognised people who do not identify as either male or female, upholding the rights of transgender people to be registered as neither a man nor a woman. The case was brought by a transgender person, Norrie.

Adoptions by same-sex couples

The *Adoption Act 1984* (Vic.) was amended in 1997 to allow a man and a woman living in a de facto relationship or a traditional Indigenous marriage to adopt a child. Same-sex couples in Victoria cannot adopt other people’s children; however, they can have a child through assisted reproductive technology (ART). This medical treatment enables a woman to become pregnant by means other than sexual intercourse or artificial insemination.

In 2002, the Victorian Attorney-General asked the Victorian Law Reform Commission (VLRC) to investigate whether there should be changes to the law relating to **ART and adoption**. In its position paper on parentage, the VLRC recommended a number of changes to adoption laws and asked the public to comment on the suggested changes. In terms of same-sex couples, the VLRC acknowledged that some people in the community are opposed to a child being adopted by a same-sex couple, but noted that Victoria would be wrong to continue its ban on same-sex adoptions.

The VLRC recommended that a homosexual couple wanting to adopt should be treated in the same way as a heterosexual couple. That is, the birth parents must agree to the placement, the couples should face the same rigorous assessment process, and the views of any older children should be taken into account before the adoption being approved. The VLRC also recommended that single people should be able to adopt where they can meet the requirements expected of couples and that single people should not be restricted to adopting in ‘special circumstances’. These recommendations have not been acted on.

Currently Western Australia (2002), the Australian Capital Territory (2004), New South Wales (2010) and Tasmania (2013) have given same-sex couples adoption rights.

The VLRC also considered the legal position of a woman in a lesbian relationship whose partner has a child using donor sperm and whether the legal complexities arising from such an arrangement could be simplified by changing the adoption laws.

The VLRC’s recommendations, from its *Assisted Reproductive Technologies and Adoption Final Report 2007*, are included in a suite of changes contained in the *Assisted Reproductive Treatment Act 2008* (Vic.), which came into effect on 1 January 2010. A summary of the changes are outlined in table 9.2.

DID YOU KNOW?

Michael Jackson, Sarah Jessica Parker and Matthew Broderick, gay couple Elton John and David Furnish, and Nicole Kidman and Keith Urban became parents using surrogacy arrangements. Nicole Kidman was criticised in the media for referring to her commissioned surrogate mother as a ‘gestational carrier’ when publicly thanking the woman.

Table 9.2 Assisted reproductive treatment laws**CURRENT LAWS UNDER THE ASSISTED REPRODUCTIVE TREATMENT ACT 2008 (VIC.)**

- A woman can access Assisted Reproductive Treatment (ART) if, **considering her circumstances**, she is unlikely to become pregnant or carry a child other than by ART, or she is at risk of producing a child with a genetic disease or abnormality if ART is not used.
- **This is irrespective of whether a person is married, single, in a same-sex or opposite-sex relationship.**
 - The consent of the woman and her partner is required and the couple must undergo counselling.
 - A police check is also required. Treatment will be denied to a woman or her partner with convictions for sex offences and violent offences or if child protection authorities have removed a child from the home.
- A woman who performs self-insemination using donor sperm (or a friend or relative who assists) does not commit an offence. Medically qualified ART providers must perform all other forms of ART.
- A man who donates sperm, used by a woman without a male partner, is not the father of the resulting child irrespective of whether the donor is known to the woman or her partner.
- Similarly, an egg donor is not the mother of the resulting child.
- A woman who gives birth is presumed to be the mother of a child born. Her partner (**regardless of sex**) will be named as the parent of the child as long as the couple are **in a genuine domestic relationship** when the woman underwent ART or self-insemination, and the partner consented to the procedure.
- **Surrogacy is available regardless of a person's marital or relationship status or sexual orientation.**
 - Surrogacy arrangements using ART are permitted but must first be approved by the Patient Review Panel.
 - A surrogate must be at least 25 years of age and have conceived at least one child of her own. The procedure must not use the surrogate's eggs.
 - The commissioning parents (not the surrogate mother) in an altruistic surrogacy arrangement must be unlikely to become pregnant or carry a pregnancy to birth.
 - The commissioning parents must reside in Victoria and the ART procedure must occur in Victoria.
 - The surrogate can only be reimbursed for expenses and cannot profit from the arrangement. It is illegal to advertise for surrogates. These provisions limit commercial surrogacy.
 - The commissioning parents and the surrogate must undergo a police check and counselling, and obtain legal advice.
- The surrogate and her partner (if relevant) are considered the legal parents at birth.
- Within the first six months of the birth, the commissioning parents can apply for a court order to transfer parentage from the biological mother and partner. The court must be satisfied that it is in the best interest of the child, that the child is living with the commissioning parents and that the surrogate mother (and her partner at the time of conception) freely consents.
- Once approved, a new birth certificate is issued with the commissioning parents named as the child's parents.

BELIEVE IT OR NOT!

Since 2002, commercial surrogacy is legal in India. Couples all over the world travel to India to commission a surrogate. Prices are generally a quarter of those in the USA or Europe. India has recently drafted new laws to regulate the industry.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Same-sex marriage

- 1 Which parliament and what laws govern marriage in Australia? What is the current law in relation to same-sex marriage? Explain. *(3 marks)*
- 2 Investigate current views for and against the recognition of same-sex marriages.
 - a Discuss conflicting opinions about the recognition of same-sex marriages. *(5 marks)*
 - b With reference to same-sex marriages, explain the action individuals or groups have taken to push for law reform. *(5 marks)*
- 3 Write a letter to the editor of your local newspaper in response to a possible editorial column where the editor suggested that 'Australian marriage laws are largely irrelevant in today's society'. *(4 marks)*
- 4 How has a change in the law in Britain changed the rights of British nationals living in Australia? *(1 mark)*
- 5 Read the case study 'Death of a domestic partner' and answer the questions.
 - a Detail the problems Miranda encountered in the year 2000, which a married person might not have faced in the same situation. *(4 marks)*
 - b Explain how the issues in Miranda's case would have a different solution or outcome under today's law. *(4 marks)*
 - c Name the Acts of parliament that eliminate the discrimination or problems faced by same-sex couples like Jayne and Miranda. *(4 marks)*

Death of a domestic partner

Jayne and Miranda had lived together for 15 years. When they first met, Jayne had put a deposit on a house. They moved in together and over the years spent about \$100 000 on renovations. They both contributed towards the renovations and the monthly mortgage payments. They also both contributed towards the furniture in the house. They had a loving relationship and wanted children. They were not able to be part of the IVF program because it was necessary to be a 'married woman'.

In February 2000, Jayne fell ill and went to the hospital. By the time Miranda got to the hospital, Jayne's condition had deteriorated. The hospital would not tell Miranda what was wrong with Jayne or let her see her.

They said only relatives were allowed in. Miranda slept the night on a couch in the waiting room, only to find in the morning that Jayne had died in the night. Jayne had a nephew who she had not seen for 10 years. Miranda rang him to let him know what had happened. The next day the nephew arrived to take possession of all Jayne's things. The house was in Jayne's name. Jayne did not leave a will and, as the only surviving relative, the nephew was entitled to everything. He eventually realised that Miranda had nowhere to go so he let her stay in the house for a short while as long as she paid a weekly rent to him.

Jayne had given her car to Miranda a year ago. To transfer the car registration into her name Miranda had to pay stamp duty.

- 6 To what extent do you think the law has changed in response to demands for change in relation to same-sex couples? Create annotated timelines depicting changes in the legal status of both de facto couples and same-sex couples over time. *(10 marks)*
 - 7 Look back at the extract 'Reactions to the High Court decision on same-sex marriage laws in the ACT'. Discuss the views for and against the High Court decision. *(4 marks)*
 - 8 Explain how a couple in a same-sex relationship might be able to have a child. *(2 marks)*
 - 9 If a woman in a same-sex relationship has a child, who is legally regarded as the mother? Would the donor of the sperm be regarded as the father? *(2 marks)*
 - 10 Explain the rights of a same-sex couple to have a child through surrogacy. *(2 marks)*
- (Total 50 marks)*

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Surrogacy

- 1 Read the case study 'Grandmother gives birth to grandson' and answer the questions.
 - a What type of surrogacy is described in this case study? *(1 mark)*
 - b What requirements must Peter and Janine meet to be the commissioning parents in a surrogacy arrangement? *(2 marks)*
 - c Does Margaret meet the legal requirements of a surrogate in Victoria? Explain. *(2 marks)*
 - d Could Margaret have used her own eggs in this surrogate arrangement if Janine's eggs were not available? Explain. *(1 mark)*
 - e Is it legal for Margaret to be paid as a surrogate? Explain *(2 marks)*
 - f According to the law, who are Matthew's mother, father and siblings at birth? Explain. *(3 marks)*
 - g What process must a commissioning couple use to become the legal parents of the child of a surrogacy arrangement? *(2 marks)*
 - h What problems or issues might arise from a surrogacy arrangement and to what extent has the law addressed these issues? *(2 marks)*

Grandmother gives birth to grandson

Janine and Peter were married. Janine contracted a serious illness before she had the chance to have any children. The doctors managed to harvest her eggs before medical treatment, which rendered her infertile. Janine's mother, Margaret, immediately offered to be a surrogate for her daughter because she knew how much her daughter and son-in-law wanted to have a child and she also desperately wanted to be a grandmother.

Margaret's de facto partner supported the idea and helped Margaret through the pregnancy. Janine and Peter helped to pay for Margaret's medical expenses and any other associated costs.

The child, Matthew, was born as a result of ART procedures, which implanted an embryo (from Janine's egg and Peter's sperm) into Margaret's womb. When Matthew was born, Janine and Peter took custody of the child, and Margaret and her partner were happy to adopt the role of grandparents.

- 2 Design a fact sheet for a couple who are considering commissioning a surrogate to have a child for them, *or* design a fact sheet for a woman considering the role of surrogate mother. *(5 marks)*
- (Total 20 marks)*

DIVORCE

Over time, the law changes to reflect a shift in social values and trends. People in today's society have accepted divorce as part of everyday life. Equal opportunities for women, the availability of contraception and fertility treatment have all influenced changes in the law.

Australia inherited the laws of the United Kingdom at the time of European settlement and so our laws on marriage and divorce originated from there. Marriage was viewed as a union for life and divorce was very difficult.

Under the *Matrimonial Causes Act 1959* (Cth), the party applying for a divorce had to show that their spouse caused, or was at fault for, the marriage breakdown and was required to prove that one of the recognised grounds for divorce had been met (for example, desertion or adultery). These grounds had to be proved in open court, so getting a divorce was often a traumatic, humiliating and expensive procedure. The Act did include one 'no fault' ground for divorce: separation for five years, which was a long time to wait for a divorce. Having to prove fault often led to conflict and unjust results.

The *Family Law Act 1975* (Cth) changed Australia's divorce laws and is based on the concept of **no-fault divorce**. This Act recognises that when a marriage breaks down there is often fault on both sides. No-fault divorce allows most matters to be resolved quickly, with less blame and hostility. It also puts more emphasis on the needs of all parties involved, particularly any children of the marriage.



Figure 9.12

The breakdown of a marriage can result in divorce.

The purpose of divorce law

Divorce refers to the ending of the legal relationship between a man and a woman who are married. The marriage entered into no longer exists, and each party is free to remarry if they wish. With increased opportunities and expectations, members of society have become less prepared to stay in relationships that are not satisfying and happy.

The purpose of Australia's divorce law is highlighted in the principles to be applied by the court when exercising jurisdiction under the *Family Law Act 1975* (Cth). These are to consider:

- the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life
- the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children
- the need to protect the rights of children and to promote their welfare
- the need to ensure safety from family violence
- the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship with each other and with the children.

When a marriage no longer fulfils a person's needs and desires, the person may be unhappy and the relationship dysfunctional. One solution is for the couple to separate and consider divorce. This can be painful and disruptive to the people involved. The Family Court will settle as many cases as possible through counselling or mediation. The aim is to reduce any bitterness between the parties

and any emotional harm to children. People with children are required to undergo family dispute resolution before lodging an application for divorce. A divorce will not be granted unless the couple can prove to the court that proper arrangements have been made for the children of the marriage.

Obtaining a divorce

The *Family Law Act 1975* (Cth) provides only one ground for divorce. A couple must prove the **irretrievable breakdown of the marriage**. To do this, couples must live separately and apart for a continuous period of 12 months or more immediately before filing the application for divorce. There is no need for the parties to prove that either party was at fault.

The aim of the *Family Law Act* is to encourage reconciliation wherever possible. Therefore, a couple may reconcile and live together for up to three months without the mandatory 12-month separation period starting over again. If their reconciliation does not last, then the first separation period and the subsequent separation period are used to calculate the required 12-month separation period. This is known as the **resumption of cohabitation** rule.

Couples can lodge a joint divorce application or one party can choose to divorce their spouse by lodging a sole application. Sole applications require additional time for the other party to be informed and to respond if necessary. Couples who are married less than two years must attend counselling sessions, and couples with children must show that they have agreed to suitable arrangements for the care and welfare of the children before the court will approve the divorce.

Separation under one roof

Divorcing couples who cannot live separately because of the care of children, or for financial reasons, are able to live **separately and apart under one roof**. Separation can be under one roof if there is obvious evidence of two households.

However, if there is evidence of violence, molestation, harassment or psychological abuse between people sharing a home (partner or children), then the Family Court can issue an injunction or restraining order, which directs the offending person to stay away from the home until the court can deal with the division of property. Police deal with urgent matters involving family violence under state law.

Divorce order

An application for a divorce is made to the **Family Court of Australia** or to the **Federal Circuit Court of Australia**. In cases where there are no children and the couple can agree about divorce matters, the divorce application is processed without a court hearing. In contested cases, the parties must attend court. Most evidence is submitted in written form. Oral evidence can be given, but this is rare. When the court has decided that a divorce should be granted, a **decree of dissolution of marriage**, commonly known as a **divorce order**, is issued. The order takes effect one month after it is made.

LEARNING ACTIVITY 9.2

Obtaining a divorce

- 1 Briefly explain the overall purpose of the *Family Law Act 1975*.
- 2 Explain the concept of no-fault divorce.
- 3 What is the only ground for divorce?

- 4 How long must a married couple be separated before a divorce can be granted?
- 5 Explain the 'resumption of cohabitation' rule.
- 6 How can a married couple live in the same house but be separated?
- 7 How long does a divorce order take to become effective?

DIVISION OF PROPERTY

The Family Court deals with property disputes arising from a breakdown of a relationship irrespective of whether a couple is in a marital, de facto or same-sex relationship. The Family Court can declare which party has the right to particular pieces of property and can change the property interests of a party if this is considered appropriate.

In any relationship where the parties are living together there is usually jointly owned property. This can include the house where the couple is living and everything within the family home, as well as other property owned by the couple (for example, a holiday home, a family business, bank accounts, shares, cars, a caravan, equipment, superannuation entitlements). The matrimonial home is often the most substantial asset belonging to the parties and as such causes the greatest number of problems when it comes to deciding who should keep it or how the proceeds from the sale of the home should be divided.



Figure 9.13

The matrimonial home is often the most contested property in a divorce.

Considerations of the court in division of property cases

Direct and indirect contributions

The court will consider all property owned by the parties even if it is registered in the name of one spouse or partner only. If the other person contributed to or assisted in the acquisition of the property, either directly or indirectly, then the court will order that the property be included in the financial settlement and divided accordingly.

Direct contributions would include the monthly payment of a mortgage on the property, the payment of the deposit for the property, the outright ownership of the property or payment for renovations to the property.

Indirect financial contributions may include payment of other bills, such as gas and electricity, in order that the other partner would have enough money to pay the mortgage. Indirect contributions other than financial contributions include contributions as homemaker and parent. This could be cleaning the house, doing the washing, cooking and looking after the children. It would also include maintaining the house and thereby keeping its value. The time spent by one partner on cleaning the house and looking after children allows the other partner time to earn an income to maintain the family.

In June 2010, the Family Court decided that where one partner has suffered continuous violence, this could be taken into consideration in the property settlement because the violence made the victim's contribution more onerous.

CASE STUDY

Mallet v. Mallet

In *Mallet v. Mallet* [1983–84], the High Court took an asset-by-asset approach to assessing the property of the parties. The court recognised that the wife had made a contribution to the family assets in her role as homemaker and mother, and that this freed the husband to earn the income used to acquire the assets. The High Court added that the wife's contribution as a homemaker and parent should be recognised in a substantial way.

Superannuation

If a couple have been paying **superannuation** during the marriage, the value of the superannuation can become part of the property settlement. The law relating to superannuation has evolved over the years, with an increased awareness that one person's superannuation may have been for the benefit of both people in a relationship, particularly if both people have done without things in order to make superannuation contributions. It is therefore fair that both parties should benefit from the superannuation entitlement.

DID YOU KNOW?

Couples can make pre-marriage financial agreements that specify how any property is to be divided in the event of a divorce.

Property settlements

The parties themselves can come to an amicable agreement in making a property settlement. The court encourages couples to use counselling, mediation or arbitration to facilitate an agreement. This saves court costs and usually leads to a better relationship between the parties. Couples who cannot agree can ask the court to make an order.

Court orders

The court has a wide range of powers when making property orders. It may:

- order payment of a lump sum, whether in one amount or in instalments
- order payment of a weekly, monthly, yearly or other periodic sum

- order that a specified transfer or settlement of property be made by way of maintenance for a party to a marriage
- order that any document be executed
- appoint or remove trustees
- make a permanent order, an order pending the disposal of proceedings, or an order for a fixed term or for life or during joint lives or until further orders impose other terms and conditions
- make an order by consent (that is, agree to make an order that both parties want).

Spousal maintenance

Either party to a marriage, a de facto relationship or a same-sex relationship may be liable to maintain the other party, to the extent that they are reasonably able, if, and only if, the other party does not have adequate means of support.

Applications are usually lodged within two years of a de facto or same-sex relationship ending or within one year of a divorce order taking effect. When considering spousal maintenance applications, the matters the court will take into account include:

- the age and state of health of each of the parties
- the income, property and financial resources of each of the parties, and the physical and mental capacity of each of them for appropriate gainful employment
- whether either party has the care or control of any child from the relationship who has not attained the age of 18 years
- commitments of each of the parties which are necessary for them to support themselves
- the responsibilities of either party to support any other person
- the duration of the marriage or relationship
- whether either party is cohabiting with another person, and the financial circumstances relating to the cohabitation
- any child support arrangements.

LEARNING ACTIVITY 9.3

Division of property

- 1 Look back at the case study of *Mallet v. Mallet*. What did the court decide in this case? What was the reason for this decision?
- 2 Read the case study of *Shaw v. Shaw* and answer the questions.
 - a Do you agree with the decision in this case? Give reasons.
 - b What is the difference between direct and indirect contributions in property settlements?

Shaw v. Shaw [1989] FLC 92–010

This was an appeal by the husband against the Family Court orders. The parties were married in 1974 and separated in 1986. At the time of the marriage the husband had very substantial assets, whereas the wife had few assets. The sum total of the assets when the parties decided to separate was \$1 866 000; this was less than the value of the assets owned by the husband at the time of the marriage.

CASE STUDY

The wife claimed that she had made considerable contribution to the welfare of the family, including her contribution as homemaker and parent. The trial judge found this contribution to be most significant and awarded a share of 30 per cent to the wife and the balance to the husband.

The husband appealed against this decision on the grounds that his assets had not increased, but diminished. The decision on appeal was that the wife's contribution should be 10–12 per cent of her husband's existing property rather than 30 per cent, because the assets brought into the marriage by the husband exceeded the value of those left at the time of separation. Despite this reasoning, the appeal court then decided to adjust the proportion to go to the wife to 25 per cent because she had no real capacity to earn income except by the investment of her award from her husband. She was in need of a house and she needed to support herself at a reasonable standard of living for the rest of her life.

- 3 Read the case study of *Napthalia v. Napthalia*. Do you think, in this case, the contribution as homemaker and parent should have been considered in relation to the whole of the assets? Explain.

CASE STUDY

Napthalia v. Napthalia [1989] FLC 92–021

In this case the wife appealed to the Full Court of the Family Court against the finding that the assets of the parties were in two categories: matrimonial and business assets. The trial judge did not take into consideration the wife's contribution to the business as a homemaker and parent.

The Full Court allowed the appeal, finding that it was not permissible for the trial judge to draw a distinction between matrimonial and business assets. In the case of a wife whose role is primarily that of homemaker and parent, her contribution under S79(4)(a), (b) and (c) is not to be confined to the former matrimonial home, but extends to the whole of the parties' assets, including the business.

- 4 Read the case study of *Berry v. James* and answer the questions.
- a How was the property settled in this case?
 - b Why did the wife (Ms Berry) believe that there had been a miscarriage of justice?
 - c How would you decide the case? Explain.

CASE STUDY

Berry v. James [2010] FamCAFC 58

After separation in May 2005, the parties consented to an order dividing the property, with 63 per cent going to the husband and 37 per cent to the wife (Ms Berry). The wife appealed against the decision declaring that the husband had not disclosed all his financial assets, including the expectancy of interest in his father's estate and the fact that she had contributed \$25 000 to the marriage. She believed that there had been a miscarriage of justice because of the non-disclosure and because she was not represented at the original hearing.

The husband had contributed \$25 000 to the marriage from the sale of a house. The wife contended that she had contributed the same amount. The couple started a furniture business together but the wife withdrew from it and transferred her interest in the business to her husband. The value of the husband's superannuation was about \$56 000 and the wife's was about \$3000.

They jointly owned a house worth approximately \$270 000. The furniture business was worth approximately \$23 000. There was a joint debt of approximately \$90 000. The total net value of assets was \$267 000. The husband was to pay the wife \$80 000 for her share in the home and the wife was to transfer her interest in a boat to her husband.

The court dismissed the wife's appeal.

- 5 Read the case study 'Seeking a property settlement' and answer the questions.
 - a As Fred bought the home before he started his relationship with Robyn, should Robyn have any claim on the house? Explain. Would the fact that they are not married make any difference to their claim? Explain.
 - b What would the court consider when deciding if Robyn has any claim on the property?
 - c What other major assets could be included in Fred and Robyn's financial settlement?
 - d Would the fact that Robyn has been granted custody of the children be a consideration in the division of property? Explain.
 - e Do you think that the age of the children might be relevant to the decision of the court? Explain.

Seeking a property settlement

Fred and Robyn lived in a de facto relationship for seven years. They had three young children aged two, four and five when they separated. Robyn was granted custody of the children.

Before they began their relationship, Fred owned a property that subsequently became the family home. Robyn worked for two years after they moved into their home and contributed to the upkeep of the home.

Robyn gave up work shortly before the birth of their first child. She has been looking after the children, doing the housework, cooking, shopping and so on while Fred has been working long hours building up his business. Fred has now decided that he no longer wants to be in the relationship and has left Robyn. The couple is in dispute as to how they will divide their property.

CASE STUDY

- 6 Explain three considerations of the court when deciding whether to award spousal maintenance.

CARE OF CHILDREN

Under the *Family Law Act 1975* (Cth), a judge, when making parenting orders, must presume that it is **in the best interests of the child** for both parents to have **equal shared parental responsibility** for the welfare and development of the child, unless evidence suggests otherwise. For example, equal shared parental responsibility would not be appropriate in cases involving child abuse, neglect or violence.

Shared parenting and equal time are not guaranteed. It will depend on the circumstances of the case. The child's wishes are usually taken into account depending on the child's age or maturity.

People who work in an advisory capacity in divorce proceedings, such as lawyers, mediators and counsellors, have a legal obligation to:

- inform couples that equal shared responsibility should be considered if it is in the best interests of the child and reasonable in the circumstances
- encourage couples to negotiate a **parenting plan** and point out where they can obtain alternative dispute resolution procedures or further assistance.

Parenting plans

A **parenting plan** is appropriate when the parents come to an **amicable** agreement about how their children will be cared for and supported after separation or divorce. The parties do not need to go to court. A parenting plan is not legally enforceable, but a court will take it into account if the parents do not keep to the agreement in the future. For a parenting plan to be legally acceptable, it must be in writing, made free from threats or intimidation, dated and signed by both parties. The kinds of things that may be covered in a parenting plan include:



Figure 9.14
Parents share responsibilities under a parenting plan.

- who the child will **live with**
- the length of **time to be spent with each parent** and other people such as grandparents
- how the parents will share responsibilities and decision-making (such as which school the child will attend)
- the type of **communication between the child and each parent**
- arrangements for special days such as birthdays and Christmas
- processes for changing the plan
- child support arrangements for a child
- any other issues relating to parental responsibility.

Consent orders and parenting orders

Sometimes the parents come to a **negotiated** agreement either with legal assistance or following family dispute resolution. An out-of-court agreement reached between the parties is then registered with the Family Court registry. These court-approved agreements are known as **consent orders** and they can cover parenting arrangements as well as other issues such as division of property, child support and spousal maintenance. These orders are formal agreements that are legally enforceable.

Parents (or other interested parties) can apply to the Family Court for a **parenting order**. These orders are used where the parties cannot agree, so they ask the court to decide the issues in dispute. Any person concerned with the welfare and development of a child can ask the court to make a parenting order. This may be a parent, the child, grandparents or other people closely associated with the child. The parties are required to attend family dispute resolution before applying for a parenting order unless it is a matter of urgency, or there is a history of family violence, or one party cannot participate due to illness, disability or distance. They will also be asked to attend court as required. Where necessary, the court will appoint a lawyer to independently represent the child's interests during parenting order applications.

When a court makes a parenting order, there is a **presumption of equal shared responsibility** unless it can be shown that this is not **in the best interests of the child**. This does not mean that parents will automatically have equal time with their children as the court must also consider whether equal shared responsibility is **reasonably practicable in the circumstances**. If equal shared responsibility is not reasonably practicable, then the court must ensure the child has **substantial and significant time** with both parents. This allows both parents to attend special events and be fully involved in their child's life. Scheduled visits should be more than just the alternate weekend. Under these arrangements, the parents must consult on long-term issues such as medical, educational or religious needs as well as short-term or day-to-day decisions.

When determining whether parenting arrangements are **in the best interests of the child**, the court must consider whether the child:

- would benefit from contact with both parents
- needs protection from one or both parents because of past violence, physical or psychological abuse.

If the court sees a conflict or inconsistency in the application of these primary considerations then it must give greater weight to keeping the child safe from harm.

EXTRACT

Section 60B(2) *Family Law Act 1975*

Best interests of the child – principles to be considered

- children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
- parents should agree about the future parenting of their children; and
- children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Source: *Family Law Act 1975*

Child support

Parents (whether they are married or not) are obliged to financially support and provide proper care for their children. This responsibility also exists for single people who become parents through a short-term or casual sexual relationship. The Family Court will not grant a divorce unless adequate arrangements have been made for the care and support of all children in the marriage.

Separated parents can decide to make their own arrangements about child support or the Australian Government Department of Human Services can calculate the amount to be paid and can assist with the collection of payments. Once the department has made a child support assessment, accepted a child support agreement or registered a court order, it will inform the parties how much has to be paid. The department can then collect the payments through Child Support Collect and transfer the payments to the receiving parent.



Figure 9.15

Both parents have to cooperate in the best interests of their child.

LEARNING ACTIVITY 9.4

Care of children

- 1 Read the case studies below. State whether you believe the person claiming spousal maintenance and/or child support is entitled to it. Give reasons for your opinions.

a Georgio and Carmel

Georgio and Carmel met at a party in Lakes Entrance. They were both on their annual holiday. They saw each other regularly for a week. At the end of their holiday they went their separate ways. Georgio lived in Sydney and Carmel lived in Melbourne. After a few weeks, Carmel found she was pregnant as a result of her liaison with Georgio. She wanted to keep the child and she decided to go through with the pregnancy. She did not even know Georgio's address to let him know what had happened. After the baby was born she met a friend of Georgio's who gave her his address. By then she had realised it was going to be very difficult to look after the child on her own. She wrote to Georgio claiming child support.

b David and Kate

David and Kate met when they were 18. They went out together for one year and then got married. They had a son, Mark, a year later. David liked to go out with his friends while Kate stayed home to look after Mark. They grew apart and decided to separate. Mark was two years old. Kate was granted custody of Mark. David was still studying full-time, and working at a supermarket three nights a week. Kate had a part-time job. Kate was claiming spousal maintenance for herself and child support for Mark.

c John and Jennifer

John and Jennifer had been in a long-term de facto relationship for 10 years and had two children, aged six and eight. John was a professional photographer and was putting all his time and money into building up his business.

Jennifer had gone back to work as a dental nurse and she met someone else. She decided to leave the relationship, taking the two children with her. John, not wanting to lose his children, contested child-care arrangements, but was unsuccessful. Jennifer claimed child support from John.

d Richard and Claire

Richard and Claire had been married for eight years. They had one daughter, Louise, who was six. Claire had gone back to her job as marketing manager in a large firm. Her job was very demanding and often took her overseas. Richard believed the marriage

was not working and decided to leave the matrimonial home. He took Louise with him. Richard, who was an architect, was granted custody of Louise. Claire was earning more money than Richard. Richard made a claim for child support from Claire.

- 2 What obligations does the *Family Law Act* place on parents in relation to the maintenance of their child?
- 3 Would these obligations still apply if the father did not know that the child had been born?
- 4 Read the case study 'Deceit and child support' and answer the questions.
 - a Why did Mr Magill stop paying child support?
 - b Why was the original County Court decision reversed?
 - c What was the outcome of the second County Court case against the Child Support Agency?

Deceit and child support

The case of *Magill v. Magill* [2006] HCA 51 caused a degree of legal controversy. Mr Magill and his wife separated after five years of marriage. In that time, they had three children. Between 1992 and 2000, Magill paid child support until he found, through DNA tests, that he was not the father of the two younger children. In 2001, Magill used the tort of deceit (fraudulent misrepresentation) to sue his ex-wife in the County Court for the anxiety and depression her actions caused; the resulting loss of earnings and the money he had paid in child support.

He was awarded \$70000 in compensation. The decision was reversed in the Victorian Court of Appeal. The High Court unanimously upheld the Court of Appeal's decision on the basis that it is inappropriate to use the tort of deceit in such cases as it is best used in commercial cases where there is a deliberate lie and not for personal relationships where a person does not lie but merely chooses to remain silent or keep secrets.

In a separate County Court action, Magill sued the Child Support Agency for negligence because he suffered psychological stress when the agency miscalculated the amount of child support he should have paid. The County Court dismissed his claim, ruling that the Child Support Agency did not cause his injury.

CASE STUDY

- 5 Read the case study 'Breakdown of a same-sex relationship' and answer the questions.
 - a Does this case fall within the jurisdiction of the Family Court?
 - b What options do the parties have in coming to a property settlement?
 - c What options do the parties have in deciding who will look after the child?
 - d What core principle guides Family Court decisions about parenting? Explain.
 - e Is child support a consideration in this case? Explain.

Breakdown of a same-sex relationship

Jack and Ric lived in a same-sex relationship. They moved into a flat together, which was bought and paid for by Ric. They both worked for three years earning approximately equal income. They organised for a surrogate mother to give birth to a child (Tina) by IVF. Jack contributed the sperm. Ric stayed home to look after Tina for the first year and then went back to work while Tina was in child care. When Tina was six years old, Jack and Ric decided to separate. Jack was claiming a share of the flat, and both Jack and Ric were claiming custody of Tina.

CASE STUDY

METHODS AND INSTITUTIONS FOR RESOLVING DISPUTES

The *Family Law Act 1975* (Cth) established the Family Court of Australia, created provision for Family Court counselling, mediation and arbitration, and provided the framework for divorce, parenting plans, spousal maintenance, child support and property settlements.

The Family Court of Australia

The Family Court is a federal court. Divorce proceedings are geared towards parties resolving their issues without the formality of a court hearing. The court deals with matrimonial disputes such as:

- divorce applications
- spouse maintenance issues
- parenting plans
- child support (maintenance)
- property settlements
- injunctions related to family law.

The Family Court can also deal with financial matters arising from the breakdown of de facto relationships including same-sex relationships. The Federal Circuit Court of Australia was established to ease the workload of the Family Court. Less complex family law cases are heard in the Federal Circuit Court either on application of the parties or on transfer from the Family Court.

Family Relationship Centres

The Commonwealth Parliament has established **Family Relationship Centres** to provide advice and support to couples, mothers, fathers, grandparents and children. The aim of these centres is to help people to maintain healthy relationships and good parenting. Mediation is provided for couples wishing to resolve family disputes. As well as Family Relationship Centres, people can use the **Family Relationship Advice Line** and **Family Relationships Online** to find information and services to improve their relationships or deal with relationship difficulties.



USEFUL WEBSITE

Family Relationships Online www.familyrelationships.gov.au

Family counselling

Family counselling helps people with relationship difficulties that relate to children, marriage, separation and divorce. There are many groups offering family counselling. Adults, young people, couples and their children can ask a family counsellor for assistance. Family counsellors listen to concerns and problems, and help people to find their own answers. They also give information about services available for further assistance. Anything said in a counselling session is confidential and cannot be used as evidence in any court, although any indication of child abuse must be reported.

Family dispute resolution

The *Family Law Act* encourages couples to resolve their family disputes through family dispute resolution rather than going to court.

Family dispute resolution is a process conducted by one or more independent practitioners to assist members of families, including separated families, to sort out their problems. It is an alternative to going to court, and is **less adversarial and cheaper** for the parties who may not be able to afford legal representation. It encourages the parties to resolve their dispute through discussion and negotiation. It can also be **empowering** for the parties as they have contributed to the decisions made.

Under the *Family Law Act 1975* (Cth), family dispute resolution includes services such as mediation and conciliation. **Family dispute resolution practitioners** are impartial and will not take sides. They can help the parties to look at the problems objectively. Unlike counsellors, family dispute resolution practitioners will not assist with emotional problems. They concentrate on reaching a solution to specific disputes. They will listen to both sides and help the parties work through the issues. They cannot give legal advice but will suggest other options if it appears that an appropriate resolution cannot be reached.

Family dispute resolution is compulsory before applying to a court for a parenting order. Anything said during a family dispute resolution session is confidential and cannot be used as evidence, although any indication of child abuse must be reported. A family dispute resolution practitioner will provide the parties with a certificate stating one of the following:

- One party did not attend.
- A genuine effort was made to resolve the dispute.
- One or both parties did not make a genuine effort to resolve the dispute.
- The family dispute resolution practitioner decided that the case was not appropriate for family dispute resolution.

Collaborative law

Collaborative law is an alternative method of resolving family law disputes using a non-adversarial approach. For this approach the parties meet with a solicitor who works in collaborative law. The parties and their legal representatives agree to work together to find a fair solution to whatever financial or child-related issues they have that need to be resolved without involving a court.

Each party must employ their own legal representative to represent their interests. The parties and their legal representatives agree to try to reach an agreement without going to court. Face-to-face discussions are conducted between the parties with their legal representatives present. Other professionals can be involved if required. The collaborative process:

- removes the immediate threat of litigation
- provides the support of legal representation during negotiations
- encourages the development of a trusting alliance between the parties
- involves the parties in negotiations based on their interests rather than what a court might order if the matter proceeded to litigation
- aims to achieve results based on the needs of the parties
- minimises the need for large amounts of correspondence between the legal representatives
- uses independent experts, including child specialists and financial advisers, outside the adversarial system.

The parties agree to engage in the collaborative process in good faith and to provide full and honest disclosures of all relevant information. They also agree not to begin legal proceedings while engaged in the collaborative law process. Negotiations focus on the future wellbeing of the parties and their children, and the parties try to develop practical and mutually beneficial options and reach decisions on such matters as property settlements and parenting plans.

Collaborative law practices have been used in various parts of the world for a number of years. It has been found that the collaborative process creates and sustains cooperative negotiations and is more likely to result in a fair outcome that is satisfactory to both parties. A number of family dispute resolution organisations have expressed interest in the collaborative law process.

The Law Council of Australia has established national guidelines for collaborative practice.

LEARNING ACTIVITY 9.5

Methods and institutions for resolving disputes

- 1 Explain the role of the Family Court and the Federal Circuit Court in family law disputes.
- 2 **Investigation**
Investigate Family Relationship Centres. Design a fact sheet that encourages their use.
- 3 Explain what occurs during family dispute resolution. Discuss the advantages of this type of dispute resolution.
- 4 How does family dispute resolution differ from family counselling?
- 5 What is collaborative law? What advantages does it provide?

CAPACITY OF DIVORCE LAW TO DEAL WITH CHANGE

There has been a gradual change in the law in relation to divorce over a period of time from an era when divorces were difficult to obtain and fault had to be proved to a no-fault system of divorce that is more interested in the needs of the parties.

Table 9.3 Timeline of changes to divorce law

UNITED KINGDOM	
To 1857	The way to obtain a divorce was to get a private Act passed through parliament specifically for the couple wishing to divorce. This was very rare and only for the very rich.
1857	<i>Divorce and Matrimonial Causes Act</i> It was possible to get a divorce if the husband could prove a single act of adultery by the wife, or the wife could prove her husband's aggravated adultery. Divorce was still very difficult and regarded as very serious.
1900	<i>Commonwealth of Australia Constitution Act</i> The <i>Commonwealth of Australia Constitution Act</i> was passed in the United Kingdom to apply to Australia and gave the Commonwealth Parliament in Australia the power to pass legislation with respect to marriage [section 51 (xxi)], and divorce and matrimonial causes, and in relation thereto, parental rights and the custody and guardianship of infants [section 51 (xxii)].
1923	The unequal provisions of the law of adultery were removed in England.
1937	The grounds for divorce in England were extended to include cruelty, desertion and insanity as well as adultery. These grounds made it possible to obtain a divorce because there had been a breakdown of the marriage.

AUSTRALIA	
1959	Matrimonial Causes Act (Cth) This Act was passed in 1959, but was not proclaimed until 1961, due to its controversial nature. Under this Act there were 14 grounds for divorce and it was possible to get a divorce if any one of these could be proved. These grounds included: • desertion for two years • persistent drunkenness • conviction for serious crime • cruelty • incurable insanity • adultery • separation for five years.
1975	Family Law Act (Cth) This Act was innovative for its time. It is based on 'no fault'. Under this Act there is only one ground for divorce (now called dissolution of marriage): that the marriage has irretrievably broken down. Evidence for this would be that a couple have lived separately and apart for more than 12 months.
1987	Family Law Amendment Act (Cth) This Act implemented the reference of power from the states for the Family Court to deal with custody, guardianship and maintenance of ex-nuptial children, originally not part of the <i>Family Law Act</i> because the Act only dealt with marriage and divorce and children of a marriage. This change meant that facilities such as counselling and conciliation would be available for ex-nuptial children as well as children of a marriage.
1995	Family Law Reform Act (Cth) This Act made amendments in relation to dispute resolution through mediation, counselling and other like forms of dispute resolution that should be used before seeking a court-imposed decision. It also placed emphasis on the concept of parental responsibility for the care, welfare and development of children rather than giving parents any rights to custody and access, which tends to encourage ideas of division and ownership of the children.
2000	Family Law Amendment Act (Cth) This Act provided a system of court-referred and private arbitration as a cheaper, quicker and more accessible dispute resolution procedure than court litigation for the resolution of property disputes. The Act also provided for binding financial agreements that can be made before or during marriage, or at the point of separation. For the agreements to be binding, legal advice must be obtained by both parties before entering into them.
2001	Family Law Legislation Amendment (Superannuation) Act (Cth) Under this amendment, couples can make a superannuation agreement specifying when and how superannuation entitlements will be divided. Previously, superannuation interests could not be split. Instead, the property settlement was adjusted to take account of one party having access to their superannuation in the future.
2005	Family Law Amendment Act (Cth) Under this Act, legal terms are simplified [dissolution of marriage is replaced with 'divorce' and decree nisi with 'order']; the state magistrates' courts can transfer property proceedings to the Federal Magistrates Court (now called the Federal Circuit Court) and people who have found through DNA testing that they are not a parent of a child can recover child maintenance payments.

AUSTRALIA

2006

Family Law Amendment (Shared Parental Responsibility) Act (Cth)

Major changes in the Act included a presumption of shared and equal parental responsibility and compulsory counselling for parents in child-related matters (except in cases of family violence). Counselling is provided in 65 nationwide Family Relationship Centres.

2006

Child Support Legislation Amendment (Reform of the Child Support Scheme) Act (Cth)

This Act made radical changes to the way child maintenance is calculated and the way child maintenance payments are enforced. The Act was amended in 2007.

2008

Family Law Amendment (De Facto Financial Matters and Other Measures) Act (Cth)

This Act gives de facto couples the same access as married couples to the Family Court of Australia for property and spousal maintenance matters. Cases between de facto couples concerning their children have been within the federal family law regime since 1988.

2008

Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act (Cth)

This Act redefined de facto relationships to include same-sex couples.

2011

Family Law Legislation Amendment (Family Violence and Other Measures) Act (Cth)

This Act amends the *Family Law Act 1975* to prioritise the safety of children when considering parenting orders, particularly in cases involving violence, child abuse, mental illness and substance misuse. It broadens the definition of 'abuse' and 'family violence' to capture the full spectrum of harmful behaviour and requires legal advisors, counsellors or dispute resolution practitioners to prioritise safety as an issue when dealing with clients and to inform the court accordingly. This Act came into operation in June 2012.

DID YOU KNOW?

A NSW study highlighted the 'HSC itch' as a factor in the increased trend in divorce among women aged between 50 and 65. One explanation is that they stay in their unhappy relationship until their youngest child finishes school.

LEARNING ACTIVITY 9.6

Capacity of divorce law to deal with change

- 1 Explain the gradual change to a no-fault system of divorce in Australia.
- 2 Select three changes in family law since 1975 and explain how the law was changed in each instance.
- 3 To what extent do you think Australian family law reflects the changing attitudes of people in society?
- 4 Why is it important for the Family Court to hear all unresolved disputes between separating couples?

ISSUE – SHARED PARENTING

The idea that both parents should have a role to play in bringing up their children after separation was the basis for the law reform enacted in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). While the Act retains the fundamental principle that decisions must reflect the **best**

interests of the child, the law now also presumes that it is beneficial for a child to have **equal and shared parenting arrangements** unless there is evidence to the contrary. For example, equal shared parental responsibility would not be appropriate in cases involving child abuse, neglect or violence.

EXTRACT

How a court determines what is in a child's best interests

The primary considerations are:

- a whether the child will benefit from having a relationship with both parents
- b the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

In applying the above considerations, the court must give greater weight to a child safety.

Additional considerations are:

- a the child's views, maturity and level of understanding
- b the type of relationship the child has with either parent, grandparent or other relatives
- c the extent to which each parent has tried to spend time with, communicate with or participate in decisions about the child as well as the extent to which the parent has fulfilled their parental obligations
- d the probable effect of changes on the child's lifestyle including separation from parent/s, siblings or significant others with whom the child has been living
- e the practicalities and expense of the child spending time and communicating with a parent on a regular basis
- f the ability of the child's parents (or other relative) to provide for the child including emotional and intellectual needs
- g the maturity, sex and cultural background of the child and either parent
- h the right of an Aboriginal or Torres Strait Islander child to enjoy his/her culture
- i each parent's attitude to the child and their parental responsibilities
- j any family violence issues involving the child or the child's family members
- k any family violence orders that apply to the child or the child's family members
- l whether the order is likely to generate further legal proceedings in relation to the child
- m any other relevant factor the court is prepared to consider.

Source: adapted from S60CC of the *Family Law Act 1975* as amended by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth)

The 2006 Act encourages 'cooperative' and 'shared' parenting, which the Howard (Liberal) Government felt was essential for a child's development. The child's wishes are usually taken into account, but this depends on the circumstances of the case and the child's age or maturity.

These reforms were in direct response to the 2003 parliamentary report *Every picture tells a story*, which highlighted the importance of 'family-friendly outcomes' and the need for a less adversarial form of dispute resolution in family law matters.

Fathers' groups such as the Lone Fathers' Association and Dads in Distress welcomed these changes. They argued the previous law excluded the non-custodial male parent from the child's life, and was inequitable and a causal factor in male suicides.

The changes were also enacted because of concerns about children growing up without the care and influence of both parents. It was important that both parents take responsibility for the child's financial and emotional wellbeing.



Figure 9.16
Shared parenting

However, the law soon attracted criticism from some sectors of the community. Ex-Family Court judge Tim Carmody branded the changes a ‘failure’ because shared parenting will never suit the small percentage of couples who end up in court. He argued that it is illogical to expect hostile parents, who cannot agree despite having undergone family dispute resolution, to comply with a shared parenting arrangement.

Women’s Legal Services Australia launched its ‘Put Safety First in Family Law’ campaign because it believed that the law’s focus on shared parenting inadvertently gave violent parents, or parents with psychiatric conditions or substance abuse issues, open access to their children and that their ex-partners were reluctant to report the abuse for fear of being labelled an ‘unfriendly parent’.

Child sex abuse researcher professor Freda Briggs and child protection advocate Charles Pragnell are both part of the Safer Family Law Group. They argue that the 2006 amendments to the *Family Law Act* were geared towards the rights of parents rather than the rights of the children. Pragnell said he believed ‘the courts should focus on the needs and wants of the child and the rights of the child to be protected from abuse’.

This issue was thrust into the media spotlight with several reported cases of children dying, at the hands of their parents, in the midst of bitter separation or custody disputes. The shocking death of Darcey Freeman caused the Rudd (Labor) Government to commission retired family court judge Richard Chisholm to review the family law’s effectiveness in dealing with family violence. It is still unclear whether these disturbing cases are a direct result of family law reform or merely examples of angry, jealous or aberrant parent behaviour.

The Men’s Rights Agency points out that 35 per cent of child murders are attributed to biological mothers and 29 per cent to biological fathers. The agency argues that these acts are ‘the product of despair or incomprehensible madness and should not be a catalyst for gender wars’.

CASE STUDY

The death of Darcey Freeman

In 2011, Arthur Phillip Freeman was found guilty of throwing his four-year-old daughter, Darcey Freeman, to her death off the West Gate Bridge in Melbourne. His two boys and other bridge users looked on in horror. In court his ex-wife testified that the last words he said to her were ‘You’ll never see your children again’. His defence counsel argued the man was mentally impaired at the time. The couple had recently finalised a bitter custody dispute that reduced the father’s access to the children.

Man stabbed his two-year-old daughter

A 24-year-old Melbourne man tricked his ex-fiancée into allowing him access to their two-year-old daughter. He later stabbed the girl to death with a 30-centimetre knife and was sentenced to life in prison. The couple had separated following a rocky relationship involving threats and family violence. The mother claimed her daughter adored her father and that he had not previously shown any violence towards the girl. In a phone conversation the man told his ex-wife, 'I killed her to get back at you ... Even if I go behind bars, I know you are suffering'. His lawyers argued his personality disorder, exacerbated by substance abuse, made it difficult for him to manage his anger.

CASE STUDY

Woman jumped to her death with 22-month-old son

In 2008, a 35-year-old mother strapped her 22-month-old son to her body and jumped to their deaths from Melbourne's West Gate Bridge. The woman believed that the boy's father was going to start court proceedings to amend their shared custody arrangement. She committed suicide and killed her son because she did not want him taken from her. A friend explained that, in her mind, she thought she was saving him from a bad life.

CASE STUDY

The Australian Institute of Family Studies (AIFS) and Professor Richard Chisholm conducted separate inquiries into the effectiveness of the 2006 provisions. The AIFS reported that shared parenting worked well when parents could agree, but that it was of limited benefit in acrimonious cases or where there was a history of family violence or child abuse. The AIFS study found there has been a miniscule increase in the number of children spending considerable time with both parents. Before 2006, 12 per cent of families had shared parenting arrangements. The proportion of families with similar arrangements after the legal changes is about 16 per cent. Of these, 70 per cent of couples said the arrangement worked for them.

Professor Chisholm's Family Courts Violence Review was critical of the public's misunderstanding of the law. He reported that some parents saw the concept of shared equal parenting as a parental 'right' regardless of the practicalities of the arrangement or what is best for the child. He argued that shared parenting should be one possible option for judges to use when considering the best interests of the child rather than it being the focus of the law. He said judges cannot apply a 'one-size-fits-all approach in custody disputes'.

A further government study by clinical psychologist Dr Jennifer McIntosh found that children in high-conflict shared parenting households tended to be more anxious, distressed and had difficulty with attention and task completion. The study also found that children benefited more from spending quality time rather than more time with their parents.

A study by the Social Policy Research Centre at the University of NSW also found that shared parenting arrangements did not work in high-conflict families. It concluded that:

- a few families do benefit from shared parenting arrangements, particularly those who can do so without conflict
- many shared arrangements do not last over time and often revert to care by one parent
- the success of shared parenting has little to do with the time allocated to each parent and has more to do with the level of cooperation, joint decision-making and the absence of violence or safety issues
- children also want to have a say in the arrangements rather than arrangements focusing on their parents' needs.

In response to this criticism, the Commonwealth Parliament passed the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). This Act removed a problem that arose with the 2006 changes in the law. Under the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, a court was to consider the level of cooperation between the parents and the continuing relationship between the child and parents as one of the factors in determining custody disputes. Parents would not raise issues of family violence when negotiating custody arrangements in case they were labelled 'hostile' or 'uncooperative'. They did not want to jeopardise their custody application. This provision, and the provision that allowed a court to award costs against a parent who could not substantiate abuse claims, was repealed to remove any impediments to family violence issues being raised by either party.

Professor Chisholm welcomed these and other amendments which mandate that a child's safety will now take priority over a child maintaining contact with both parents. His comments annoyed men's groups who thought the new provisions would weaken the Howard Government's shared parenting laws. The other provisions in the 2011 Act encouraging safety first in family law are that:

- the physical and non-physical behaviours that constitute family violence are defined so that the behaviour is easily recognisable
- the definition of child abuse has been broadened beyond assault and sexual assault to include neglect and psychological harm caused by exposure to family violence – where this behaviour exists, it must cause a family member to be 'fearful' rather than 'reasonably fearful' removing the need to judge a person's fear against a reasonable person in the same situation
- a court is to consider a child's safety and all family violence orders, not just those that are final or contested orders, when determining parenting orders
- there is also a legal obligation on all parties to inform the court of any risks to the child including any child protection notifications or investigations
- the application of the UN Convention on the Rights of the Child has been included as an additional objective when dealing with custody disputes.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Shared parenting

- 1 Describe the purpose of the *Family Law Act*. (2 marks)
- 2 Explain the advantage of no-fault divorce. (2 marks)
- 3 Explain the different methods of dispute resolution available to couples who are about to separate or divorce and wish to arrange parenting plans. (6 marks)
- 4 Investigate Family Relationship Centres. Write a report on:
 - their role
 - the method of dispute resolution used by the centres
 - the type of advice given

- the location of two Family Relationship Centres
- two other types of help suggested by the Family Relationship Centres.

(6 marks)

- 5 Look back at the case studies 'Death of Darcey Freeman', 'Man stabbed his two-year-old daughter' and 'Woman jumped to her death with 22-year-old son' and answer the questions.
- What occurred in each of these cases? (3 marks)
 - To what extent do you think the law relating to shared parenting has been successful in meeting the changing demands in society? Discuss. In your discussion refer to each of these case studies and comment on how these cases may have led to changes in the law. (8 marks)
- 6 Read the case study 'Child's school project becomes a plea to the Family Court' and answer the questions.
- What is the basis of the 11-year-old girl's complaint to the Family Court? (2 marks)
 - Do you think an equal and shared parenting arrangement would be appropriate in this girl's case? Give reasons. (3 marks)
 - Why did the Commonwealth Parliament change Australian family law to include the presumption of 'equal and shared parental responsibility'? (3 marks)
 - Conduct Internet research on two individuals or groups in favour of equal and shared parenting and two against. Explain their views and the action they took to have their views heard. (8 marks)
 - What action has the federal Attorney-General taken to try to resolve problems associated with shared parenting? (2 marks)
 - 'The presumption of equal and shared parental responsibility is in direct contrast to the principle that family law decisions should reflect the best interests of the child.' Discuss the validity of this statement. (5 marks)

(Total 50 marks)

Child's school project becomes a plea to the Family Court

Michaela Whitbourn, *The Sydney Morning Herald*, 16 December 2013

She has witnessed countless bitter rows between her warring parents, including an incident at her primary school assembly that led to police being called. Her mother, a health worker, admits she has an alcohol abuse problem and her behaviour towards her former husband and his new wife has been 'appalling'.

Her parents can barely speak to each other. Tempers flared when her father took her on an overseas trip without telling her mother.

But when she wrote a school project about a child trapped in a vicious custody battle, a Family Court judge heard a cry for help.

'This has got to stop,' the 11-year-old known as 'T' wrote in a childish cursive script. 'Not in a few years. Not when people can finally be [bothered] to do it. It needs to be done NOW!'

In four sentences, the student traced the despair of thousands of children dragged into messy familial dramas in the courts – and their struggle to be heard above the fray.

'The heading of the writing ... said that in the Family Court, children should have a say.'

ASSESSMENT TASK REPORT AND INTERVIEW

Family law

Arrange an interview, or school visit, with someone who has expertise in the area of family law, such as a solicitor, barrister, or a representative from a Family Relationship Centre or the Family Court.

Write a report on your findings. In your report include explanations of:

- the purpose of the *Family Law Act*
- the extent to which you think the law fulfils that purpose and reflects values in society
- problems that some people believe exist with no-fault divorce
- where someone could go when a marriage begins to break down
- two methods of resolving family law disputes other than going to court; and an explanation of the advantages and possible disadvantages of these methods
- parenting plans and parenting orders.

(Total 20 marks)

ASSESSMENT TASK MOCK COURT OR ROLE PLAY

Family Relationship Centres

Pretend you work in a Family Relationship Centre. A man comes to you for advice and support. He is having relationship problems with his spouse. He constantly fights with his spouse over her gambling problem and the fact that she leaves their children (both under 15 years of age) at home alone when he is at work. He says he wants a divorce and he wants the children to come and live with him. His mother says she will help him look after the children while he is at work. In his initial conversation with you he says he does not think that there is much chance of saving the marriage.

Working in groups of four to six people, complete the following tasks:

- Discuss the different methods this man could use to resolve his dispute.
- Select a non-adversarial method of resolving the dispute and write a brief script for a role play that highlights the issues in dispute and the procedure used to resolve them. Assign members of the group to play the people involved in the case. (Your teacher may ask you to perform the role play to the class.)

Working individually, write a report that explains:

- the initial advice this man might have been given about the different avenues of assistance that could help him
- this man's rights and responsibilities under Australian divorce laws relating to the divorce, care of children and maintenance
- conflicting attitudes in society that might be relevant to this case.

(Total 20 marks)



CHAPTER 10

CONSUMERS AND THE LAW

OUTCOME

At the completion of this unit you should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- legal principles relevant to the selected area/s of law
- a contemporary issue for the selected area/s of law
- the capacity of the legal system to respond to demands for change
- methods and institutions for resolving disputes arising under the selected area/s of law.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area/s of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

KEY LEGAL TERMINOLOGY

acceptable quality Goods fit for their purpose or intended use.

caveat emptor Literally, 'let the buyer beware'.

conditions Certain terms that form part of a contract that must exist for the contract to be binding.

consumer A consumer is generally a person who purchases a good or service for less than \$40 000; or any person who buys a good or service for personal, domestic or household use regardless of cost; or a person who buys any car or trailer designed for use on public roads.

consumer guarantee Specific consumer rights that form part of a consumer sales contract and are implied by law.

contract A legally binding agreement where a person has offered to buy or sell something, and another person has accepted the offer.

exemption clauses Clauses in a contract that set out when a person is exempted from being liable.

scam A dishonest and deceptive attempt to defraud someone.

standard-form contract A pre-written agreement used by suppliers who regularly sign contracts with their clients. Most terms and conditions are set with little scope for negotiation; for example, mobile phone plans and insurance agreements.

telemarketing A form of selling via telephone.

trader A person or group that sells a good or service.

PROTECTION OF CONSUMERS

The role of the law is to protect individuals who are unable or unwilling to protect themselves. Consumer protection laws have developed over time and often reflect moral, political, economic and social values or trends. In times gone by, the number of products available for sale was much smaller, and it was possible to inspect a product before you purchased it. At a market stall, for example, you could check to see if the vegetables were fresh and the cloth was good.

These purchases were governed by contract law and the principle of **caveat emptor** (let the buyer beware). Industrialisation brought with it a greater range of goods and selling methods. An increase in competition caused some traders to resort to misleading and deceitful practices to maximise profits. The reliance on packaging has meant that many goods can no longer be closely inspected.

Consumer laws aim to protect consumers and make them aware of their rights. Consumers can fall prey to the unscrupulous business practices of some traders, and the law provides them with the possibility to get a remedy for problems that arise.

CONSUMERS AND CONTRACT LAW

Each time you purchase or lease goods or services you enter into a contract. In day-to-day transactions, these contracts are unwritten. However, written contracts are commonly used when people:

- make large purchases (for example, buying a car or a house)
- order goods or services to specification (for example, ordering blinds or carpets)
- enter into an ongoing relationship with a supplier (for example, through an insurance policy, a mobile phone plan or a gym membership).

Under the contract, you make the commitment to pay in exchange for the goods or services. Each contract you make has the following elements:

- **an offer** – One person makes a proposal to another person.
- **acceptance** – The other person accepts the offer.
- **consideration** – There is a benefit (something of value) that passes between the parties.
- **certainty of terms** – The terms of a contract must be clear and easily understood.

For a contract to exist, both parties must have the legal capacity and the intention to create legal relations. That is, both parties must intend that the contract will be legally binding and they must be able to freely agree. Persons who might not have a legal capacity are people with a cognitive disability or young people.

Australian Consumer Law

The Australian Consumer Law, which came into operation in 2011, applies nationally as a result of an agreement between the Commonwealth Government and the governments in each state and territory to enact uniform consumer protection laws. This means consumers have the same legal rights no matter where they live in Australia. The purpose of the Australian Consumer Law is to:

- promote and encourage fair trading practices and a competitive and fair market
- protect consumers
- regulate trade practices
- provide for codes of practice
- provide for the powers and functions of the director of Consumer Affairs Victoria, including powers to conciliate disputes and carry out investigations into alleged breaches of the law.
- promote uniformity with the consumer laws of other jurisdictions through the interpretation and application of the Australian Consumer Law in Victoria
- regulate certain businesses.

To enable this change in the law, the Commonwealth Parliament enacted the *Trade Practices Amendment (Australian Consumer Law) Acts (No. 1 and No. 2) 2010* (Cth). These Acts repealed the *Fair Trading Act 1974* (Cth) and embedded the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). At the same time, each state and territory passed laws, which adopted the Australian Consumer Law and repealed existing laws that would otherwise duplicate the new and revised provisions. To effect these changes, the Victorian Parliament passed the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic.) and the *Australian Consumer and Fair Trading Act 2012* (Vic.).



Figure 10.1

Each time you purchase goods you enter into a contract.

Unfair contract terms in standard form contracts

The Australian Consumer Law outlaws unfair terms in standard-form contracts. A **standard-form contract** is provided by the seller, with all the contract terms and conditions already printed before the sale is made. The seller will then cross out clauses that do not apply. There is little scope for the consumer to negotiate terms. Often the consumer has little choice other than to agree; particularly if they want the good or the service on offer.

Standard-form contracts are used in the supply of a range of goods or services; for example, mobile phone or Internet plans and car purchase or hire agreements. Standard-form contracts can be very lengthy and difficult to understand.

The Australian Consumer Law's unfair contract terms provisions protect the rights of **consumers** who enter into standard-form contracts to purchase goods or services, land or financial products for personal, domestic or household use. These provisions do not apply to business contracts, negotiated contracts, insurance policies and shipping contracts. A standard-form contract term will be considered unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract
- the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

An unfair contract term is unenforceable. Nonetheless, the contract itself can still be enforceable, particularly if the purpose of the contract can be fulfilled once the unfair term is removed.

Some examples of unfair terms in a consumer contract could be:

- a term that permits one party (but not the other) to vary the terms of the contract
- a term that permits one party (but not the other) to terminate the contract
- a term that penalises one party (but not the other) for a breach or termination of the contract
- a term that permits one party (but not the other) to renew or not renew the contract
- a term that limits one party's right to sue another party.

If a standard-form contract term is found to be unfair, the Federal Court has the power to make any orders it sees fit. In practice, if a term is found to be unfair, then the party attempting to enforce it will no longer be permitted to do so. If the term is or was already enforced, the court may grant remedies to return the party against whom the term was enforced to that party's original position. For example, this could involve awarding damages or ordering that the contract be fulfilled.

The **Australian Competition and Consumer Commission (ACCC)** and the **Australian Securities and Investments Commission (ASIC)** can also seek a declaration from the court that a consumer contract term is unfair.

EXTRACT

ACCC considers suing over unfair contracts

Greg Roberts, *The Sydney Morning Herald*, 15 March 2013

Gyms, travel agents and car hire companies have been put on notice that they face being sued over contracts that rip off consumers. The warning follows a review by the Australian Competition and Consumer Commission (ACCC) into unfair contracts offered by companies.

Industries targeted by the review were chosen due to a high number of complaints from consumers hiring cars, joining gyms or booking travel. The ACCC believed some contracts offered by such companies caused a significant imbalance to the detriment of consumers.

ACCC chairman Rod Sims said that in most cases, the businesses under review chose to make changes removing problematic terms from their standard-form contracts.

However, some had not cooperated with the ACCC during the review or chose not to change their standard-form contracts to address problematic terms.

'The ACCC is considering whether court action is warranted against businesses to deal with specific provisions still in use which it considers may operate unfairly,' Mr Sims said in a speech to the Consumer Congress ...



Figure 10.2

A high number of consumer complaints were from consumers joining gyms, hiring cars and booking travel.

ACCC v. ByteCard Pty Ltd FCA 2013

The ACCC launched legal action against a Canberra Internet provider for unfair terms in its contracts. This matter was brought to the ACCC's attention by the Australian Communications Consumer Action Network.

The Federal Court ruled that some terms in the company's standard contract were unfair to its customers and created an unnecessary imbalance between the parties. The unfair terms were not necessary to protect ByteCard and could be detrimental to the consumer.

The Federal Court decision rendered the unfair terms invalid. These unfair terms specified that:

- the company could vary the amount payable without giving the consumer the right to renegotiate or terminate the contract
- the company could terminate the agreement at any time and without reason
- the consumer could be required to indemnify the Internet company against any and all liability, loss, judgment or damage.

CASE STUDY

BELIEVE IT OR NOT!

The first phone bill Samuel Nicolopoulos received after getting his Apple iPhone gave him 'bill shock'. The 26-year-old said he would show the phone to friends, demonstrating its high-speed Internet capabilities. As a result, his first bill included \$800 for excess data. He said he knew little about his contract when he signed up for the phone, and had not been made aware of the data fees involved.

Consumer guarantees

There are several 'consumer guarantees' in the Australian Consumer Law which protect the interests of consumers when they enter into a sales contract regardless of whether the contract is written or verbal. Under previous laws, these consumer guarantees were known as implied conditions.

In most circumstances, and for the purpose of consumer guarantees, the Australian Consumer Law defines a **consumer** to be a **person (or business)** who purchases:

- goods or services under \$40 000
- goods or services over \$40 000 which are ordinarily acquired for personal or domestic purposes
- a vehicle of any value designed for transportation on public highways.

The person is not classed as a consumer if they use the items for the purposes of trade, commerce, production, repair or manufacture.

These guarantees apply to most commercial transactions including those conducted online and those involving second-hand goods, goods from factory outlets and leased or hired items. They do not apply to private sales or traditional auctions (as the auctioneer sells on behalf of a private seller). These consumer guarantees apply in addition to any manufacturer's warranty or extended warranty which may be provided with the goods. When consumers buy goods and services they have certain guaranteed rights. These are explained next.



Figure 10.3 Consumer guarantees apply to most commercial transactions.

Goods should be fit for the purpose

The Australian Consumer Law states that goods purchased must be **fit for their intended purpose**. In some cases the intended purpose of the item is obvious. A refrigerator's purpose is to keep food cold. If it cannot reasonably do so then it is not fit for its purpose and the consumer can claim a remedy.

If a consumer has a specific purpose in mind when buying a product then they should discuss this with the salesperson. In such circumstances, a supplier must guarantee that the goods sold will be appropriate to the consumer's needs, particularly if the consumer relies on the supplier's expertise and advice when deciding whether to purchase. For example, if a consumer wanted to buy a chainsaw to remove small trees from a suburban block, then the supplier must make sure the chainsaw sold can do the job. However, the consumer will have no claim if they use this same chainsaw in an unreasonable or abnormal way such as felling large trees in the forest. The supplier's guarantee does not apply if the consumer misuses the product.

Acceptable quality

The seller and the manufacturer of goods have an obligation to ensure that goods sold are of acceptable quality. This means that the goods should be:

- fit for their purpose and safe to use
- free of faults or defects for a reasonable time after purchase
- acceptable in appearance or finish.

When deciding whether goods are of acceptable quality the law considers:

- the type of goods purchased – are they heavy-duty, top-of-the-range, big-ticket items
- the price paid – expensive items should last longer than cheap ones
- the description on packages or labels or information given by the supplier at the time of sale
- all other relevant circumstances.

This does not apply if the purchaser is told about a defect or the defect can easily be seen before the sale. For example, if you purchased an electric kettle in a sealed box then you would expect it to be of acceptable quality according to the price you paid for it. If not, you could return it and ask for a refund or a replacement. If, however, you purchased the kettle at a reduced price because it was obviously scratched or clearly marked as damaged, then you do not have the same right to complain, because you were aware of the item's condition before purchase.

DID YOU KNOW?

- A **manufacturer's warranty** or guarantee promises that the goods are free of defect and is one way manufacturers show their willingness to comply with the law. Australian Consumer Law guarantees apply in addition to any manufacturer's warranty.
- An **extended warranty**, for which a consumer pays extra, must offer more than the rights provided by the consumer guarantees listed in the Australian Consumer Law. It is against the law for a seller to mislead or to pressure a consumer into buying this optional extra.

Sale by description or demonstration

There is an expectation that goods will match the description given or match any demonstration model shown before purchase. For example, a newly purchased electrical appliance should look and operate the same as the make and model described, displayed or demonstrated in-store or online. Goods must meet any additional promises (express warranties) a seller makes about a product. For example, if a manufacturer claims a wall hook can hold a frame of a certain weight then the product must be able to do as claimed.

Sale by sample

When an item is sold from a sample, it is expected that the goods supplied will correspond closely to the sample and be of acceptable quality. For example, it is common practice for a consumer to choose carpet from a book containing sample carpet squares. The carpet installed in the home should match the sample shown. If there is a substantial variation from the sample shown then the supplier must rectify the problem. The consumer should be given reasonable opportunity to compare the goods supplied with the original sample. Slight unavoidable variations are acceptable and often suppliers will warn consumers of the possibility. For example, individual characteristics such as natural markings of leather or small knots in wooden furniture may be reasonable variations in some circumstances.

Ownership and repair of the goods

The supplier must guarantee that they own the goods and can legally transfer the ownership rights to the consumer. The goods must be free from any hidden securities or debt. Manufacturers must also guarantee that they will provide reasonable access to spare parts and repair facilities should the item develop a defect.

Skill and care in the provision of services

Traders who supply a service to consumers must exercise appropriate care and skill. They must have an acceptable level of training and skill to complete the work and avoid doing damage or causing the consumer any loss. They must also complete the work in a reasonable time. For example, a tradesperson hired to lay concrete should have the knowledge and skill to do so in a safe manner, without causing damage to property or injury to persons. The finished product must be fit for the intended purpose, and the time taken to do the job should be reasonable and appropriate.

Non-compliance with consumer guarantees

If a consumer finds, within a reasonable time after delivery, that the product or service does not comply with any of the consumer guarantees (or other warranties), then the consumer may have a claim against the supplier or the manufacturer who are obliged to rectify the problem. Where there is a problem the consumer can ask for the goods to be repaired or replaced, or they can ask for a refund or compensation. The remedy provided will depend on the circumstances and whether the problem is a minor or major one.

If the supplier refuses to do so, the consumer can contact Consumer Affairs Victoria for advice. If the supplier is a national corporation, the Australian Competition and Consumer Commission (ACCC) will give consumers advice on how to pursue the complaint. In more complex cases, these consumer organisations may choose to take action on behalf of consumers.

Exemption clauses

When a purchaser signs a written contract, the contract often contains some clauses explaining situations when the seller is not liable under the contract. These are referred to as **exemption clauses**. Exemption clauses cannot apply to consumer guarantees as it is mandatory for suppliers to offer and honour these guarantees. It is unlawful for suppliers or manufacturers to try to remove or change the consumer guarantees. Any statement in a contract or any in-store sign that tries to limit or negate these consumer guarantees is illegal.

LEARNING ACTIVITY 10.1

Consumers and contract law

- 1 Look back at 'ACCC considers suing over unfair contracts' and *ACCC v. ByteCard Pty Ltd.*
 - a What is a standard-form contract?
 - b Why can a consumer be at a disadvantage when dealing with a supplier who uses a standard-form contract?
 - c Give three examples of industries where standard-form contracts are in common use.
 - d Provide two specific examples of standard-form contract terms that would be considered unfair.
 - e What is the role of the ACCC in dealing with a complaint about unfair contract terms? Refer to the case study to illustrate your answer.
- 2 What does the term 'caveat emptor' mean?
- 3 Select three consumer guarantees and explain how they would be relevant when buying a specific product; for example, a bicycle or a clock.
- 4 What is an exemption clause? Can a consumer guarantee be subject to an exemption clause?
- 5 Read the following case study 'Faulty toaster' and make a list of the consumer guarantees that are breached with this transaction.

Faulty toaster

Jayne purchased a toaster from a local electrical goods shop. It was an expensive toaster. She realised she could get something cheaper but she liked the shape and colour. She was assured it was excellent quality and worth the money. The salesperson said he had one in the box, not opened. When she got it home she found that the colour of the toaster was not like the one she had looked at. The enamel was motley on one side, with areas of light and dark. When she went to use it she had trouble getting it to toast the bread to an adequate standard. Even on the highest setting the bread came out only just warm.

The second time Jayne used the toaster, sparks came out of the top of it. She was very worried that she might electrocute herself.

CASE STUDY

UNFAIR TRADING PRACTICES

In relation to unfair trading practices, the Australian Consumer Law mirrors many of the provisions of the now repealed *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1999* (Vic.). Unfair trading practices which are deemed illegal include:

- engaging in **unconscionable conduct** where a person deliberately takes advantage of another person; for example, deliberately taking advantage of a person with a disability when negotiating a contract (disability can include drunkenness, old age, emotional infatuation, illiteracy, economic necessity or financial overcommitment)
- using misleading or deceptive conduct, including false advertising or promises that something will happen in the future
- falsely representing goods as new or falsely stating the country of origin

- falsely representing or exaggerating the performance characteristics, uses or benefits of goods or services
- falsely representing the price of goods or services
- advertising goods using false customer testimonials
- advertising goods with false statements regarding sponsorship, approval or affiliation
- using bait advertising by offering goods at a low price to entice people to buy when the trader does not have a reasonable supply or has no intention of selling the item at that price
- offering gifts, prizes or rebates to obtain a sale when the trader does not intend to give the gifts or prizes
- accepting payment with no intention of supplying the goods or service
- omitting to tell the consumer important and relevant facts about the goods or service during a sale
- supplying goods that do not comply with safety standards
- engaging in referral selling or pyramid selling schemes
- demanding payment for unsolicited goods or services
- using harassment or coercion to force another to purchase goods or services.

Where gifts, rebates or prizes are offered and where payment is made in advance, the law now states that the goods or service must be provided within the specified time or within a reasonable time when no time frame is provided.

DID YOU KNOW?

- Where a product or a service is advertised using two different prices (for example, an in-store price and a catalogue price) the product must be sold at the lowest price. There is provision for an item to be withdrawn from sale until an honest mistake in advertising can be corrected.
- It is illegal for a business to send credit cards or debit cards to a person without their consent.
- Prices for goods and services should include all compulsory fees, charges and taxes.

Unconscionable conduct

Unconscionable conduct is unfair or unreasonable conduct in business transactions that goes against good conscience. This can occur in transactions between businesses or in transactions between businesses and consumers.

When deciding if conduct is unconscionable, courts can consider, among other things:

- the relative bargaining strengths of the business and the consumer
- whether the business required the consumer to comply with conditions that were not reasonably necessary to protect the legitimate interests of the business
- whether the consumer understood any documentation that may have been used
- whether the business used undue influence, pressure or unfair tactics
- the price and terms on which the consumer could have acquired the same or equivalent goods elsewhere.

CONSUMER RIGHTS

If consumers believe they are a victim of unfair or illegal sales practices, they can initially discuss their complaint with Consumer Affairs Victoria. Consumer Affairs will advise the consumer on the best way to handle the issue and may refer the consumer to other regulatory bodies. Consumer Affairs

will encourage the consumer to approach the trader to resolve the matter. In some cases Consumer Affairs may hold a conciliation session with the parties to the dispute to try to reach a settlement. If this is not successful, the matter can be taken to the Victorian Civil and Administrative Tribunal (VCAT) Civil Claims List.

Various sales practices are regulated by law, providing consumers with rights when dealing with sellers.

Unsolicited sales practices and supply

Unsolicited sales cover consumer transactions where initial contact is uninvited and occurs away from a seller's normal business premises and include door-to-door sales, telemarketing (telephone sales) or sales from a temporary stand in shopping centres.

Door-to-door sales

Strict rules apply to door-to-door selling because the supplier initiates contact with consumers who are not necessarily looking to buy. The rules are as follows:

- Generally, door-to-door sales visits are limited to 9 am and 6 pm on weekdays and between 9 am and 5 pm on Saturdays. They are not allowed on Sundays and public holidays.
- Sellers must clearly identify themselves, explain why they are making contact and provide the address of their normal place of business.
- A seller must leave a consumer's premises (or hang up the phone) on request and not make contact again for a further 30 days.
- The consumer must receive a written copy of any agreement immediately (if made in person) or within five business days (if made by phone) with a notice of their rights to cancel the agreement.
- The consumer has an automatic right to terminate the agreement within a 10-day cooling-off period for purchases over \$100 during which time the consumer should not receive or pay for the goods and services.

The unsolicited selling provisions do not apply if the consumer invites the trader to their home or if the consumer initiates contact by phone. A further termination period of three or six months applies if a seller breaches one or more of the following rules.

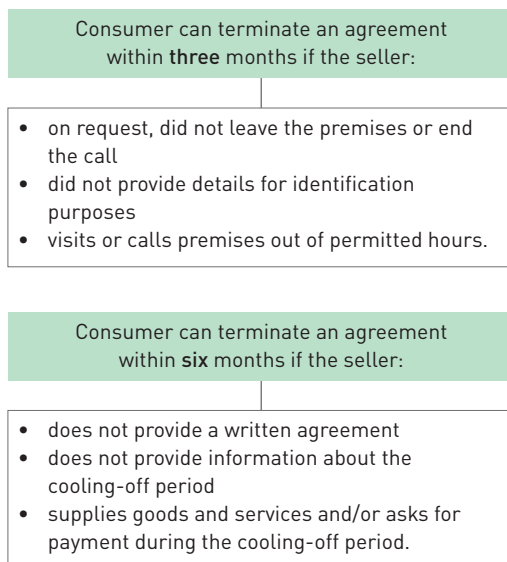


Figure 10.4 Door-to-door salesperson

DID YOU KNOW?

The Federal Court fined AGL (South Australia) and CPM Australia \$60 000 because their door-to-door salesperson did not leave a consumer's property despite seeing a sign that read 'DO NOT KNOCK Unsolicited door-to-door selling not welcome here'. The salesperson ignored the sign on the front door and attempted to engage the occupier in negotiations for the supply of energy.

Telemarketing

Generally, the same rules apply to telemarketing sales as for door-to-door sales but there are a few differences. One difference is the hours of contact. Calls are restricted to between the hours of 9 am and 8 pm on weekdays and between 9 am and 5 pm on weekends. No calls can be made on public holidays. The telemarketer is also obliged to tell the consumer on request how they accessed the consumer's telephone number. Telemarketers can supply products during a cooling-off period but cannot accept payment during this time.

Unsolicited supply of goods or services

If a supplier sends or gives a consumer goods or services that they did not request then the consumer is under no obligation to pay for it. The consumer can keep the item if the supplier does not recover it within three months. Any document sent with the goods must inform the consumer that they do not need to pay for the items.

Mail order/online sales

All Australian Consumer Law guarantees apply to online or mail order sales. There is no obligation for the seller to offer a cooling-off period. TV shopping channels also fall into this category.

Lay-by

A lay-by is an agreement to pay for goods in instalments. No interest is charged on the money owed. The consumer does not take the goods until the item is paid for in full. The agreement must be in writing and give details about the trader, the goods, the deposit, the amount owing and any terms and conditions including cancellation fees. Either party can cancel the agreement at any time. A supplier can do so if the goods are no longer available, the trader is going out of business or the consumer has breached the agreement in some way. If the consumer terminates the agreement, a reasonable termination charge may apply. The consumer is entitled to a refund of monies paid less the termination fee.

Contracts

Contracts must be written in plain English. The terms in a contract must be fair. They must be written in good faith where parties are dealing openly and fairly. One party cannot deliberately disadvantage the other.

Credit

Consumers can make an agreement to borrow money or to buy items on credit where they arrange to repay the seller over time with interest. In these cases the consumer enters a credit contract. The contract must state the credit provider's details, the amount being borrowed, the annual percentage interest rate, how interest is calculated and charged, any default rate of interest on non-payment and how this is calculated, credit fees or other enforceable charges, information on how to change the contract, information about commission charges, if mortgage guarantee or credit-related insurance applies and the frequency of account statements.

Once the agreement is signed, the consumer should be given a copy and a statement outlining their rights and responsibilities under the contract.

Receipts

The seller must provide the consumer with proof of purchase or a receipt for all items over \$75. Receipts for items under \$75 must be given on request. Itemised bills must also be given on request.

Refunds

A consumer has a right to a refund when goods or services have a major defect, do not do what they are expected to do, do not match a sample shown or if they came with an explicit promise of a refund (for example, goods bought on trial). These rules also apply to items purchased as gifts.

A refund is not applicable if:

- the consumer changes their mind or makes a mistake in selection
- the defect is minor and the item can be repaired or replaced within a reasonable time
- the consumer knew about a fault before purchase
- the consumer damages the goods with inappropriate use
- the person cannot provide proof of purchase (this does not need to be a receipt; it can be something such as a credit card statement).

Refund signs

Generally, signs that deny consumers a refund are illegal in Australia.



Figure 10.5

The sign on the left is illegal. The sign on the right is legal.

Bag searches

Stores may display signs that make a bag search a condition of entry as a way of deterring thieves. Most customers comply with requests to look inside bags. If a store reasonably believes a person has stolen goods then the store may choose to detain the person and ask police to attend to do a search.

LEARNING ACTIVITY 10.2

Unfair trading practices and consumer rights

- 1 What is unconscionable conduct?
- 2 Explain two unfair trading practices.
- 3 Design a fact sheet, flyer or brochure that outlines consumer rights.
- 4 If you were given the job of a door-to-door salesperson, what would you need to know before you start?

- 5 Read the case study 'Refund for faulty goods' and answer the questions.
 - a Why does Christina want a refund?
 - b When are consumers entitled to a refund?
 - c Explain how the consumer guarantees of 'fit for the purpose' and 'acceptable quality' apply in this instance.
 - d What do you think Christina should have been told before purchasing the goods if the factory outlet was to avoid being liable to pay a refund?
 - e If the trousers had not shrunk, but Christina had found a small fault in the fabric, do you think she would still be entitled to a refund? Explain.
 - f If Christina had bought trousers through a mail order catalogue, and then found when they arrived that they were different to the picture in the catalogue, do you think she would be entitled to a refund? Explain.

CASE STUDY

Refund for faulty goods

Christina and Denise went to a direct factory outlet of a well-known manufacturer. Christina found white cotton trousers that had been reduced to \$25 from \$49. They were labelled as seconds but, on careful inspection, Christina could not find any fault with them. Christina wore the trousers a couple of times and then washed them carefully according to the instructions. They shrank four sizes and were no longer wearable. She was upset that the trousers were now useless to her. She took it up with the factory outlet. They said they did not offer exchanges or refunds on seconds.

Even though the trousers were seconds, the consumer guarantees still apply. Christina was entitled to ask for a refund because she could not have known that the trousers would shrink so much. Labelling as seconds is not sufficient to warn customers of hidden faults. The trousers were clearly no longer fit for the purpose they were purchased for because they could not be worn and were not of acceptable quality according to price. Even though they were cheaper, they would still be expected to last more than two wears.

- 6 Read the following examples. For each case, state whether the behaviour is contrary to the provisions in the Australian Consumer Law. Give reasons for your answer.
 - a A farmer was in the middle of a heavy bout of drinking when a real estate agent convinced him to sell his farm at 30 per cent below its true value.
 - b A car rental company uses an online booking system to advertise its hire cars at a cost of \$35 per day. When customers collect a car, they are charged an additional \$12 per day in other mandatory fees, which were not mentioned on the website.
 - c A supermarket advertises apples under large signs which state: 'Help Australian farmers – Buy Australian produce – Advance Australia Fair'. On closer inspection each apple bears a small 'Produce of New Zealand' label.
 - d A woman takes her car in for a regular service. On pick-up she is told her windscreen was replaced because it was 'chipped and pitted'. The new screen cost \$400.
 - e A hair replacement company told a client that it could regrow the client's hair when in fact the client was given a hairpiece, which was glued to the client's scalp.
- 7 Read the case study 'Wrecked recliner' and answer the questions.
 - a Explain whether this woman has any redress under the Australian Consumer Law. Refer to the consumer guarantees of 'acceptable quality' and 'fit for purpose' in your answer.

- b What facts in the case show that the woman did not cause the defect by using the goods in an unreasonable or abnormal way?
- c Is the expiration of the manufacturer's warranty relevant in this case? Explain.
- d What advice would you give people about purchasing extended warranties?
- e What organisation can the woman contact to get advice about how to handle her complaint?
- f Which legal body will most likely hear and resolve this complaint?

Wrecked recliner

A woman bought a lounge suite for \$3000. After 10 months she discovered that one of the chairs did not recline. The chair was hardly used. She lived on her own and often sat on the couch to watch TV. She did not test the chair's reclining function on delivery. She informed the retailer, who said that he would 'look into it'. Several months passed. When she again made contact with the retailer, he said 'it was out of his hands' and gave her the manufacturer's contact details.

The manufacturer was reluctant to deal with her complaint because the 12-month manufacturer's warranty had expired. He said it could cost her up to \$300 for labour costs and parts. He then offered to sell her an extended warranty for \$150.

CASE STUDY

Consumers and the law of negligence

The law of negligence protects consumers who are injured as a result of hidden defects and other faults. Before the law of negligence existed, consumers had no protection if goods were faulty due to poor manufacturing practices.

Manufacturers are driven by the goal of making money for themselves or their shareholders. They will therefore make goods in the most cost-effective way, and some may compromise quality and safety for the sake of profits. However, since the development of the law of negligence (established in Australia in 1936), manufacturers have been more careful with the products they supply to consumers. If they are not, they risk being sued to compensate consumers who have been injured as a result of their lack of care or unsafe practices.

The law of negligence has led to two main advantages for consumers:

- The manufacturer is likely to take more care in manufacturing the goods.
- Consumers are protected if mistakes are made and they are injured as a result.

For example, if someone buys a toy, they expect it to be safe. If someone is injured while playing with the toy, and the toy is faulty or badly designed, the injured person can sue the manufacturer for negligence, with the aim of being paid compensation for the injury caused.

For a case of negligence to be successful in the courts, it is necessary to prove the following elements:

- The person who was negligent **owed a duty of care** to the person injured.
- The duty of care was **breached**.
- The breach of the duty of care caused loss or damage (**causation**).
- **Harm or loss** resulted from the breach of duty of care.

If it can be proved that the person was owed a duty of care, and that the duty of care was breached and harm was caused, the wronged person can claim compensation (**damages**).

Negligence can be claimed for either poorly manufactured goods or for services that are negligently delivered and cause loss or harm as a result; for example, a doctor could be sued for negligence if

he or she is negligent in the type or level of medical care provided. **It might not be negligence if a consumer elects to participate in a risky recreational activity** like white-water rafting or bungee jumping. The recreational service provider may ask the consumer to sign a waiver, which means the consumer accepts responsibility for any reasonable injury sustained as a result of their participation. However, the waiver is not legal if the operator is grossly negligent or makes a false statement in relation to the waiver.

CASE STUDY

Salmonella poisoning

An 11-year-old girl sued a fast-food outlet for negligence. She sued through her father. She claimed she became brain-damaged and crippled from salmonella poisoning after eating at the restaurant. Evidence was produced at the trial of disturbing and quite unsettling practices in the kitchen of the restaurant. The fast-food outlet is appealing the court's decision that they should pay the girl \$8 million in damages and legal costs.

LEARNING ACTIVITY 10.3

Negligence

- 1 Look back at the case study 'Salmonella poisoning'. How does the law of negligence help to protect consumers? Refer to this case study in your answer.
- 2 What has to be proved for a successful negligence case?
- 3 Read the case studies 'Facial injuries caused by tummy machine' and 'Boy almost loses finger'. For each case study, explain the legal arguments you would use if you had been acting for the injured party.

CASE STUDY

Facial injuries caused by tummy machine

Ms Penny Kyriakidis was given a stomach trimmer for her birthday. She had used it for two weeks when a plastic clip gave way and a tube from the machine catapulted into her face causing serious injury. She could not speak or eat properly for months. The distributor of the stomach trimmer maintained that the machine had not been used properly. Kyriakidis was awarded an out-of-court settlement of \$10 000.

CASE STUDY

Boy almost loses finger

When Andrew Sicari was eight, he injured his hand on the serrated edge of his wardrobe doorknob. He needed 14 stitches. His father said the handles cost him a fortune and were supposed to be top of the range. The lawyer for Andrew claimed he had three other clients who had suffered similar injuries from the same handles. Andrew was awarded an out-of-court settlement of \$16 500.

- 4 Read the extract 'Court awards little Zac Ward a record \$6.44 million payout for injuries sustained during birth' and answer the questions.
 - a Does this case involve the provision of a product or a service? Explain.
 - b What happened to Simone Ward when she first attended the hospital?

- c What action was taken by the hospital on her return?
- d What occurred to Zac and in what way did Mrs Ward claim that the hospital was negligent?
- e Do you agree with the High Court decision? Explain.

EXTRACT

Court awards little Zac Ward a record \$6.44 million payout for injuries sustained during birth

Sophie Elsworth and Alison Sandy, *The Courier-Mail*, 8 April 2011

A landmark \$6.44 million payout is due to be awarded today to a six-year-old boy who allegedly suffered a serious brain injury during birth and was later diagnosed with cerebral palsy, court documents have revealed.

The compensation follows a four-year legal battle and will be the largest sum paid out for such a case in Queensland, surpassing the \$5.502 million awarded to Toowoomba boy Christopher Hills in 2006 after he also developed the disability due to complications during his birth.

Simone and Steven Ward and their son Zac, aged 6, lodged the claim in Brisbane's Supreme Court in 2007 for personal injuries and consequential loss as a result of alleged negligence by Dr Robert Watson and HCoA Operations (Australia) Pty Ltd.

Zac requires assistance to feed himself, is unable to walk or stand unaided and suffers other health complications, court documents state.

The Ward family, from Hendra on Brisbane's northside, proceeded with legal action after what are claimed to have been complications during his birth and claim their son was born in 'poor condition' and was 'pale and flaccid at birth'.

Zac was born on 15 June 2004, at North West Private Hospital in Everton Park after Mrs Ward had an emergency, lower-section, caesarean section, according to court documents.

The documents state Mrs Ward had visited the hospital earlier that day after having high blood pressure but was discharged that afternoon.



Figure 10.6
Steven and Simone Ward received a landmark \$6.44 million payout for their son Zac, 6, who allegedly suffered a serious brain injury during birth.

It was claimed she was induced and told to return to the hospital if her condition worsened, which she did at 8 o'clock that night.

The documents state 15 minutes after she arrived at the hospital Dr Watson examined Mrs Ward and determined he would perform an emergency, lower caesarean section. Zac was born 28 minutes later and had suffered a serious brain injury due to lack of oxygen prior to his delivery.

He allegedly then developed seizures about 12 hours after birth and was subsequently diagnosed with severe, spastic, quadriplegic cerebral palsy.

The documents state, 'had a foetal compromise been detected, appropriate obstetric management could have been undertaken such that the third plaintiff would have been delivered without sustaining the effects of hypoxic injury to his brain'. The Wards claim Zac's brain injuries were caused by negligence by the doctor and the hospital.

The family, represented by Shine Lawyers, reached an agreement with the defendants and Zac's parents are also expected to receive an undisclosed sum. The compensation is expected to be sanctioned in Brisbane's Supreme Court today.

Since Zac's birth Mrs Ward experiences frequent crying spells, is socially withdrawn and suffers from intrusive negative thoughts, according to the documents. In addition, Mr Ward is stated to suffer from reactive anxiety and depression.

Christopher Hills received a \$5.3 million payout from the Queensland Government after he developed cerebral palsy because of birth complications during his caesarean at Toowoomba Base Hospital.

His damages payout has been put into a trust fund until he is 18.

METHODS AND INSTITUTIONS FOR RESOLVING CONSUMER DISPUTES

The ACCC, ASIC and Consumer Affairs Victoria

The Australian Competition and Consumer Commission (ACCC) is the national regulatory authority which deals with most consumer complaints. Complaints involving financial products and services are investigated by the Australian Securities and Investments Commission (ASIC). Consumer Affairs Victoria is a state regulatory body. It works in cooperation with the ACCC and ASIC to protect and promote the interests of Victorian consumers. Some of the roles that Consumer Affairs Victoria undertakes include:

- reviewing and advising the Victorian Government on consumer legislation and industry codes
- advising and educating consumers on their rights and responsibilities and changes to the law
- conciliating disputes between consumers and traders
- enforcing and ensuring compliance with consumer laws.

Services provided by Consumer Affairs Victoria

Consumer Affairs Victoria provides a range of consumer services, including:

- several offices at Justice Service Centres across Victoria
- information and advice on issues such as:
 - Indigenous consumer affairs

- refunds
- scams
- mobile phones
- door-to-door sales
- credit and debt
- Internet shopping
- assistance to conciliate disputes between consumers and business owners or landlords
- community education talks and events
- brochures explaining consumers' rights.

Consumer Affairs Victoria dispute resolution

Consumer Affairs Victoria will attempt to conciliate a dispute but cannot compel a trader to participate in the conciliation process or to resolve a dispute. Complainants also have the option of seeking civil remedies in the Victorian Civil and Administrative Tribunal (VCAT) or the courts, and complainants will be informed of this.

Complaints can be made in writing or online on the Consumer Affairs Victoria website. In some circumstances a complaint will be accepted over the telephone; for example, when urgent assistance is required. Consumer Affairs may refer complaints to the ACCC or ASIC.

Victorian Civil and Administrative Tribunal

VCAT will hear disputes between consumers and traders. There is no limit on the value of the goods or services in dispute. A person may file an application in VCAT's Civil Claims List. VCAT will initially try to mediate the case, but if an agreement is not reached, both sides will be asked to present their evidence and then a tribunal member will decide the case on the same day. Parties will be expected to present their own case, particularly if the dispute involves a claim for less than \$10 000.

Victorian Ombudsman and Industry Ombudsman

The Victorian Ombudsman is a constitutional independent officer of the Victorian Parliament. The office was established under the *Ombudsman Act 1973* (Vic.). The ombudsman can assist consumers if they have paid for goods or services from a government body, such as a local council.

Specific industries may also have an ombudsman to assist with consumer complaints. Two examples are the Victorian Energy and Water Ombudsman and the Telecommunications Industry Ombudsman.

Lawyers

Lawyers can give consumers advice about how to gain compensation or the return of money owed. A matter can be taken to a court or tribunal, or a lawyer can negotiate an out-of-court settlement. Lawyers will often work on a 'no win, no fee' basis. In such situations, the lawyers will only receive payment for their services if they win the case.

Courts

A consumer dispute can be taken through the court system for final resolution. In its civil jurisdiction, the Magistrates' Court of Victoria hears and determines disputes arising from claims for damages,

debt or other monetary demands. The Magistrates' Court can determine most disputes over money or property up to the value of \$100 000; in certain circumstances the court can also hear cases with an unlimited value.

Larger civil claims can be taken to the County Court or the Supreme Court. If the dispute relates to a matter that comes under federal jurisdiction, it can be taken to the Federal Court.

LEARNING ACTIVITY 10.4

Methods and institutions for resolution of disputes

- 1 What is the role of Consumer Affairs Victoria and VCAT's Civil Claims List in resolving complaints between traders and consumers?
- 2 Read the case study 'Ab-Fab Machine is not so absolutely fabulous'. Imagine that Maria comes to you for advice. Write a short report on what you would advise her. In your report you are asked to:
 - compare her case with the list of unfair trading practices outlawed by the Australian Consumer Law
 - decide if the company has engaged in unfair trading and explain why
 - explain what Maria can do to get her money back and help to ensure that this company does not continue to sell these devices in the future.

CASE STUDY

Ab-Fab Machine is not so absolutely fabulous

Maria received a phone call one Sunday morning from a telemarketing company called Phone Sales Pty Ltd. She was asked if she was interested in buying an electronic muscle-stimulating device called the Ab-Fab Machine. She was told an independent study proved that just 20 minutes of use each day was equivalent to 500 sit-ups and that she would lose four kilograms in four weeks. If she ordered that day she would receive a bottle of tanning lotion as a free gift.

She agreed to purchase the machine for \$100 reduced from \$200. The Ab-Fab Machine arrived in the mail the next week but the lotion was not included. Maria used the product as per instructions but saw no flattening of the stomach and no reduction in weight. One day she got a small electric shock from the battery recharger and did not use the product again.

When she mentioned this to a friend, they told her it was a scam and that they had purchased the same machine from the same company for \$100 but were not told of any discount. This made Maria angry. She pursued the matter with the company but they maintained the goods were supplied as ordered, the battery recharger was safe when delivered and the free gift was offered on an 'only while stocks last' basis. They refused to give her money back.

CLASS ACTIONS

In Australia, **class actions** (or **group proceedings** as they are formally known) can be commenced by one person making a claim in circumstances where seven or more people have claims which arise out of the same or related circumstances.

Class actions allow the victims of mass wrongs to protect their rights as consumers in the most cost-effective way. If a group of people have been similarly injured by the same individual or group,

they can join together to bring a civil action. In this way they can support each other and share the cost. It is also a more efficient way of dealing with a number of claims, saving court time and the time of court personnel. Class actions enable people to pursue civil actions that they may not otherwise have been able to afford had they pursued individual cases.

The person who commences a class action is required to describe the class of people who are being represented. Once the class is described, every person in that class is assumed to be part of the class unless they decide to 'opt out' of the action by filing a notice with the court in a specified form. The representative applicant (also known as the lead plaintiff) does not need the consent of the class members and does not even need to know who they are or where they live. In the United States, people who are part of the 'class' have to opt in by making a claim.

Australia's first successful group proceeding occurred in 1995 when a firm of solicitors, Slater & Gordon, represented more than 1000 people who had suffered salmonella poisoning as a result of eating contaminated peanut butter.

Class actions related to consumer complaints will usually involve the tort of negligence or contract law. Some class actions will have resulted from:

- manufacture and sale of defective products such as breast implants, heart pacemakers, knee implants, IUDs and travel sickness pills
- misleading and deceptive conduct through the sale of faulty home alarms to homeowners
- the negligent construction and operation of the Melbourne Aquarium, which caused an outbreak of legionnaires' disease
- outbreaks of mass food poisoning associated with restaurants, pizza houses and hotels
- breaches of credit legislation by major banks and finance companies.



Figure 10.7

Maurice Blackburn
Lawyers handle class
actions.

LEARNING ACTIVITY 10.5

Class actions

- 1 What are class actions? How can they help to protect consumers?
- 2 Name two types of civil law that may be relevant to class actions.
- 3 Read the case study 'Legionnaires' disease at the Melbourne Aquarium' and explain how the tort of negligence relates to the case.

Legionnaires' disease at the Melbourne Aquarium – negligence

More than 144 people suffered legionnaires' disease as a result of their exposure to *Legionella* bacteria while attending the Melbourne Aquarium between 8 and 27 April 2000. This disease is serious and caused the death of several people and severe injuries to many others.

CASE STUDY

A class action, which was issued in the Supreme Court of Victoria, made allegations of negligence against the Melbourne Aquarium, the construction company, mechanical engineers, an air-conditioning company and the water treatment company in relation to the maintenance, cleaning, testing or repair of the cooling towers and the pumps serving the cooling towers at the Melbourne Aquarium.

The class action was issued on behalf of the lead plaintiff. It was found that the source of the disease was from the cooling towers at the aquarium. Settlement was reached in February 2004. Under the settlement, each claimant was assessed for injury suffered. Compensation was paid in June and July 2004.

- 4 Read the case studies 'State-of-the-art alarm systems' and 'Overcharging by banks' and explain how contract law applies in each case.

CASE STUDY

State-of-the-art alarm systems – unfair trading practices

FAI Home Security and its linked credit provider FAI Finance Corporation sold more than 100 000 home alarms to consumers throughout Australia. Consumers were told that the alarms were 'state-of-the-art'. The company used highly developed sales techniques and focused on working class areas. They sold low-quality alarms at high prices.

In 1999, a class action was issued in the Federal Court against FAI Home Security and FAI Finance Corporation on behalf of consumers who bought the home alarm relying on the representations made by the sales staff at the time of purchase. The class action alleged that various representations made during the sale of the Home Security Guard I and II alarm systems were misleading and deceptive.

The Federal Court approved the settlement of the class action. Purchasers received a refund of most of the purchase price of the alarm systems plus all legal costs. The class action was a cost-effective way to ensure that a large number of consumers with relatively small claims could successfully obtain damages.

CASE STUDY

Overcharging by banks – breach of contract

Australia's banks face the biggest class action in corporate history for overcharging their millions of customers about \$5 billion in exception fees. Exception fees include:

- fees when customers overdraw their accounts or exceed their overdraft limit
- dishonour fees when cheques bounce
- late payment fees for credit cards or loan accounts
- fees for overdrawing on a credit card.

Until recently, some banks charged up to \$60 for exception fees when the true cost might only have been a few dollars at most on each transaction. Banks have made billions from these unfair charges.

The central legal argument is that one party to a contract, when it seeks damages from the other party for breaking a contractual term such as a late payment, can only recover a reasonable pre-estimate of its actual costs.

The claims against the banks can go back six years and will involve repayment of those fees plus interest from the date of the deduction.

The class action will be funded by IMF (Australia) Ltd, on a 'no win, no charge' basis; that is, IMF covers all of the costs and only gets paid if the cases are successful. IMF also meets the banks' costs if the cases are unsuccessful. There is no cost to the customer unless money is successfully recovered from the banks.

On Monday 5 December 2011, the Federal Court of Australia found in favour of ANZ account holders who were charged late credit card fees. Proceedings continue against other banks.

- 5 Explain why some lawyers offer their services, in civil law cases, on a 'no win, no fee' basis. How might this benefit consumers?

CAPACITY OF THE LEGAL SYSTEM TO RESPOND TO DEMANDS FOR CHANGE

How consumer laws have changed over time

Consumer laws have changed over time. Under the principle of *caveat emptor* (let the buyer beware), people were expected to check goods for defects before purchase. Consumer transactions were typically between local producers and buyers. However, with industrialisation, mass production and packaging, the courts, and then parliament, saw the need for greater consumer protection because consumers were no longer able to check goods before purchase and producers were no longer local traders.

Two landmark cases made manufacturers liable for unsafe products. *Donoghue v. Stevenson* (1932) in the United Kingdom and *Grant v. Australian Knitting Mills* (1936) in Australia established the tort of negligence to cover faulty consumer products. However, it was not until the 1950s and 1960s, following the turbulent eras of the Great Depression and World War II, that the consumer movement gained traction.

In 1960, the Australian Consumer Association was established. Its regular publication, entitled *Choice*, often featured product comparisons and articles exposing unfair practices or unsafe products. Similar consumer organisations were springing up worldwide, forcing governments to take notice. Towards the end of this decade, the Commonwealth and state governments began to incorporate consumer protection in their policy statements. Cabinet ministers were appointed to oversee the enactment of consumer affairs legislation and related regulatory bodies.

The *Trade Practices Act 1974* (Cth) had a dramatic impact on consumer transactions in Australia. For the first time, national consumer laws outlawed misleading and deceptive conduct and required goods to be fit for their purpose and safe when purchased. In addition, the Trade Practices Commission was established to administer and enforce the *Trade Practices Act 1974*. In 1995, this role was given to the Australian Competition and Consumer Commission (ACCC), an independent statutory authority.

In 1996, Australia adopted a National Competition Policy, which aimed to remove restricted competition in the marketplace so that increased competition would improve consumer choice and drive down prices. In an effort to better regulate a more competitive market, the *Trade Practices Act 1974* was extended to cover professional services, small businesses and public utilities rather than just incorporated companies.

In 2001, changes were made to the *Trade Practices Act 1974* to strengthen its provisions and enhance the role of the ACCC. Penalties for breaches of the Act were raised to a maximum of \$1.1 million for corporations and \$220 000 for individuals. Courts were also given power to make publicity orders, which require a business to run media advertisements that explain their unfair business practices and the penalty they received. The ACCC was also given the power to take class actions, particularly in anti-competition cases, and to intervene in cases of public interest.

In an effort to grapple with the ever-increasing number of telemarketing calls directed at private telephone numbers, the federal government passed the *Do Not Call Register Act 2006* (Cth). This Act outlined rules for telemarketing calls and introduced the Do Not Call Register. A consumer can list their telephone number on the register in order to stop some (not all) telemarketers from calling their number.

In Victoria, the *Fair Trading Act 1999* (Vic.) was the primary consumer protection legislation. It has since been repealed and its provisions are now reflected in the Australian Consumer Law.

Consumer Affairs Victoria, a business unit of the Department of Justice, was established as Victoria's main consumer affairs regulator and it has maintained this role under the current Australian Consumer Law.

In 2001, a reference panel consisting of consumer, industry, academic and legal representatives made a number of recommendations to strengthen the provisions of the *Fair Trading Act*. As a result, there were major changes to this Act, which were included in the *Fair Trading (Amendment) Act 2003* (Vic.). These changes included doubling the penalties for offences under the Act, plain English to be used in consumer contracts, door-to-door sales and telemarketing sales were improved and a range of unfair business practices such as misleading and deceptive conduct and unconscionable conduct were prohibited.

In 2004, Consumer Affairs Victoria established the Unfair Contract Terms Taskforce, which works with different industries to check that the industry's consumer contracts did not contain unfair terms. Since then Consumer Affairs has worked with the mobile phone and vehicle rental companies, fitness centres and carpet and curtain suppliers to ensure their standard-form contracts comply with current consumer laws.

Some of the provisions in the Victorian *Fair Trading Act 1999* mirrored those in the *Trade Practices Act 1974*. This created a level of confusion for consumers and traders as Commonwealth law applied in some situations while different state and territory laws applied in others.

The Victorian ***Fair Trading Act 1999* (Vic.) was repealed on 1 July 2012 by S233 of the Australian Consumer Law and Fair Trading Act 2012 (Vic.)**. This Act brought in the application of the **Australian Consumer Law**. It also repealed a range of Acts of states and territories such as the *Fair Trading Act 1987* (NSW).

Shaping of current laws

In 2008, the Productivity Commission reported on its inquiry into Australia's consumer protection framework. It recommended the creation of a national, uniform consumer law which would improve the national economy by reducing complexity and duplication for both consumers and businesses. Reforming consumer protection laws should, according to the Productivity Commission, save Australians up to \$4.5 billion a year. In 2009, the Council of Australian Governments made an intergovernmental **agreement to create uniform Australian consumer law** and their agreement came to fruition with the passing of the *Trade Practices Amendment (Australian Consumer Law) Acts 2010 (No. 1 and No. 2)* (Cth). These Acts repealed the *Fair Trading Act 1974* (Cth) and transferred its amended provisions to the *Competition and Consumer Act 2010* (Cth). State and territory parliaments passed

reciprocal legislation adopting the provisions of the Australian Consumer Law, which came into effect in January 2011. The ACCC administers the Australian Consumer Law contained in the *Competition and Consumer Acts 2010* (Cth).

Before the commencement of the Australian Consumer Law in 2011, both the Commonwealth Parliament and each of the state and territory parliaments passed laws to regulate consumer transactions; often there was overlap and similarities between these laws. The uniform Australian Consumer Law replaced over 20 different Acts of parliament, making the law simpler and easier to enforce.

The Australian Consumer Law provides:

- a single, **national consumer law** for Australia based on the laws contained in the *Trade Practices Act 1974* and draws on best practice in state and territory consumer laws
- laws which prohibit **unfair contract terms** in standard-form contracts
- a revised national **product safety** law and enforcement system
- national **consumer guarantees** which apply when consumers buy goods and services
- **new enforcement powers** for Australia's consumer agencies, including substantiation notices, infringement notices and public warning notices – enforceable by all Australian courts and tribunals
- the Australian Competition and Consumer Commission (ACCC) as the national regulator working in cooperation with consumer law agencies in each state and territory
- similar provisions in the *Australian Securities and Investments Commission Act 2001* (Cth), so that financial products and services are treated in the same way.

Two years later, the Labor government released an exposure draft of a new law. Its purpose was to extend the unfair terms protection in the Australian Consumer Law to insurance products (other than life insurance) and allow ASIC to take action against insurers with unfair terms in their standard-form contracts.

The insurance industry felt that the changes were unnecessary as consumers already had adequate avenues of redress under the *Insurance Contracts Act 1984* (Cth). Assistant Treasurer David Bradbury said the legislation was necessary to encourage insurers to look carefully at their contracts, making sure policies are fair to both parties. The Consumer Action Law Centre agreed. It cited the ambiguous nature of exclusion clauses in the fine print of contracts and the wave of insurance complaints following recent natural disasters as good reason for the change.

The changes were recommended in the National Disasters Insurance Review Report and in separate reports from the Senate and the House of Representative committees. Despite these recommendations for reform, the Bill lapsed when the Coalition won government at the 2013 federal election.

LEARNING ACTIVITY 10.6

Capacity of the legal system to respond to demands for change

- 1 Draw a timeline that shows the evolution of Australian consumer protection laws.
- 2 Name and describe the work of two groups who have influenced changes in consumer laws in Australia.
- 3 How can a court change consumer law? Give an example.
- 4 Read 'Election promise to remove unfair contract terms for small business'.
 - a Explain the processes that the federal government may take to inform and consult the community about this proposed change.
 - b Briefly explain the steps the federal government will need to take to make the proposed change to the *Australian Consumer Law 2011* (Cth).

CASE STUDY

Election promise to remove unfair contract terms for small business

During the 2013 federal election campaign, the Liberal Party promised to extend the unfair terms in standard-form contract provisions contained in the Australian Consumer Law to include small business. Their rationale was that small business owners come up against standard-form contracts when they transact with big businesses, such as telecommunications or energy suppliers, in the same way as individual consumers. The proposal was criticised by some members of the community because it did not define a small business – something that is crucial to successful implementation of the proposed change. Critics say that without proper consideration the idea has the potential to unravel and disrupt the Australian business framework.

5 To what extent are a consumer’s rights protected under the law? Are there any factors that might limit a consumer’s ability to exercise their rights? Discuss.

ISSUE – UNSAFE GOODS AND SERVICES

The safety of products has come under significant scrutiny in recent years. Depending on the product, the dangers and hazards involved can range from minor injuries to death. For example:

- The use of lead and magnets in toys has resulted in serious injuries for children.
- Elastic luggage straps can potentially cause eye injury.
- A hot water bottle can cause burns if placed directly on the skin or if it leaks or bursts.
- Poorly installed basketball rings can injure players who hang off the ring to execute a slam dunk.

The Australian Consumer Law contains uniform product safety provisions which are jointly enforced by Commonwealth, state and territory regulatory bodies. Each of these regulatory authorities monitors product safety in their jurisdictions, and reports serious product safety issues to the Australian Competition and Consumer Commission (ACCC).

These laws ensure all consumer goods and any service involving the supply, installation and repair of such goods renders them safe for use. Consumer goods or product-related services, which could reasonably cause injury to a person (regardless of whether the product is being used as intended), can be declared unsafe and are subject to a safety warning notice, safety ban or a recall notice. These notices and bans can either be issued by the supplier or by the government where the supplier will not comply or cannot be identified.

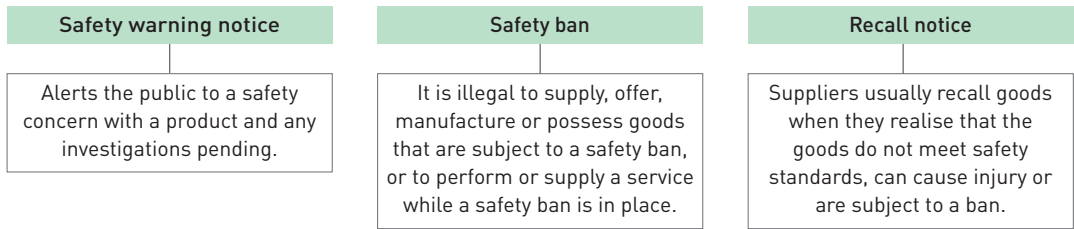


**Figure 10.8**

Magnets in toys can be dangerous if they are swallowed.

It is a crime to supply consumer goods or product-related services which do not comply with mandatory safety standards, or to continue to supply when an interim or permanent safety ban is in place. Regulatory authorities must also be informed when a supplier chooses to undertake a voluntary recall of a product or when the supplier becomes aware or receives a complaint that their product caused a death, serious injury or illness.

DID YOU KNOW?

- In 1516, Duke Wilhelm IV of Bavaria made a law limiting the ingredients of beer to barley, hops and water in an effort to improve its quality. It was the first German food quality law.
- In 1965, Ralph Nader released his book *Unsafe at Any Speed*. It was a condemnation of the US car industry. It highlighted the industry's reluctance to install safety measures such as seatbelts. It caused an uproar in the United States and led to a change in consumer protection laws worldwide.

Safety standards

There are **mandatory safety standards**, **mandatory information standards** and **voluntary safety standards** for certain categories of goods. Compliance with a voluntary industry standard is one way suppliers can guarantee the quality of their product. While suppliers cannot be forced to comply with a voluntary standard, it is illegal to falsely state that a product meets the standard. The Commonwealth Government, on advice from the ACCC, will set mandatory standards. Products that do not meet mandatory standards are banned, and suppliers who are non-compliant risk heavy fines. The ACCC is responsible for investigating and taking legal action against non-compliant suppliers.

DID YOU KNOW?

- **Standards Australia** works with each of the different industry bodies to develop internationally accepted voluntary standards. It is an independent, not-for-profit organisation.
- **SAI global** is an international company which audits and certifies that a product meets a set industry or mandatory standard. Its 'Five Ticks' StandardsMark TM can then be displayed on products.



Unsafe blind and curtain cords

In February 2010, the then Victorian Minister for Consumer Affairs, Tony Robinson, issued a warning about the childhood strangulation risk associated with blind and curtain cords. Children can either get tangled in loose cords or put the cord around their neck when playing or standing on furniture and beds. The ACCC estimates that up to two child fatalities each year can be attributed to blind or curtain cord strangulation. 'Unsafe curtain and blind cords are a hazard in the home, and can easily harm children,' Robinson said. Consumer Affairs Victoria provide free blind and curtain safety kits as part of a campaign to remove such hazards from the home.

Nicole Livingstone, swimming star and mother of three, is helping to advertise the risks by being involved in a community service announcement. 'Until it was brought to my attention, I didn't think I fully understood how quickly and easily these tragedies could occur,' Livingstone said. 'Having installed the safety kit at home, I now have peace of mind knowing my children are safe from this potential hazard. It doesn't take much to make curtain and blind cords safe,' she said.



Figure 10.9

A child playing with a curtain cord



Figure 10.10 All dangerous cords should be placed out of reach of small children.

DID YOU KNOW?

- 1–2 children die each year after being strangled by blind or curtain cords.
- Between 2001 and 2008 there were at least 11 deaths in Australia. Nine of these were of children under three years of age.
- In the United States, a child aged between 7 months and 10 years dies each month after being strangled on curtain and blind cords.

Source: Product Safety Australia

From January 2011, a mandatory standard requires that curtain and blind packaging are printed with appropriate hazard warnings. Cords must also have warning labels and be fitted with a cord guide where practical.

WARNING: CURTAIN AND BLIND CORDS HAVE CAUSED THE DEATH OF YOUNG CHILDREN AND MUST BE INSTALLED SO THAT THEY ARE NOT A STRANGULATION HAZARD. FOLLOW THE INSTALLATION INSTRUCTIONS.

WARNING:

Young children have died by wrapping loose curtain and blind cords or chains around their necks. Secure cords or chains with cord guides or keep them out of reach by winding them around a cleat. Move cots and furniture away from window covering cords or chains. Do not remove this label.

Figure 10.11

Warning on retail package (left) and warning on cord (right)

Source: Product Safety Australia

Product safety recalls

In November 2013, the ACCC recalled stretchable SpongeBob SquarePants Yo Yo Balls sold in toy vending machines. The balls were considered unsafe because they had a highly elastic and sticky cord that could stretch over the acceptable length of 500 millimetres. The cord could potentially wind around a child's neck if the ball was swung at head height and cause choking. Consumers were encouraged to contact the supplier for a refund.

Consumers have a right to expect that the goods and services they buy will be safe and without risk of illness or injury. The Australian Consumer Law makes it possible for a consumer to seek compensation or damages for personal injury or other loss caused by unsafe products. A consumer can make a complaint to their state or Commonwealth regulatory body who may take action on their behalf, or the consumer can use the civil law to sue the manufacturer.

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Unsafe goods

- 1 Visit the Product Safety Australia website. Select 'Bans, standards & recalls', and provide one example of each of the following and explain why the action has been taken for each product:
 - a a mandatory information standard
 - b a mandatory safety standard
 - c a banned product
 - d a recently recalled product.

(8 marks)
- 2 What are the penalties and consequences for non-compliance with product bans and mandatory standards? (2 marks)
- 3 Read the case studies 'Teeth whiteners' and 'Children's sleepwear'. Why does Australia need a product safety system? Explain with reference to the dangers associated with teeth whiteners and children's sleepwear. (4 marks)

Figure 10.12

Do-it-yourself teeth whiteners may contain unsafe levels of the chemical peroxide.



Teeth whiteners

The ACCC stopped the supply of do-it-yourself teeth whiteners containing unsafe levels of the chemical peroxide. The use of teeth whiteners containing concentrations of more than 6 per cent hydrogen peroxide or more than 18 per cent carbamide peroxide can result in chemical burns to the gums and mouth. The ACCC conducted a market survey following complaints from consumers who had reported injuries such as burns, blistering, tooth discolouration, tooth sensitivity and headaches. The ACCC contacted the relevant suppliers and instigated a recall of the relevant brands.

Children's sleepwear

The ACCC warned parents and carers to check the brand and labelling on children's pyjamas and nighties after Big W recalled 27 styles incorrectly labelled as low fire danger.

Children wearing nighties or pyjamas made from highly flammable materials risk severe burns if their nightwear catches on fire.

The mandatory standard for children's nightwear stipulates appropriate labelling for these garments to help parents and carers choose low fire danger garments.

- 4 Read the case study 'Formaldehyde in products' and answer the questions.
 - a To what extent is manufacturing with formaldehyde beneficial? Give reasons for your answer. (2 marks)
 - b Should the use of formaldehyde in consumer products be better regulated in Australia? Explain (2 marks)

Formaldehyde in products

Formaldehyde (CH_2O) has many purposes. It has been used extensively in manufacturing to make thousands of products. It can be found in vinyl flooring, wallpaper, foam, dyes, textiles, plastics, fertiliser, fungicides, cosmetics and pressed wood products used to manufacture furniture. Formaldehyde occurs naturally in smoke, plants and food. At low levels, it breaks down rapidly and does not accumulate in the human body or the environment. Newly made products containing formaldehyde can release a toxic gas into the air, particularly in environments with warm temperature and high humidity. High-level exposure can cause eye, throat, lung and skin irritation in people who are sensitive to the chemical. Prolonged high-level exposure may lead to cancer.

The use of formaldehyde in products is not banned in Australia. However, two Australian voluntary standards for the manufacture of particle board and medium-density fibreboard allow manufacturers to label their product a 'low-formaldehyde emission' product if levels are less than 0.0001 per cent (1 ppm).

In 2011, the ACCC warned consumers that unacceptable levels of formaldehyde were found in at least six different brands of hair-straightening products used in Australian hair salons. The products used the chemical as a preservative ingredient. The acceptable level is between 0.05 per cent and 0.2 per cent. Some recalled products contained up to 10 per cent. Salon workers and their clients complained of hair loss, skin rashes and respiratory problems.

Common names for formaldehyde are methanal, Formol, methyl aldehyde, methylene glycol and methylene oxide.

- 5 Read the case study 'Lousy labels land companies in court' and answer the questions.
 - a Describe the role of the ACCC and Consumer Affairs Victoria in these cases. *(2 marks)*
 - b Compare and contrast the facts and outcomes in the latest Dimmeys and Trade Quip Pty Ltd cases relating to the non-compliance in each case. *(4 marks)*
 - c Give two reasons for the high value in fines imposed in both cases. *(1 mark)*

Lousy labels land companies in court

In a six-month crackdown during 2011, the ACCC removed 95 000 products, which did not meet current safety standards, from Australian store and online suppliers. The type of products seized included children's night clothing, hot water bottles, cots, bunk beds, blinds and curtains.

Some retailers faced court action for non-compliance with mandatory standards. In December 2013, Dimmeys was fined \$3 million and banned for six years from selling items that have high safety standards or require warnings following several breaches of product safety laws. The products included bath toys with choking hazards, basketball rings and swimwear that did not comply with safety standards or did not have appropriate safety labels, and skin-care products that did not list ingredients. Consumer Affairs Victoria initiated the court action.

The Federal Court had previously fined Dimmeys Stores Pty Ltd \$400 000 in 2011, for selling children's dressing gowns which did not comply with the mandatory product safety standard that a fire hazard warning label must be appropriately attached to the garment. The court heard that Dimmeys was also fined in 1999 and 2001 for similar breaches of safety standards.

In 2012, Trade Quip Pty Ltd sold over 2000 unsafe hydraulic trolley jacks that did not meet the required product safety standard. The jacks were sold with incorrect warning labels. At least one model was also sold with false or misleading representation that it met the mandatory standard. The ACCC commenced proceedings against the company in the Federal Court.

The Court ordered that the company:

- pay a fine of \$100 000
- publish corrective notices
- undergo a three-year trade practices compliance program
- refrain from selling hydraulic trolley jacks without first providing written evidence that labels and products comply with the safety standards
- pay a \$7500 fine for contempt of a previous order of the court in 2007.

6 Investigation

Find one product, brand or service that has recently come under scrutiny because of a safety issue. Create a report based on this product. In your report include the following:

- an explanation of the safety issue that occurred
- a description of potential civil actions that could arise as a result of the safety issue

- an explanation of the role of the law in relation to the safety of products
- an evaluation of the effectiveness of the law in fulfilling its role and meeting the values of the community
- three methods and institutions for resolution of disputes that would be suitable for resolving this issue.

(10 marks)

- 7 Explain the capacity of the legal system to respond to demands for change with respect to unsafe products. *(5 marks)*

(Total 40 marks)

ISSUE – SCAMS

A scam is a deliberate and fraudulent scheme to trick people into giving away their money. Sometimes scams are also about identity theft so that the scammer can use the victim's personal information to access credit facilities in the victim's name. Scams come in all forms and sizes. The victim may be approached in person or they may be contacted through the mail, telephone calls, text messages, emails or fake websites.

Scams target a wide range of people. Often they involve schemes where the consumer thinks they will:

- make fast money
- enter a lottery
- buy goods at bargain prices
- receive a medical cure
- help someone in need
- be employed to work from home.

Consumer Affairs Victoria and the **Australian Competition and Consumer Commission** (ACCC) can assist consumers who have been scammed. The **Telecommunications Industry Ombudsman** may provide advice on scams related to mobile phone use. Both Consumer Affairs Victoria and the ACCC's Australasian Consumer Fraud Taskforce raise community awareness about scams. Scams can result in criminal prosecutions because perpetrators are using them to steal money from unsuspecting consumers. Scams may also give rise to civil action for compensation or an injunction.

Major issues with scams are that they are difficult to trace or they operate from overseas and beyond the ACCC's jurisdiction. Many scam victims do not report the scam because they are embarrassed or they have not lost too much money and see it as a lesson learnt.

Common scams

Lonely hearts scams

These scams often operate through online dating sites although the scammer can make contact via social networking websites too. Over time, they build a rapport with their victim, sharing their likes, dislikes and interests online. They then ask the victim for money to help with a personal problem or to pay for travel costs so the 'couple' can meet. Some may even try to blackmail their victim using recorded chat sessions or video that may embarrass the victim if made public.

Charity scams

The scammer will approach victims in person, by phone or by email. They claim they are collecting for a legitimate cause; often the charity's name is fictitious and they do not provide receipts. Charity scammers will prey on people after a disastrous world event and have been known to set up fake earthquake or bushfire appeals.

Identity fraud and scams

Scammers try to get access to a person's personal and financial details so they can use them to buy goods, withdraw cash, open bogus accounts and take out loans. They use these accounts to run up debt and avoid payment. There are different ways a scammer can gain access to personal details. It can be as simple as stealing someone's wallet or mail. However, scammers across the globe often use computer technology to set up elaborate schemes. Two common examples are:

- **account 'alert' scams** – The scammer contacts the consumer and provides a fake alert from a bank, the taxation office, Internet provider and so on. The victim is told that they need to act to verify personal details or supply passwords to stop an account security breach or closure of an account. Once obtained, the details are used for fraudulent purposes.
- **malware** – Spam emails are sent in the hope that a victim replies. Spyware or key loggers can then be installed on unprotected computers to record personal details and passwords used to access secure sites. Malware is also used to spread viruses. Once the virus is installed it suggests that the victim pays for 'special' software to remove it.

Skimming device scams

Automatic teller machines (ATMs) have been the subject of scams in Australia. The scammers were found to be using a 'skimmer' device, inserted into ATMs, which recorded the details of cards used at the ATMs. These details were then transferred onto blank cards, which were used to withdraw substantial amounts of money from the card owners' accounts.

EXTRACT

ACCC warns consumers of parcel scams and fake online shopping sites

Amy Bainbridge, *ABC News*, 19 December 2013

The Australian Competition and Consumer Commission (ACCC) is warning people not to fall victim to a parcel delivery scam this Christmas. ...

ACCC deputy chair, Delia Rickard, says complaints about the scam have more than doubled in the past 12 months.

'The fake delivery scam is when you're contacted out of the blue – it could be by phone, it could be by email or by letter – by somebody who's posing as an employee of a legitimate parcel delivery service, Fed Ex, Australia Post, something like that,' Ms Rickard said.

'They tell you that they've been unsuccessful in trying to deliver a parcel to you – it could be because you weren't home or the parcel was too big – there's a whole range of reasons they give.

'Then they say that if you pay them a small fee, usually somewhere between \$10 and \$30, they will deliver the parcel to you, and then they'll ask you for your credit card or bank account details or sometimes they'll ask you to send the money via money order or international wire transfer, which should send all your alarm bells ringing.

'There will then be fraud on their account, fraud on their credit card.' ...

'Australia Post and legitimate delivery agencies don't do that. If you think that for some reason it might be legitimate, then independently source the contact numbers for that agency through an internet search or via a phone book and contact them yourself – never use the contact details in the email or the letter because they will take you to a fake site.

'The other sure fire way is if somebody asks to be paid through a wire service or an international wire transfer, then that is almost always a warning sign that is a scam.' ...

More scams around Christmas

The ACCC says one scam that has been prevalent this festive season is fake internet stores.

'Some might be imitating a real store, some may be entirely fake and these days scammers are really good,' Ms Rickard said.

'They create great-looking websites, they look like the real thing and what you'll often find though is they're offering goods at much cheaper prices than normal – I wouldn't be surprised if they're offering quicker than normal delivery,' Ms Rickard said.

'It sounds great [and] you go about trying to make your purchase and then you get to the end and in fact what you see is that the only payment mechanisms that are available are a wire transfer or a money order, and that should set all your alarm bells ringing because none of the legitimate stores I'm aware of will ask for payment that way.

'If you're using an internet site it's always best to look for 'https' in the web address and the closed padlock as a symbol that it is a secure site, and use a secure payment mechanism, something like a credit card when making the payment.

'Christmas is a time of goodwill and people are more inclined to give money to charities and so the scammers are also taking advantage of that good will and sending emails and letters asking for donations, particularly emails with click throughs to what are fake web addresses and fake payment details.

'So if you are wanting to make a donation this Christmas, again do the independent search for the contact details for the charity of your choice and pay that way, not as a result of an unsolicited email.'

EXTRACT

A snapshot of scams in 2012

- The ACCC received over 83800 scam reports and enquiries in 2012.
- In 2011, scam losses reported to the ACCC totalled more than \$85.6 million, a 35 per cent increase from 2010. In 2012, reported losses amounted to \$93.4 million.
- The most common scam delivery methods were by telephone (51.7%), email (18.1%), Internet (10.5%) and text message (9.9%).
- The ACCC reports that high-volume scams are on the rise. These scams ask for small amounts of money but target large numbers of victims. The most commonly reported financial loss in 2012 was between \$100 and \$499.
- While scammers target all age groups, people under 18 are more likely to lose money if contacted by scammers. The ACCC suggests this is due to their susceptibility. People under 18 are also the least likely to report scams.

Source: *Targeting Scams*, ACCC report, 2012



Figure 10.13
ACCC SCAMwatch website, which provides information to consumers and businesses about scams

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Scams

- 1 What is a scam? (1 mark)
- 2 Describe the impact that a scam can have on:
 - a a consumer
 - b a consumer's financial institution such as a bank (think, for example, ATM scams)
 - c society in general. (3 marks)
- 3 Read the article 'State's logo used in Nigerian email scam' and answer the questions.
 - a What method did the scammers use to defraud the victim? (1 mark)
 - b Describe the victim. What loss did she suffer? (2 marks)
 - c Why was this particular method of scamming considered alarming? (1 mark)
 - d Do you think that others could become victims of this scam? Why? (2 marks)
 - e If the scammers were caught, explain what sorts of legal actions could be taken against them. (2 marks)

State's logo used in Nigerian email scam

Amanda O'Brien, *The Australian*, 14 May 2010

The West Australian government has been drawn into an elaborate Nigerian scam after its logo was used in fake documents sent to a Perth woman so she could be fleeced by criminals.

The daring use of the government crest in a series of faked emails from Consumer Protection WA has stunned authorities, who say it is the first time they have been impersonated in this way.

'This is a particularly alarming scenario where the scammers have actually impersonated the WA42 regulator,' Consumer Protection Commissioner Anne Driscoll said yesterday.

The victim, a single mother, lost almost \$9000 after she tried to sell a \$250 portable PlayStation on eBay and fell into a trap set by Nigerian criminals. In what was her first Internet sale, the woman was bombarded with fake forms for freight, transfers, customs and other requirements from a bogus buyer.

When she contacted Consumer Protection, she was advised to break all contact, which she did. But she then received a series of authentic-looking emails, allegedly from the government department, telling her Nigerian authorities were investigating the case and asking her to cooperate with them.

The emails, complete with a government crest, eventually told her she had been awarded compensation of US\$251 000 by the Nigerian president. She was then advised to comply with a request to transfer US\$7000 so the compensation could be paid.

- 4 Look back at the extracts 'ACCC warns consumers of parcel scams and fake online shopping sites' and 'A snapshot of scams in 2012' and answer the questions.
 - a Explain three different scams mentioned in this article. *(3 marks)*
 - b Provide at least four suggestions as to how a consumer can avoid the scams mentioned in the article. *(4 marks)*
 - c Explain the role of the ACCC in relation to scams. *(2 marks)*
 - d What is the most common delivery method for scams? *(1 mark)*
 - e Which type of scam is on the rise? *(1 mark)*
 - f Why do you think people under 18 are more likely to lose money if contacted by scammers? *(1 mark)*
 - g Investigate charity scams and identity fraud scams. Discuss how these types of scams operate and why they may or may not be successful if perpetrated on young people. *(6 marks)*
 - 5 **Investigation**

Access the ACCC's SCAMwatch website. Select two of the following types of scams and find an example of each type selected.

 - pyramid or chain letters scams
 - health and medical scams
 - job and employment scams
 - lottery and competition scams
 - online dating scams.

Create a PowerPoint presentation and show it to the class. In the presentation include:

 - an overview of each scam selected *(4 marks)*
 - the warning signs that should give rise to concerns about the legitimacy of the good or service, and what a person should do if they come across the scam *(4 marks)*
 - the extent to which the law protects people against scams. *(4 marks)*
 - 6 If you thought you were a victim of a scam, which methods and institutions for resolving disputes would you use? *(4 marks)*
 - 7 Explain how the law has changed to better deal with scams. *(4 marks)*
- (Total 50 marks)*



CHAPTER

11

WORKPLACE LAWS

OUTCOME

At the completion of this unit you should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- legal principles relevant to the selected area/s of law
- a contemporary issue for the selected area/s of law
- the capacity of the legal system to respond to demands for change
- methods and institutions for resolving disputes arising under the selected area/s of law.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area/s of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

KEY LEGAL TERMINOLOGY

Australian Human Rights

Commission An independent statutory organisation that works to protect and promote human rights, including within the workplace.

awards The minimum wages and conditions set by the government. Also called modern awards.

contract An agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced by the law.

discrimination When someone is treated less favourably than another person or group because of an attribute such as gender or ethnic origin.

enterprise agreement An agreement about wages and other matters between two or more employees and their employer.

Fair Work Commission An independent national workplace

relations tribunal with power to carry out a range of functions relating to enterprise bargaining, industrial action, dispute resolution, termination of employment, safety net of minimum wages and employment conditions, and other workplace matters.

Fair Work Ombudsman A statutory body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints and ensures compliance with Australia's workplace laws.

harassment When someone is unreasonably made to feel intimidated, insulted or humiliated, particularly if this happens on a regular basis.

redundancy When an employer terminates an employee's job because they are no longer needed.

unfair dismissal When someone's employment has been terminated and the termination was harsh, unjust or unreasonable.

union An organisation that represents and protects the rights of employees.

unlawful termination When someone's employment has been terminated for a reason that is not lawful.

VCAT Victorian Civil and Administrative Tribunal; the Human Rights List of VCAT can deal with disputes relating to discrimination in the workplace.

Victorian Human Rights and Equal Opportunity

Commission Independent Victorian statutory body that helps people resolve complaints of discrimination, sexual harassment and religious vilification.

workplace bullying Aggressive or unreasonable behaviour against someone who works in the same workplace as the bully, particularly if this happens on a regular basis.

THE PURPOSE OF THE LAW

Workplace laws are crucial to the operation and conduct of places of employment and the rights of employees in the workplace. Many legal issues can arise from situations regarding employment and can involve employment agreements and contracts, workplace safety, bullying and harassment.

The workplace is a dynamic environment. Like schools, laws need to be in place to ensure the protection and safety of people. The workplace is governed by various federal and state laws, which are designed to ensure the safety of employees and promote harmonious and cooperative work environments. The laws also establish a variety of 'watchdogs', which are in place to ensure that employers follow laws and are penalised if they do not do so.

There are various bodies and institutions that can become involved in workplace issues. These include the Fair Work Commission, the Fair Work Ombudsman, the Australian Human Rights Commission and the Victorian Human Rights and Equal Opportunity Commission. The courts may also become involved in resolving workplace disputes, or when employers or employees are penalised due to a workplace incident.



Figure 11.1

Workplace laws aim to promote safe and cooperative work environments.

WORKPLACE RELATIONS

Workplace relations relates to the interplay that occurs between employees and employers about the terms and conditions of their employment. It often involves negotiation about pay and work conditions and resolution of conflicts that arise over these issues. Industrial relations or employee relations are other terms used for workplace relations. Currently, the area of workplace relations is regulated by the *Fair Work Act 2009* (Cth).

Laws relating to workplace relations cover:

- employment agreements that can be entered into
- wages or salary employers must pay to employees
- work conditions that must be provided by employers to all employees.

The law in Australia relating to these issues has been constantly changing. In order to understand the law, it is useful to consider some of the history of laws in this area.

History of workplace relations

The laws relating to workplace relations in Australia have a long and interesting history. When the Commonwealth Constitution came into force in 1901, it gave the Commonwealth Parliament the power to make laws in relation to conciliation and arbitration for the prevention and settlement of industrial disputes that extended beyond the limits of any one state.

In 1904, the Commonwealth Government passed the *Conciliation and Arbitration Act*. Some of the provisions of this Act included:

- preventing lockouts and strikes in relation to industrial disputes
- creating the Commonwealth Court of Conciliation and Arbitration (later rebranded the Conciliation and Arbitration Commission after some court decisions about the court's power – changed again in 1988), designed to settle disputes in the workplace
- where employees are prevented from working, the making and enforcing of agreements between employers and employees in relation to disputes.

A system of awards for particular occupations was established about three years later. An award stipulates a basic minimum wage and conditions that an employer must provide to employees. An award is considered a safety net for employees, to ensure that employers do not take advantage of them in relation to pay and conditions.

Several recent major pieces of legislation have since changed the environment for workplace relations in Australia. Some of these are listed below.

Industrial Relations Act 1988 (Cth)

The *Industrial Relations Act 1988* (Cth) **abrogated** (cancelled) the *Conciliation and Arbitration Act 1904* and renamed the Conciliation and Arbitration Commission as the Australian Industrial Relations Commissions (AIRC). It established **certified enterprise agreements**, also known as enterprise bargaining agreements, which were agreements made between an employer and employees (represented by their union) about pay and conditions. Once agreed upon, agreements were sent to the AIRC to be certified.

Workplace Relations Act 1996 (Cth)

The *Workplace Relations Act 1996* continued some of the provisions contained in the *Industrial Relations Act 1988*, such as the AIRC determining federal awards, but also introduced some new workplace relations concepts. The *Workplace Relations Act* aimed to encourage employers and employees to negotiate with each other, rather than governments deciding what wages and conditions should be provided to employees.



Figure 11.2
People demonstrating for their rights at work. The *Fair Work Act 2009* was passed by the Labor Government to improve working conditions.

The *Workplace Relations Act* introduced **Australian Workplace Agreements** or AWAs. AWAs were individual formal contracts negotiated without the assistance of a trade union which stated the terms and conditions of employment. An AWA was able to override certain employment conditions that were contained in state or territory laws, such as the wages of an employee, except for particular conditions such as occupational health and safety. Once an AWA was signed by both employee and employer, it was sent to the Workplace Authority, a government body, to be registered. The maximum life of an AWA was three years.

The Act limited the number of items an award could cover to only 20, such as sick leave and annual leave. All other matters needed to be negotiated at the workplace between the employer and employee.

The *Workplace Relations Act* also limited the involvement and effectiveness of unions by placing some restrictions on union activity and expanding the use of enterprise bargaining agreements.

Though well received by some, the *Workplace Relations Act* was amended in 2006 by the *Workplace Relations Amendment Act 2005*, known as WorkChoices, which became one of the most controversial pieces of legislation in Australian workplace relations history.



Figure 11.3
Signing a workplace contract

WorkChoices

The *Workplace Relations Amendment (WorkChoices) Act 2005*, known as WorkChoices, came into effect in March 2006 and was promoted as improving national economic performance.

Some of the amendments that the WorkChoices legislation made to the *Workplace Relations Act* included:

- establishment of a body known as the Australian Fair Pay Commission (AFPC) to decide minimum wages
- further promoting AWAs, and increasing the maximum life of an AWA to five years
- exempting companies with less than 100 employees from unfair dismissal laws
- exempting all companies from unfair dismissal laws where a dismissal was for a bona fide operations reason
- outlawing industry-wide industrial action.

The passing of this new law was strongly opposed by many employees, unions and the Australian Labor Party. On 15 November 2005, one of the largest protests ever formed took place in the heart of Melbourne, with protesters rallying in opposition to the new laws.

The WorkChoices legislation became a major issue in the 2007 federal election.



Figure 11.4
On 15 November 2005, many Victorians rallied to show their opposition to the introduction of the WorkChoices legislation.

The current law

In March 2008, following the removal of the Howard Government and the inception of the Rudd Government, the Commonwealth Parliament passed the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, which aimed to abolish some of the provisions of the WorkChoices legislation. This Act started the process of removing AWAs and creating new 'modern awards' that would apply to Australian businesses.

On 20 March 2009, the Senate passed the *Fair Work Act 2009*, which completely abolished WorkChoices. The law came into effect on 1 January 2010.

Some of the changes included:

- abolishing AWAs, with only those AWAs created before the *Fair Work Act* remaining in place and lasting only the lifetime of the agreement
- increasing the ability of employees to bring **unfair dismissal** claims against an employer by restoring the protection against unfair dismissal if they have worked for that employer for more than six months. If the organisation has less than 15 employees, then the employee must have worked there for a minimum of 12 months to make an unfair dismissal complaint
- increasing the number of minimum employment conditions from five to 10, now called the National Employment Standards (NES)
- increasing unions' ability to become involved in enterprise bargaining
- creating a new federal body called Fair Work Australia (later renamed the Fair Work Commission), designed to unify and centralise all authorities dealing with federal workplace laws.

Changes to *Fair Work Act*

In 2012, the Fair Work Act Review Panel reviewed the operation of the *Fair Work Act*. As part of the review, submissions were made and the consultations were conducted with key stakeholders. A report was released on 2 August 2012, which made 53 proposals to improve workplace relations laws in Australia.

On 1 January 2013, a number of recommendations made by the Fair Work Act Review Panel were implemented. This included renaming Fair Work Australia to Fair Work Commission and aligning the time frames for lodging unfair dismissal and general protections dismissal applications.

On 1 January 2014, several changes to the *Fair Work Act 2009* began operation as a result of laws passed in 2012 and 2013. The changes to the Act include new anti-bullying measures, changes to right of entry for officials of organisations who have entry permits to enter businesses, new time frames for unlawful termination applications, and new consultation requirements when changing regular rosters and working hours.

In September 2013, the Coalition formed government at a federal level. The government has indicated that it will provide terms of reference to the Productivity Commission to conduct a full review of workplace relations laws in Australia.



USEFUL WEBSITE

Fair Work Commission www.fwc.gov.au

LEARNING ACTIVITY 11.1

Workplace relations

- 1 What are workplace relations?
- 2 Why is the Commonwealth Parliament able to legislate in areas of industrial relations?
- 3 Certified enterprise agreements were established in 1988. What are these?

- 4 Name the current federal law that governs workplace laws.
- 5 What is an AWA? Explain which law introduced AWAs, and which law abolished them completely.
- 6 Identify two individuals or groups that were in favour of WorkChoices and two individuals or groups that were against WorkChoices. For each individual or group, discuss with a classmate one argument that this individual or group would make for or against WorkChoices.

FAIR PAY AND WORK CONDITIONS

The *Fair Work Act 2009* governs the requirement for employers to provide fair pay and good working conditions for all employees. Employees have various protections under the Act, which also provides information on how disputes can be resolved.

Work conditions

The *Fair Work Act 2009* established 10 National Employment Standards (NES). Employees are covered by the NES regardless of whether they are on an award, individual contract or collective agreement, as long as they are covered by the national workplace system.

Under the NES, employees are entitled to certain minimum conditions in the workplace. The NES are considered to be a 'safety net' to ensure that employees are not taken advantage of.

The NES are set out in the *Fair Work Act 2009*. They are outlined in the extract.

EXTRACT

National Employment Standards

- 1 **Maximum weekly hours of work** – 38 hours per week, plus reasonable additional hours.
- 2 **Requests for flexible working arrangements** – an entitlement allowing employees in certain circumstances to request a change in their working arrangements because of those circumstances.
- 3 **Parental leave and related entitlements** – up to 12 months unpaid leave for every employee, plus a right to request an additional 12 months unpaid leave, plus other forms of maternity, paternity and adoption-related leave.
- 4 **Annual leave** – four weeks paid leave per year, plus an additional week for certain shift workers.
- 5 **Personal leave** – 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required.
- 6 **Community service leave** – unpaid leave for voluntary emergency activities, with an entitlement to be paid for up to 10 days for jury service.
- 7 **Long service leave** – as set out in agreements and awards (pending development of a uniform national long service leave standard).
- 8 **Public holidays** – a paid day off on a public holiday, except where reasonably requested to work.
- 9 **Notice of termination and redundancy pay** – up to five weeks notice of termination and up to 16 weeks redundancy pay, both based on length of service.
- 10 **Provision of a Fair Work Information Statement** – employers must provide new employees with a copy of this statement, which contains information about workplace laws.

Source: Fair Work Ombudsman

In addition to the NES, an individual agreement or enterprise agreement may set out further work conditions that have been negotiated and should be provided to the employee during the course of their employment. This may include, for example, bonuses, incentives, a company car, an office with a view, shares in the company, a mobile phone or a computer/Internet set-up at home. The conditions that can be provided to an employee vary widely, depending on the level of seniority of the employee, and the industry in which they work.



Figure 11.5

Some employees' work conditions include access to a crèche for their children.

Fair pay

Under the current laws, a person's pay is determined by one of the following:

- modern award
- enterprise agreement, also referred to as a collective agreement
- individual contract.

Modern award

A modern award is a single national award applicable to an occupation or industry. An employee's pay could be determined by a modern award, which establishes the minimum wages that must be paid to a person in a particular industry. The modern award will also set out what overtime rates, penalties and allowances will be paid to an employee, the superannuation benefits he or she will receive, and the amount of leave the person will receive.

Modern awards are industry-specific; that is, different awards apply to different industries.

The Fair Work Ombudsman, established by the *Fair Work Act*, provides an online resource to enable employers and employees to determine the minimum wage that must be paid to an employee. In 2014, the ombudsman launched a new tool called PayCheck Plus, which can be used by employees to determine the minimum wages for their job.

Every four years the Fair Work Commission must review all modern awards. As a result of the review, a modern award can be varied or cancelled, or the commission may make a new modern award covering a specific job or industry.

An award is often thought of as a 'safety net'. It is a level below which wages cannot fall so it protects workers from being underpaid.

EXAMPLE: MODERN AWARD

Sylvia works as a legal assistant in a law firm in the city. She is not covered by a workplace agreement or contract, and has been informed that she will be paid in accordance with the current modern award. Sylvia discovers on the Fair Work Ombudsman website that she is covered by the Legal Services Award 2010, and that the minimum wage that must be provided to her are dictated by this award.

Enterprise agreement

An enterprise agreement, also referred to as a **collective agreement**, is an agreement made between employers and employees, often represented by a union, about wages and conditions. It has the effect of displacing an applicable modern award (or awards) and creating an enforceable set of terms and conditions of employment for particular employees at a particular workplace.

In addition to the 10 National Employment Standards established by the *Fair Work Act*, an enterprise agreement normally sets out the wages that are to be paid to the employees in that workplace. The wages must not be below the award wages, and are usually set at a higher rate than the relevant award rates.

Once the employees and their employer have accepted the agreement, it is sent to the Fair Work Commission for approval. The Fair Work Commission conducts the '**better off overall test**', which means that it must be satisfied that, at the time of the test, each employee will be better off overall if the agreement applied to the employee, than if the employee were covered by the modern award.

If a new employee starts work at the business, and that person has not negotiated his or her own individual contract, then they will normally be covered by the collective agreement.

EXAMPLE: ENTERPRISE AGREEMENT

John has just started working as a teacher at Caloundra Christian College. His employer has informed him that he is covered by an enterprise agreement and he will be paid in accordance with that agreement. John looks on the Fair Work Commission website and finds that an enterprise agreement came into operation on 6 March 2014 for Caloundra Christian College, and will expire in 2016.



Figure 11.6
Reaching an enterprise agreement is about employers and employees negotiating about wages and conditions.

Individual contracts

Other than awards and enterprise agreements, employees can also be covered by an **individual contract**. This is a contract between an employer and an employee that does not have to be sent to a body such as the Fair Work Commission for approval. The contract must, however, still conform to modern awards in that it must pay at or above the wage levels set out in the award for that industry.

NOTE

For more information on contracts, see chapter 8.

Individual contracts are popular with private sector companies such as accountancy firms, law firms and other corporate businesses, particularly for employees at executive management level.

These contracts are enforceable through the courts and must have all the elements of a legally binding contract.

EXAMPLE: INDIVIDUAL CONTRACT

Manny starts work at an organisation as an IT software developer. He is provided with an individual contract setting out his wages and conditions of employment. He can either sign this, or enter into negotiation with his employer for the wages and conditions that he would like to have and sign an amended contract that is satisfactory to both him and his employer.

Failure to comply

The *Fair Work Act* sets out various remedies and penalties if an employer fails to abide by workplace laws relating to fair pay and work conditions.

The Fair Work Ombudsman can initiate action in the Federal Court or Federal Circuit Court. A range of civil penalties can apply for breaches of the modern awards or the NES. An employee is also entitled to take his or her own action against an employer for failing to pay the minimum wages, or failing to provide appropriate work conditions.

LEARNING ACTIVITY 11.2

Fair work conditions and pay

- 1 Read the extract 'Jetstar fined over breaches of workplace laws' and answer the questions.
 - a On what basis were the pilots employed (award, individual contract or enterprise agreement) before and after they were transferred to the Jetstar Group?
 - b Explain the role of the Fair Work Ombudsman in this case.
 - c Why was Jetstar fined when it had already paid back the amounts deducted from the pilots?

EXTRACT

Jetstar fined over breaches of workplace laws

Fair Work Ombudsman media release, 6 February 2014

Two Jetstar companies have today been fined a total of \$90 000 for unlawfully making six cadet pilots responsible for training costs and making deductions from their wages, despite receiving advice the deductions contravened workplace laws.

Jetstar Group Pty Ltd and Jetstar Airways Pty Ltd have each been fined \$45 000 in the Federal Court in Sydney after admitting they breached the *Fair Work Act*.

The penalties are the result of legal action by the Fair Work Ombudsman.

The six pilots were recruited between October 2010 and January 2011 and were employed on New Zealand individual contracts through a New Zealand-based Jetstar subsidiary while they underwent six months of training.

At the conclusion of the training, the cadet pilots' employment was transferred to Australian entity Jetstar Group.

Justice Robert Buchanan found that Jetstar continued to pursue plans to recover training costs from the cadet pilots despite advice that this was unlawful under Australia's Air Pilots Award 2010.

Jetstar deducted a total of \$17 500 from the cadet pilots' wages between June and September 2011 before the practice was ceased and the money was returned to them in November 2011, following a legal challenge by the Australian Federation of Air Pilots (AFAP).

Deductions were made from all six pilots' wages, including one pilot who had refused to agree to the deductions.

Justice Buchanan said that there was a lack of evidence of contrition or remorse from Jetstar.

'The respondents used their vastly superior bargaining power to effectively brush aside any personal resistance by cadet pilots, not desisting until the AFAP stepped in', Justice Buchanan said.

'The conduct of Jetstar Group and Jetstar Airways was calculated solely by reference to their assessment of their own commercial interests and their determination that the cadet pilots should be ultimately responsible for the cost of their training.'

Justice Buchanan said the companies 'undertook their contravening conduct notwithstanding advice (the substance of which is now accepted) that what they were proposing to do, and did do, was contrary to the Award and the *Fair Work Act*.'

Imposing penalties at 68 per cent of the available maximum, Justice Buchanan said, 'I think it is appropriate to mark the Court's disapproval of what was done'.

'A penalty should be fixed, if possible, with a view to ensuring that the risk of punishment is not seen as an acceptable cost of doing business.'

2 Read the extract '76 000 back-pay for Top End workers' and answer the questions.

- a Explain the workplace laws that the employer breached.
- b Where could new employers get information about rates and entitlements that their employees should receive?
- c Describe one difference between the actions of the Northern Territory company and the Jetstar companies (above). Do you think the different outcomes were a result of the employers' knowledge of the breaches? Explain.

EXTRACT

\$76 000 back-pay for Top End workers

Fair Work Ombudsman media release, 19 February 2014

Dozens of employees in the Northern Territory have been reimbursed more than \$76 000 after inquiries by the Fair Work Ombudsman revealed they had been underpaid at work.

In Darwin, 21 cleaners received a total of \$34 500 – an average \$1642 each – as a result of being underpaid their minimum hourly rate and penalty rates over eight months last year.

The employees were paid flat hourly rates of \$18. As casual employees, they were entitled to a higher minimum rate, as well as penalty rates for overtime, weekend and shift work.

Fair Work Ombudsman Natalie James says the employer was new to the industry and unaware of the relevant workplace obligations.

Ms James says the case highlights the importance of employers seeking correct advice about the pay rates and entitlements that apply to their employees.

'A small mistake left over time can result in a hefty bill for back-payment of wages – so it is important employers get it right in the first place,' she said.

3 Investigation

Go to the Fair Work Commission website and answer the following questions.

- a Find and write down three agreements that came into operation this year.
- b You have just started working as a hairdresser. Your employer has told you that you are covered under the 'federal award' but you do not know what that means. Find out what the minimum wage would be under the award.
- c Your friend is a nurse and is not sure what the name of her award is. Write down the award for her. Explain to her what this is.
- d Write a report on how useful you feel the Fair Work Commission website is. Comment on:
 - whether it is easy or difficult to find awards and agreements
 - how well it explains awards and agreements
 - whether it provides information on how disputes can be resolved.

DISCRIMINATION AND HARASSMENT

Discrimination

The *Equal Opportunity Act 2010* (Vic.) in Victoria aims to free workplaces from discrimination against and between employees. Discrimination means treating someone less favourably than others on the basis of irrelevant attributes, such as race, colour, national or ethnic origin, or sex. Discrimination can be either indirect or direct, and can occur in all areas of the workplace.

Workplace discrimination can occur in recruiting and selecting staff, the terms and conditions offered, who receives training, and who is considered for promotion, retrenchment or dismissal.

Discrimination is prohibited in Australian workplaces under the following federal and state Acts of parliament:

- *Equal Opportunity Act 2010* (Vic.)
- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth).

NOTE

More information on these laws can be found in chapter 13.

Equal Opportunity Act 2010 (Vic.)

The *Equal Opportunity Act 2010* is the main legislation in Victoria dealing with discrimination in the workplace. This Act repeals the previous *Equal Opportunity Act 1995*. It was passed on 15 April 2010 and came into effect in August 2011.

The *Equal Opportunity Act* makes it illegal for an employer to discriminate against an employee for a number of reasons. These reasons include:

- age
- breastfeeding
- employment activity
- gender identity
- disability
- industrial activity
- lawful sexual activity
- marital status
- parental status or status as a carer
- physical features
- political belief or activity
- pregnancy
- race
- religious belief or activity
- sex
- sexual orientation
- personal association (whether as a relative or otherwise) with a person who is identified by one of the other attributes on this list.

Examples of discrimination in the workplace include:

- a woman being denied a promotion because she is pregnant
- being deliberately excluded from training programs because of being of a certain race
- not being given a job opportunity because of a physical attribute such as height
- being excluded from certain projects because of your gender.



Figure 11.7
It is unlawful to discriminate against someone in the workplace because she is pregnant.

Lisa denied promotion

Lisa applied internally for a job at her place of employment. She was five months pregnant at the time, but was highly qualified for the job and was the highest performing employee in her team. Although she was well qualified for the position, she was informed by her manager that she did not get the job because she would only be able to do it for a short period of time.

CASE STUDY

There are some situations that do not give rise to discrimination, even though a person has been treated differently. For example, a person who has not performed to the best of their ability may not get a promotion as a result.

Harassment

Under federal and state legislation, harassment is unlawful and occurs when someone is intimidated, insulted or humiliated because of a particular attribute.

Harassment in the workplace can include:

- telling insulting jokes about a particular religion
- sending sexually explicit emails

- displaying offensive or pornographic screen savers
- making derogatory comments about someone's race
- asking intrusive questions about someone's sex life.

Harassment is prohibited under the following legislation:

- *Age Discrimination Act 2004* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Equal Opportunity Act 2010* (Vic.)
- *Fair Work Act 2009* (Cth).

Although the different Acts cover the same areas of discrimination and harassment, the Acts focus on different things. For example, the *Disability Discrimination Act* makes it unlawful for someone to be harassed on the basis of disability; the *Racial Discrimination Act* covers discrimination on the grounds of race but not disability.

Under the various Acts, employers are required to take reasonable steps to ensure that harassment does not occur in the workplace. Reasonable steps are not defined under the various Acts, but the Australian Human Rights Commission has established a checklist for employers to use as a guide.

The federal Coalition, in 2014, considered changing the *Racial Discrimination Act 1975*, which currently makes it unlawful for any person or group to act in a manner that is reasonably likely to offend, insult, humiliate and intimidate because of race. Under the change, the only criteria would be 'vilify or intimidate another person'. Many community groups opposed this suggested change, believing it would lead to more racial discrimination and acts of humiliation. This suggested change was dropped by the Coalition.

CHECKLIST

An 'all reasonable steps' checklist could include:

- ✓ preparing and promoting a written policy on workplace discrimination and harassment
- ✓ training staff to identify and prevent workplace discrimination and harassment
- ✓ ensuring all line managers model appropriate standards of professional conduct
- ✓ conducting awareness-raising sessions for all staff
- ✓ removing offensive, explicit or pornographic calendars, literature, posters and other materials
- ✓ obtaining high-level support from senior management
- ✓ including accountability mechanisms in position descriptions for managers.

Sexual harassment

Unwelcome conduct of a sexual nature that offends, insults, humiliates or intimidates another person is likely to be unlawful sexual harassment. Sexual harassment does not just apply to physical behaviour or asking someone for sexual favours. Questions about a person's sex life, comments on physical appearance and constant leering are all examples of sexual harassment. Sending sexually explicit emails or text messages and displaying offensive pornographic posters or calendars can also be forms of sexual harassment.

Sexual harassment is prohibited by various Acts, including the *Sex Discrimination Act 1984* (Cth), *Equal Opportunity Act 2010* (Vic.) and *Occupational Health and Safety Act 2004* (Vic.).

LEARNING ACTIVITY 11.3

Discrimination and harassment

- 1 Provide a definition of discrimination. Give two examples of discrimination.
- 2 Make up two scenarios, each covering discrimination on the grounds of a different attribute as listed in the *Equal Opportunity Act 2010*.
- 3 Look back at the case study 'Lisa denied promotion'. Do you think she has been discriminated against? Discuss.
- 4 **Investigation**
Look up the Commonwealth *Age Discrimination Act 2004* and explain the purpose of that Act.
- 5 Read the article 'Company fined \$30K for age-based termination threat' and answer the questions.
 - a What laws could the Fair Work Ombudsman claim the company breached?
 - b What was the problem with the company's policy?
 - c What impact would sacking employees when they reached a certain age have on the individuals and on the labour market generally?

EXTRACT

Company fined \$30K for age-based termination threat

Ewin Hannan, *The Australian*, 8 April 2014

A Queensland restaurant worker who was told he would be sacked on his 65th birthday has been awarded \$10 000 in compensation and the restaurant's operators fined almost \$30 000.

The case is the first time the federal workplace watchdog, the Fair Work Ombudsman (FWO), has taken legal action against a company on the basis of age discrimination.

After raising questions about his pay, Cheng Peng Lee was informed by his employers that it was company policy to sack workers once they reached retirement age.

A letter from the company accountant said it was 'the policy of the company that we do not employ any staff that attain the retirement age, which in your case is 65 years'.

Mr Lee, 64 years old at the time, had worked full time for the company for 15 years until taking long-service leave. After returning from leave to part-time work in 2011 and questioning his pay rate, he was told he would be terminated.

In his written response, Mr Lee said termination of his employment was 'irrefutably an act of blatant discrimination'.

'It must be pointed out, my effectiveness as a food and beverage attendant when I turn 65 is no less than my effectiveness at the age of 64,' he said.

After the company stood firm, Mr Lee lodged a complaint with the FWO. The Federal Circuit Court fined the company and its owners \$29 150 for contraventions of age discrimination and record-keeping laws. The company has been fined \$20 790, and its joint directors and equal shareholders, Nopporn Theravanish and Michael Theravanish, have also been penalised a further \$4180 each.

Judge Michael Burnett ordered Theravanish Investments to pay \$10 000 compensation to Mr Lee.

Fair Work Ombudsman Natalie James said discrimination against employees on the grounds of age was unlawful and the outcome of the case served as a warning to employers that age discrimination would not be tolerated.

'Limiting employment opportunities of workers because of their age is totally unacceptable and we take such conduct very seriously because of the impact it has on individual workers and the labour market generally,' Ms James said.

- 6 Explain a situation that would be regarded as harassment in the workplace.
- 7 What is sexual harassment?
- 8 Read the article 'Workplace bullies cost \$15 billion each year' and answer the questions.
 - a How many Australians experienced workplace bullying or harassment? What percentage of the Australian population is this?
 - b What was the total cost to the economy of bullying and harassment?
 - c What are the hidden costs of bullying and harassment?
 - d Why do you think 'psychosocial hazards' are not given the same attention as 'physical dangers'?
 - e What type of harassment is seen as increasing?
 - f Describe one possible change to the laws relating to harassment that could help overcome existing problems.

EXTRACT

Workplace bullies cost \$15 billion each year

Nicola Berkovic, *The Australian*, 28 January 2010

Bullying and harassment in the workplace costs the economy about \$15 billion a year and is not properly addressed in occupational health and safety (OHS) laws.

In a draft report released yesterday, the Productivity Commission found 2.5 million Australians experienced some aspect of bullying during their working lives.

It said while some progress had been made in ironing out inconsistencies in OHS standards nationally, businesses were still burdened by 3392 pages of regulation across Australia.

The report prompted federal Sex Discrimination Commissioner Elizabeth Broderick to call for employers and governments to turn their sights on the psychological safety of workers.

The Productivity Commission found the total cost to the economy of bullying and harassment was about \$14.8 billion a year.

This did not include the hidden costs, such as hiring and training employees to replace those who left as a result of workplace stress.

The report said 'psychosocial hazards' such as bullying and harassment were not given the same attention by inspectors as physical dangers. 'This adds to uncertainty for businesses about the extent of their duty of care and how to address (such) hazards,' it said.

Workplace stress claims tended to be more costly than claims for less serious physical injuries and resulted in more time taken off work. The report said only Queensland and Western Australia had codes of practice on how to detect and manage bullying, which gave business more clarity about their responsibilities.

South Australia was the only state to include specific laws in its OHS Act about inappropriate behaviour in the workplace.

In other parts of Australia, the issue was covered only by the employer's general duty to provide a healthy and safe workplace.

Ms Broderick said complaints to the Australian Human Rights Commission suggested sexual harassment was increasing. But while sexual harassment was unlawful under the *Sex Discrimination Act*, the law relating to harassment and bullying more generally was less clear.

WORKPLACE SAFETY

Workplace laws operate to ensure the safety and protection of employees. It is a reasonable expectation of employees that workplaces are safe, and that all the appropriate steps have been taken by the employer to ensure that the workplace is free of hazards.

This not only applies to physical dangers such as equipment failure and poisonous substances, but also to mental and physical dangers associated with unsafe practices such as discrimination, bullying and harassment.

Various workplace laws are in place to ensure employee safety. These include:

- *Occupational Health and Safety Act 2004* (Vic.)
- *Equal Opportunity Act 2010* (Vic.)
- *Fair Work Act 2009* (Cth)
- federal laws relating to discrimination such as the *Racial Discrimination Act 1975*, *Age Discrimination Act 2004*, *Sex Discrimination Act 1984* and *Disability Discrimination Act 1992*.



Figure 11.8
The *Occupational Health and Safety Act* aims to protect workers.

Safe work conditions

Occupational health and safety (OHS) is the term used to promote safety in the workplace. The reason for ensuring safe work conditions is twofold: it ensures that workers are protected and that businesses do not have to pay the financial costs associated with unsafe practices.

In Victoria, the *Occupational Health and Safety Act* operates to improve occupational health and safety. The Act sets out key principles, duties and rights in relation to OHS.

At a federal level, the *Work Health and Safety Act 2011* (Cth) aims to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. This Act was intended to be model legislation for states to adopt and to ensure harmonised work health and safety laws. So far Victoria has not adopted the model legislation, meaning that the *Occupational Health and Safety Act* continues to apply.

NOTE

For more information on negligence, see chapter 5.

Section 20 of the *Occupational Health and Safety Act* explains the need to ensure the health and safety of a worker. The Act imposes duties on employers and fellow employees to ensure an employee is healthy and safe at work, thereby creating a **duty of care**. If this duty of care is breached and someone suffers loss or damage as a result, then the person and/or company who breached the duty of care may be liable under the law of **negligence**.



Figure 11.9
Workplace safety equipment

The Act is not limited to only physical dangers, such as those associated with dangerous goods or hazards, but also **psychosocial hazards**, such as those associated with bullying and harassment.

The main watchdog in relation to OHS in Victoria is **WorkSafe**, an independent statutory body that provides advice and guidance about OHS, and ensures compliance with the *Occupational Health and Safety Act*. The Act also sets out how businesses will be investigated and prosecuted by WorkSafe. Enforcement plays a key role in WorkSafe's prevention activity, with the additional aim of deterring other businesses from using unsafe practices.



USEFUL WEBSITE

WorkSafe www.worksafe.vic.gov.au



Figure 11.10 Senior WorkSafe Officer Ken Johnson inspects a construction site in Darwin.

EXTRACT*Occupational Health and Safety Act 2004***PART 1 – PRELIMINARY****2 Objects**

(1) The objects of this Act are:

- (a) to secure the health, safety and welfare of employees and other persons at work; and
- (b) to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work; and
- (c) to ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and
- (d) to provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards having regard to the principles of health and safety protection set out in section 4.

4 The principles of health and safety protection

- (1) The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
- (2) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
- (3) Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.
- (4) Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.
- (5) Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

Source: *Occupational Health and Safety Act 2004* (Vic.)

LEARNING ACTIVITY 11.4**Safe work conditions**

- 1 What is the main legislation dealing with health and safety in the workplace in Victoria?
- 2 What is the difference between physical dangers and psychosocial dangers? Provide an example of each.
- 3 What is one purpose of the *Occupational Health and Safety Act*?
- 4 Read the article 'Tradesman killed, another injured in Caulfield South building collapse' and answer the questions.
 - a What were the circumstances that gave rise to the accident in which one man was killed and another injured?
 - b Could the injured man take action? If so, against whom and what relief may he seek?
 - c What do you think will be the role of WorkSafe in this situation? Identify two possible outcomes of its investigation.

- d What are some of the possible dangers that can exist on a construction site? Make a list of as many of these dangers as you can think of.
- e What are some of the possible outcomes that can occur when not enough care is taken at a construction site?
- f Conduct some online research about work safety on construction sites. Provide some statistics about the number of incidents that occur over a 12-month period.

EXTRACT

Tradesman killed, another injured in Caulfield South building collapse

Jessica Wright, *The Age*, 22 August 2013

A 21-year-old man has plunged 15 metres to his death and another man has been seriously injured in a dramatic collapse of a two-storey building in Melbourne's south-east.

Police say the top and mezzanine floors of the Hawthorn Road shopfront, in Caulfield South, gave way shortly after 10 am trapping the two men under the rubble.

The deceased is understood to be a 20-year-old and his colleague, a 48-year-old subcontractor, who was on Thursday listed in a serious condition at the Alfred hospital.

Police believe building materials fell through the top floor of the building, which was undergoing extensive renovations, and onto the middle level, which then collapsed onto the workers ...

Construction at the site began in late April. The site has a narrow shopfront and is between a pizzeria and a beauty salon.

According to a Metropolitan Fire Brigade spokesman, three other electricians were standing on the ground floor when the building gave way and managed to jump clear of the roiling mass of bricks and debris.



Figure 11.11
The scene of the
building collapse in
Caulfield

An Ambulance Victoria spokesman said paramedics were called to the site about 10 am and it became clear to rescue workers there was little anyone could do for the younger man.

The other man was freed from the collapsed two-storey building in a joint effort by paramedics and the Metropolitan Fire Brigade.

Emergency workers and passersby worked frantically to remove the rubble, their efforts rewarded when the man was finally pulled free – albeit with fractures in both arms and a leg, and with heavy cuts and bruising ...

WorkSafe inspectors and an investigator attended the scene along with 10 MFB units, including an emergency rescue crew ...

ISSUE – WORKPLACE BULLYING

The *Fair Work Amendment Act 2013* came into operation on 1 January 2014. According to this Act, workplace bullying occurs when an individual or a group of individuals repeatedly behave unreasonably towards a worker or a group of workers, and their behaviour creates a risk to health and safety. Unreasonable behaviour is not defined in the amended Act, but the draft model Safe Work Australia's Code of Practice for Preventing and Responding to Workplace Bullying defines unreasonable behaviour as behaviour that a reasonable person, having regard for the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening.

Any person can be the target of workplace bullying. A worker subject to bullying in the workplace may apply to the Fair Work Commission for an order to stop the bullying.

Workplace bullying is also prohibited under the *Occupational Health and Safety Act*. Victims may be able to make a complaint under various discrimination statutes if the bullying is due to a certain attribute.



Figure 11.12 Workplace bullying can range from verbal or physical assault to psychological abuse.

EXTRACT

Fair Work Act – 1 January 2014 changes

Fair Work Ombudsman eNewsletter issue 12, 4 December 2013

Anti-bullying orders

A worker who has been bullied at work can apply to the Commission for an order to stop the bullying.

Under the *Fair Work Amendment Act* bullying happens when:

- an individual or group repeatedly behaves unreasonably towards a worker or group
- the behaviour creates a risk to health and safety.

Bullying doesn't include:

- one-off instances of insensitivity or rudeness, or
- reasonable management activities carried out in a reasonable manner.

To apply to the Commission a worker must be working for a constitutionally covered business. A constitutionally covered business includes:

- constitutional corporations (e.g. Pty Ltd and Ltd businesses)
- the Australian Government and its agencies
- sole traders, partnerships and trustees in ACT and NT
- incorporated volunteer associations that have at least one employee.

If a worker doesn't work for a constitutionally covered business, they can't apply to the Fair Work Commission to stop bullying. However, they can get advice from the occupational health and safety body in their state or territory.

There are no time limits for making an anti-bullying application but the worker must still be working at the business. Workers that have been dismissed can't apply for an order; however, they may still be able to pursue an unfair or unlawful termination claim.

Workplace bullying

Bullies tend to use power attributed to their position or skills in the workplace, and both men and women can be the targets. Examples of workplace bullying can include:

- physical or verbal abuse
- yelling, screaming or offensive language
- intimidation
- giving employees impossible tasks
- assigning meaningless jobs that are not necessarily required
- deliberately changing work rosters to inconvenience an employee
- giving unjustifiably bad performance reviews for an employee
- practical jokes or initiations
- spreading malicious rumours
- pressure to behave in an inappropriate manner.

Problems of workplace bullying

Bullying can have an impact on the workplace as well as the economy. It may lead to problems for employees such as:

- being less productive at work
- having less confidence and self-esteem
- feelings of fear, stress, anxiety and depression
- sleep disturbances
- adverse effects on personal life, study and relationships
- an increased level of absenteeism from work
- a lack of trust in their employer or fellow employees
- physical symptoms such as headaches, backaches and sleep problems.

In 2010, the issue of bullying in the workplace was brought to the attention of the general community and politicians following the suicide of Brodie Panlock.

EXTRACT

Brodie's law means workplace and cyber bullies face 10 years in jail

Geoff Wilkinson, *Herald Sun*, 5 April 2011

Tougher laws for workplace bullies are welcome, but employers shouldn't think they can wash their hands of the problem, unions say.

Bullies will face up to 10 years' jail under changes to stalking laws to be introduced in Parliament this week, and an industry group wants the laws to be nationwide.

The parents of Brodie Panlock, the bullied waitress whose tragic death prompted the change, yesterday welcomed the news, while some called for the Federal Government to take a leaf from the State Government and implement nationwide bullying laws to stamp out harassment in the workplace.

But ACTU president Ged Kearney told heraldsun.com.au this morning while she hoped the increased penalties would deter people from bullying, she was concerned holding individual bullies responsible could absolve employers of their obligations.

'These laws will hopefully help deter people from conducting such undesired behaviours but it shouldn't suggest to employers that it's no longer their job to provide a safe workplace for all employees,' Ms Kearney said.

'Every workplace should have policies and procedures to deal with bullying and harassment, as it's essential for employers to provide a safe and harassment-free environment for all their workers.'

The new laws, nicknamed 'Brodie's Law', will add serious workplace and cyber bullying to *Crimes Act* provisions already governing stalking.

Children who use Facebook to threaten or harass could be caught up in the change, although those under 10 cannot be brought before a criminal court.

EXTRACT

Brodie's law sees rise in bullying complaints

Hagar Cohen, *ABC News*, 11 July 2011

The death of 19-year-old Brodie Panlock in 2006 prompted the introduction of laws that make bullying at work a criminal offence in Victoria.

The young waitress took her life after being relentlessly bullied by four men at the cafe where she worked.

A coronial investigation into her death found the men spat at her, poured oil and beer on her and offered her rat poison.

The world first, known as Brodie's Law, led to a sharp spike in bullying complaints.

New figures from the Victoria's bullying watchdog, WorkSafe, show that in one year complaints to their service nearly tripled.

WorkSafe's health and safety director, Ian Forsyth, links this increase to publicity over the prosecution of the four men in Ms Panlock's case in February 2010.

A month before the perpetrators were found guilty in January, WorkSafe received 150 calls about bullying.

That number went up to a staggering 550 calls in February, and 750 in March.

But Mr Forsyth says most of these complaints are from people who identify the not uncommon personal tensions and slights – unpleasant as they are – as unlawful bullying.

'We get calls from someone who [has had] a colleague or a supervisor pass them in the foyer, and had said hello to two colleagues but not said hello to them,' he said.

'We get significant calls along those lines, where that behaviour is described as bullying.'

Most states are guided by the principle that bullying is inappropriate conduct that is repetitive and is meant to intimidate.

It is tricky territory because human behaviour is subjective, and people will interpret other people's actions according to their own perceptions.



Figure 11.13

Brodie Panlock committed suicide after being bullied at work.

Usually the victim will raise the bullying issue inside the workplace. The next step is going to the official bullying watchdog.

But some of those agencies in each state responsible for protecting employees from harassment have recently been accused of bullying their own staff.

For example, an investigation of WorkCover NSW this year found a widespread culture of bullying.

An investigation into bullying at the call centre of WorkSafe Victoria has just been completed.

Mr Forsyth says they received a large number of allegations against a manager, and most were about the manager raising their voice in conversations.

Investigators found those instances to be at the lower end of the bullying spectrum, and the allegations were unsubstantiated.

WorkSafe has also been accused in the media and in the Legislative Council of not protecting workers in need.

Veteran health and safety consultant Jim Kent says he knows of a large number of workers who were let down by the system.

'My personal view is that I think WorkSafe one day soon is heading to a Royal Commission,' he said.

'The tragedy of that is that it might happen after there's been a significant incident of some sort.'

Capacity of the legal system to respond to demands for change

Changes in OHS

The Australian Work Health and Safety Strategy 2012–2022 provides a 10-year national framework to drive improvements to workplace health and safety in Australia. It was launched on 31 October 2012 and builds on the previous National OHS Strategy 2002–12. The two driving principles that shape the strategy are that all workers have the right to a healthy and safe work environment, and that a well-designed, healthy and safe work environment will allow workers to have more productive working lives.

The strategy aims to reduce the human and financial cost of work-related injuries and illness, after figures from Safe Work Australia showed that the estimated cost associated with work-related injury and illness is more than \$60 billion per year.

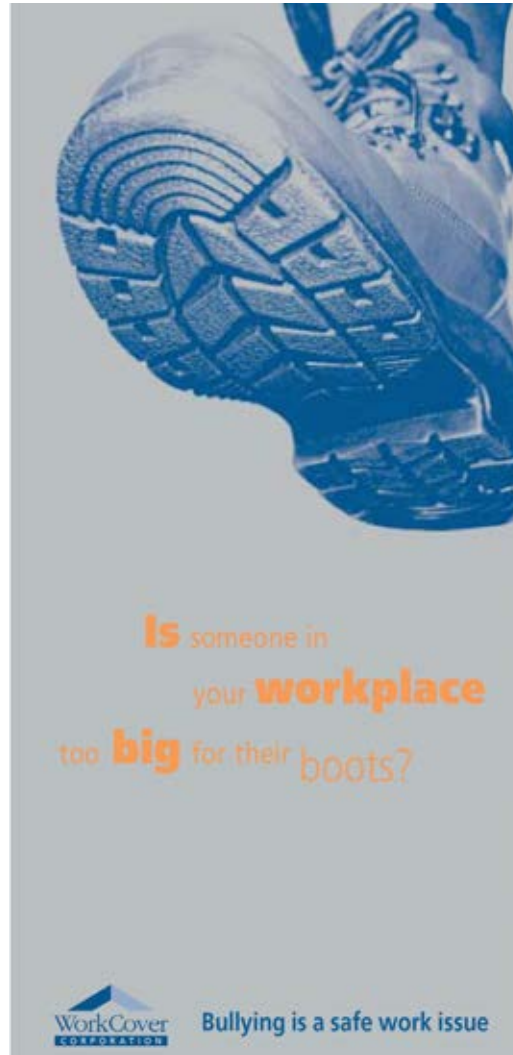


Figure 11.14 WorkCover campaign to try to stamp out workplace bullying

Fair Work Ombudsman investigates workplace bullying

A worker in Sunbury claimed he had blocks of wood thrown at him at the factory where he worked. Other staff said that nail guns were fired at them. The owner of the business denied allegations and accused the union of causing trouble. The Fair Work Ombudsman contacted the business to investigate the allegations.

CASE STUDY

Changes to the *Equal Opportunity Act*

The *Equal Opportunity Act 2010* gave the Victorian Equal Opportunity and Human Rights Commission the power to investigate workplaces in relation to discrimination, bullying and harassment. This increased the powers of the commission, which previously had to wait until a complaint was brought before it by an employee. The increase in investigative powers helps the commission to proactively identify workplaces that are unsafe in relation to discrimination, harassment and bullying.

Changes to the *Fair Work Act*

On 1 January 2014, changes to the *Fair Work Act* came into effect. One of those changes now allows a worker to apply to the Fair Work Commission for an order to stop workplace bullying.

Respect at Work campaign

Following the court case relating to the Brodie Panlock tragedy, the Victorian Government launched the Respect at Work campaign in 2010. The campaign involved a renewed focus by WorkSafe inspectors on bullying.

WorkSafe implemented measures to stamp out bullying, including assisting employers to train staff, issuing notices forcing businesses to develop anti-bullying strategies, and investigating reports of bullying.

Safe Work Australia

Safe Work Australia is a national agency created by the *Safe Work Australia Act 2008* (Cth). It aims to coordinate and develop national policy and strategies, and to assist with the implementation of model work health and safety legislation that is intended to be uniform across Australia. The model legislation was finalised in June 2011 when the *Work Health and Safety Act 2011* (Cth) was passed. At this stage Victoria has indicated that it will not adopt the new harmonised legislation.

Methods and institutions for resolving disputes – workplace bullying

WorkSafe Victoria

WorkSafe is an independent statutory body that has wide-ranging powers in relation to occupational health and safety. It is able to investigate incidents and alleged offences under the *Occupational Health and Safety Act 1985* (Vic.), and other Acts such as the *Dangerous Goods Act 1985* (Vic.) and *Equipment (Public Safety) Act 1994* (Vic.), and can prosecute workplaces for offences under the *Occupational Health and Safety Act*.

An employee who is aware of unsafe work practices can contact WorkSafe Victoria to obtain free advice or to make a complaint so that an investigation is undertaken.

Fair Work Ombudsman

The Fair Work Ombudsman can enforce the laws for employment-related discrimination. A person can make a complaint to the Fair Work Ombudsman if they believe they are not getting the correct pay, conditions or workplace rights, or if they believe an employer has discriminated against them.

If a person has been discriminated against on the basis of the grounds outlined in the *Equal Opportunity Act 2010* (Vic.), then they will need to make a complaint to the Victorian Equal Opportunity and Human Rights Commission or VCAT. However, if a person has been discriminated against in relation to matters covered in federal legislation, they can make a complaint to the Fair Work Ombudsman.

Fair Work Commission

A worker is now able to apply to the Fair Work Commission for an order to stop bullying under the *Fair Work Act*. This is only available to certain workers in Australia; that is, those who work in a constitutionally covered business or other business covered by the *Fair Work Act*.

Once an application is received, the Fair Work Commission will send a copy of the application to the worker's employer and ask for a response from the employer and the person or persons the worker alleges has been bullying them. A response will need to be lodged with the commission within seven days, following which the commission will decide how the matter should be dealt with. Dispute resolution methods include mediation, conferences or a hearing to decide the dispute.

Victorian Equal Opportunity and Human Rights Commission

If a person is being discriminated against or harassed, they may be able to have the complaint heard by the Victorian Equal Opportunity and Human Rights Commission. The Commission will use conciliation as a method of dispute resolution.

A person may also take their case to the Australian Human Rights Commission if they are sexually harassed or discriminated against on the basis of age, disability, sex or race.

VCAT

If the matter is not resolved at the Victorian Equal Opportunity and Human Rights Commission, the person may then lodge an application with the Human Rights List of VCAT to have their claim heard by a member of VCAT. It is also possible to take a complaint direct to VCAT.

Courts

Courts are able to judicially determine cases, particularly where there are breaches of occupational health and safety. Courts are given wide-ranging powers to hand down penalties as prescribed in the *Occupational Health and Safety Act*.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

- 1 Read the article 'Sussan Corporation Australia ordered to pay damages' and answer the questions.
 - a Identify four types of workplace bullying. (2 marks)
 - b Describe the bullying that occurred in this situation. (2 marks)
 - c What avenue of dispute resolution was used by Ms Keegan to resolve this issue? (1 mark)
 - d What was the impact of the bullying in this case? (2 marks)
 - e Explain the outcome of this case. (2 marks)

Sussan Corporation Australia ordered to pay damages

Tony Keim, *The Courier-Mail*, 8 April 2014

A national women's clothing retailer has been ordered to pay more than \$235 000 in damages to an employee subjected to bullying after returning from maternity leave.

A Supreme Court judge has ordered the Sussan Corporation Australia pay former employee Gabrielle Renee Keegan damages after being bullied by her supervisor, Diana Clarke, over an 11-day period three-and-a-half years ago.

Ms Keegan, who originally claimed almost \$1.2 million in damages, was an employee of the Sussan's Cairns Central store, in north Queensland, when she was subjected to workplace bullying by Ms Clarke in September 2010.

Cairns Supreme Court judge James Henry, in a just-published written decision, slammed the Sussan Corporation, saying it failed to comply with its own bullying and harassment policy.

'Ms Keegan's complaint was not treated seriously or impartially [by Sussan's],' Justice Henry said.

'Confidentiality was not respected ... (and) no attempt at all was made to investigate the complaint.'

He was particularly scathing of Sussan's further betrayal of Ms Keegan's welfare by telling Ms Clarke about the bullying complaint.

He said after learning of the complaint, Ms Clarke further bullied Ms Keegan by telling her to 'put some lip on' and 'go home to your bub'.

'Worse still, the following day Ms Keegan learnt that Sussan's apparent method of handling her complaint about her supervisor's bullying conduct had in effect been to leave the supervisor and her to sort the problem out between each other,' he said.

The court was told Ms Keegan claimed Ms Clarke's bullying was so 'extreme that she is unlikely to be able to return to full-time work.'

'In April 2010 [Ms Keegan] took leave to care for her newborn child,' Justice Henry said.

'[She] returned to work on 7 September 2010. Within the ensuing 11 days at work she became so psychologically unwell, allegedly in consequence of Ms Clarke's bullying conduct, that she was unable to return to work again.'

He said the abuse consisted of 'unwarranted criticism' about Ms Keegan's failure to sign 'customers to the store's VIP discount program, poor handwriting, failing to remove security tags from clothing and not mopping the floor properly'.

'It also involved excluding Ms Keegan from knowledge of and participation in matters of business management, ignoring Ms Keegan's offers of assistance and warning her of the consequences of a drop in standards,' he said.

'Ms Clarke's behaviour towards Ms Keegan since she had returned to work ... involved a pattern of such unreasonable and excessive behaviour by a manager towards an employee as to signal a risk that it may cause serious emotional distress.'

In handing down his finding, Justice Henry said: 'A reasonable person in Sussan's position would have realised its ongoing failure to properly address Ms Keegan's complaint considerably heightened the prospect of Ms Keegan's emotional distress worsening.'

'That is not only because the bullying would likely continue, as it did, but also because Sussan's failure would of itself distress the employee who in her time of crisis had looked to it for help.'

'Against that background the risk of Ms Keegan's mental state being so affected that she may suffer a psychiatric illness was reasonably foreseeable.'

Sussan's was ordered to pay Ms Keegan damages totalling \$237 770.

2 Read the case study 'Seeking damages for bullying' and answer the questions.

- a Explain what occurred in this case. (2 marks)
- b Identify three problems that might occur in the workplace as a result of bullying. (3 marks)

Seeking damages for bullying

Sally Berkeley, former head of the bra division Berlei, accused the manager of Pacific Brands' underwear division, which makes Bonds, Holeproof and Berlei, of being a foul-mouthed serial bully who screamed obscenities, punched furniture and, on one occasion, kicked a bin at a fellow employee.

Ms Berkeley was seeking \$9 million and exemplary damages, arguing she was treated with scornful disregard. A private settlement was reached.

- 3 Identify three methods and institutions for resolving workplace bullying disputes. Explain why you would use each method. *(6 marks)*

(Total 20 marks)

ASSESSMENT TASK REPORT

Workplace bullying

You are required to work in pairs for this assessment task. The focus of this task is on workplace bullying and the case of Brodie Panlock. Look back at the articles 'Brodie's law means workplace and cyber bullies face 10 years in jail' and 'Brodie's law sees rise in bullying complaints'. You may choose another workplace bullying case, provided it took place in an Australian workplace.

In pairs, you must choose one of the following methods to present your task:

- website
- PowerPoint presentation
- brochure
- information booklet
- poster.

You must use at least two of the following when presenting your assessment:

- newspaper article
- interview
- picture
- court transcript
- extract/s of relevant Act/s.

Provide a report on what happened in the Brodie Panlock case or the case of your choosing. You need to address the following:

- names of the relevant people involved
- the facts that gave rise to the bullying
- the outcome of the court case
- what changes in the law resulted from this case
- your opinion on current laws and further changes in the law that could be made.

You will be marked on the following:

- presentation and layout *(5 marks)*
- information about the case:
 - names of relevant people *(2 marks)*
 - facts *(5 marks)*
 - outcome of the court case *(2 marks)*
 - potential changes in the law *(5 marks)*
 - opinion *(3 marks)*
- bibliography *(3 marks)*
- innovation, originality *(2 marks)*
- level of research *(3 marks)*.

(Total 30 marks)



Figure 11.15

The termination of a person's employment could be in breach of workplace laws.

ISSUE – DISMISSAL

Termination of employment can be either **voluntary** or **involuntary**. When an employee has decided to leave the workplace of their own volition, such as resigning to work for another employer, or **retiring**; that is, no longer being employed by any company, it is referred to as voluntary termination of employment. Involuntary termination of employment is when the employer has dismissed the employee. This may be because the employee's position no longer exists (due to, for example, a restructure of the company or the company downsizing). This is called **retrenchment** or **redundancy**. Another reason may be because the employee is **sacked**.

A workplace may dismiss an employee summarily, meaning 'on the spot' or without notice. This is called instant dismissal or summary dismissal, and the employee is given no warning or notice. For example, an employee may be summarily dismissed because they have been involved in significant misconduct.

A workplace may also dismiss an employee with notice; that is, inform the employee they are dismissed and provide them with the required notice (such as two weeks', one month's or three months' notice, depending on the requirements of the employee's contract).

Both types of dismissal – instant dismissal and dismissal with notice – may give rise to two issues: **unfair dismissal** and **unlawful termination** of employment.

Unfair dismissal

In 2006, WorkChoices significantly restricted claims that could be made by employees for unfair dismissal, as an employee who was employed in a business with less than 100 employees could not make a claim. It was estimated that, at the time, WorkChoices had closed the door to about 90 per cent of the employees who may have wished to bring an unfair dismissal claim.

The *Fair Work Act* abolished this restriction and allowed any employee to make an unfair dismissal claim, regardless of the number of employees in the business, as long as they earned less than the 'salary cap' set by the government at any point in time. There are still, however, some restrictions on people who are employed by a business that has less than 15 employees.

An employee who has been dismissed is considered to have been unfairly dismissed if:

- the dismissal was harsh, unjust or unreasonable
- the dismissal was not a case of genuine redundancy.

Harsh, unjust or unreasonable dismissal

In considering whether a dismissal is harsh, unjust or unreasonable, an employee needs to take into account:

- whether there was a valid reason for the dismissal related to their capacity or conduct
- whether they were notified of that reason
- whether they were given an opportunity to respond to any reason related to their capacity or conduct

- any unreasonable refusal by the employer to allow them to have a support person present to assist at any discussions relating to dismissal
- whether they were warned about any unsatisfactory performance, if the dismissal related to such performance.

Genuine redundancy

A person has not been unfairly dismissed if the dismissal was because of a genuine redundancy. A genuine redundancy exists if:

- the person's employer no longer requires that person's job to be performed by anyone because of operational changes, such as downsizing or restructuring
- it was reasonable that the employee could not have been re-employed in the same business, or an associated entity of that business
- the employer has complied with the obligations set out in the relevant agreement or award to consult about the redundancy.

EXTRACT

When can you fire someone?

Nina Hendy, *The Age*, 7 April 2014

It was just like any other Monday morning when Angela Manderson walked into the office.

However, she hadn't even sat down when she was tapped on the shoulder.

She was called into the bosses' office.

'I was told that I was being formally cautioned, and he handed me a letter.'

The letter stated that her energy levels seemed low and that she appeared uninterested in the role.

It surprised her, because her father had worked for the company for 30 years, and he loved working there. She was also an experienced payroll officer, having held similar roles elsewhere for years with no issues.

The 30-year-old approached the HR department and asked what the letter meant. She offered to go to the doctor about her apparent health issues. She was told that the letter was nothing more than a documented conversation.

'Three days after I was given that letter, they sacked me, telling me I didn't pass the probation period. I was completely shocked.'

After the meeting, she returned to her desk to find IT staff were disabling her computer access. She was escorted out of the building.

'I had no idea it was coming. They did the same thing to a male colleague two days later, who had also been there for eight weeks,' she says.

'I felt I was going really well in the job, and was developing a good working relationship with my colleagues. I hadn't been given any formal warnings, and I had complied with the informal feedback I had been given.'

Manderson doesn't have a case for unfair dismissal because it only comes into play once you've been employed for six months. She's now hunting for work.

'It's not fair that an employer can decide they mightn't like you, and then dismiss you "fairly" just because you're within a probationary period.'

But Manderson isn't alone.

According to the Fair Work Commission, 3508 unfair dismissal claims were finalised in the first quarter of FY2014. A massive 80 per cent of these claims were settled either prior to or

during the FWC conciliation process. Only 5 per cent of the claims were decided in court, which is the last resort. The primary aim of the Fair Work Commission is to settle as many claims as it can to avoid expensive and time-consuming court processes.

Terminating is straightforward if an employee is still within their probationary period, according to Sydney recruitment expert Pam KcKean.

'As a general rule, a small business will know within the first year if a candidate is unsuitable. It's likely that if you're unhappy with their performance, they may also have changed their mind about working for the organisation, and quite often, one or two frank conversations will do the trick,' the managing director of JSS Recruiting says.

'However, as the laws surrounding unfair dismissal are complex and quite often appear subjective, care must be taken when going through this process.'



Figure 11.16 Small businesses need to follow rules when dismissing someone.

Unlawful termination of employment

Australian workplace laws protect employees from being dismissed on unlawful grounds. Laws relating to unlawful discrimination can be found in the Victorian *Equal Opportunity Act 2010* and various Commonwealth Acts.

EXTRACT

Equal Opportunity Act 2010

18 Discrimination against employees

An employer must not discriminate against an employee:

- (a) by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with the employment; or
- (b) by dismissing the employee or otherwise terminating his or her employment; or
- (c) by denying the employee access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or
- (d) by subjecting the employee to any other detriment.

Source: *Equal Opportunity Act 2010* (Vic.)

Discrimination may occur in the workplace when someone's employment is terminated. The following are examples of situations that could indicate discrimination:

- More than one employee has been involved in wrongdoing, but only one employee with a particular attribute, such as different race, is dismissed.

- The company is downsizing its operations, and elects to terminate the employment of the only female in a particular department, even though her performance is better than others in the department.
- A homosexual male is dismissed with three months' pay for no apparent reason other than that his male supervisor is not comfortable with homosexuals.

Federal Court decision rules no discrimination

In *McDonald v. Parnell Laboratories (Aust)* (2007) FCA 1903, the Federal Court had to decide whether an employee was discriminated against when she was dismissed from her employment.

Ms McDonald was a senior manager and part of her contract was that she could be required to work additional hours outside the normal 9 am to 5 pm hours. However, McDonald often did not work additional hours, due to family responsibilities.

The Federal Court found that she was not discriminated against. Before she accepted employment she would have known whether she would be able to meet her contractual duties to work additional hours. The Federal Court dismissed all claims against Parnell Laboratories (Aust) because McDonald had not fulfilled the conditions of her employment explained to her before she entered her employment contract.

CASE STUDY

Sex discrimination

It is unlawful for a business to terminate a person's employment based on gender. This applies to both men and women. It is also unlawful to terminate someone's employment on the basis of their marital status, family responsibilities or potential pregnancy.

Sex discrimination is unlawful under the Victorian *Equal Opportunity Act 2010* and the Commonwealth *Sex Discrimination Act 1984*.

EXTRACT

Sex Discrimination Act 1984

14 Discrimination in employment or in superannuation

- (2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:
- (a) in the terms or conditions of employment that the employer affords the employee
 - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment
 - (c) by dismissing the employee; or
 - (d) by subjecting the employee to any other detriment.

Source: *Sex Discrimination Act 1984* (Cth)

Disability discrimination

It is illegal to discriminate against a person who has a disability or impairment. This includes people with physical, mental, psychological or intellectual impairment and people who suffer from a disease. Disability discrimination applies when an employee has been dismissed on the basis of a disability attribute.

Racial discrimination

State and Commonwealth legislation makes it unlawful to discriminate against a person on the grounds of race, colour or religious beliefs. It is therefore unlawful to dismiss someone based on their race.

Age

It is unlawful under the *Equal Opportunity Act* to discriminate against someone because of their age. This type of discrimination can occur during a job application or become apparent as a lack of advancement opportunities. Age can also be a reason for unfair dismissal. An employer may, however, pay an employee who is under the age of 21 years according to the employee's age.

CASE STUDY

Female lawyer claims harassment and victimisation

Bridgette Styles, 28, claimed that there was a sexist culture at her work at Clayton Utz. She brought civil proceedings against Clayton Utz for \$200 000. The case was settled out of court for an undisclosed sum.

Her claim for damages was triggered by allegedly offensive comments made at boozy work functions at bars around Sydney. She alleged that the firm had done nothing to prevent inappropriate sexual language and humour being used by male employees about female employees. She said there had been a dozen incidents of unwelcome sexual conduct when she worked for the firm as a graduate solicitor between August 2007 and December 2008.

Styles maintained that she had been victimised after she complained, and defamed after her boyfriend sent a memo to colleagues, bragging about sleeping with her.

Ms Styles was dissatisfied with the firm's procedures. She felt she could not complain at the time because it was a 'hostile workplace'.

Clayton Utz says that after investigation of Ms Styles' complaint it had determined that the complaint was unfounded. Her employment was terminated in December 2008, after she was told her work was substandard.



Figure 11.17 Bridgette Styles made a claim against her employer.

Capacity of the legal system to respond to demands for change – dismissal

Fair Work Act 2009 (Cth)

The *Fair Work Act 2009* (Cth) was established in response to demands for change by the general public. WorkChoices legislation was unpopular among the voters and employees of Australia. The people

who were against WorkChoices undertook various campaigns to attempt to influence the government to initiate changes in the law. It is clear that WorkChoices contributed to the downfall of the Howard Government and to the loss of John Howard's seat in parliament.

After the Commonwealth Labor Government was elected in 2007, it worked towards abolishing WorkChoices in response to the demands for change. The *Fair Work Act* was passed in 2009. This Act abolished provisions that limited the ability of employees to make unfair dismissal claims against employers.

Though the unfair dismissal provisions still have limitations in terms of the amount of time the employees have to be employed at the workplace, the provisions are substantially more flexible than WorkChoices.

Equal Opportunity Act 2010 (Vic.)

In August 2007, the Attorney-General of Victoria announced that he intended to review the *Equal Opportunity Act 1995*, with a view to determining how best to eradicate discrimination and promote equal opportunity, including in the workplace.

The 2010 Act introduced obligations that affect employers, including a new responsibility to eliminate discrimination, sexual harassment and victimisation. It gave the Victorian Equal Opportunity and Human Rights Commission wide-ranging powers to investigate discrimination, sexual harassment and victimisation in the workplace, even without a complaint having been made to it. The commission also has the power to issue a compliance notice to a business that is in breach of workplace laws.

Previously, an individual employee was required to bring his or her claim to the commission before going to VCAT. This requirement has been abolished by the new legislation. Claims from August 2011 can be made direct to VCAT.

The passing of the Act has been well received. It is generally considered to be a step in the right direction to eradicating discrimination in the area of unfair termination of employment.

Methods and institutions for resolving disputes – dismissal

There are a number of institutions and bodies that can resolve disputes in relation to unfair dismissal or unlawful termination of employment.

Fair Work Commission

The Fair Work Commission (formerly Fair Work Australia) was established by the *Fair Work Act 2009* and was designed to be a 'one-stop shop' to carry out a wide range of functions, including providing information, advice and assistance on workplace issues.

The Fair Work Commission has the power to resolve disputes relating to unfair dismissals. An employee is eligible to apply to the commission if they have completed the minimum employment period. The minimum employment period is one year if the business employs less than 15 full-time-equivalent employees, or six months if the business employs 15 or more full-time-equivalent employees.

If the employee earns more than \$129 300 a year, then they must be covered by an award or an enterprise agreement to be able to make a complaint to the commission.

An employee must make an application within 21 days of the dismissal. The Fair Work Commission will attempt to resolve the dispute using **conciliation**. If the matter does not settle at conciliation, then the commission will hold a conference or hearing to resolve the dispute.

If the Fair Work Commission is satisfied that an employee was unfairly dismissed, it has the power to award a range of remedies, including ordering that the employee be reinstated or that compensation be paid to the employee.

Fair Work Ombudsman

The Fair Work Ombudsman can advise on and investigate workplace discrimination and, if necessary, take these matters to court.

Australian Human Rights Commission

The Australian Human Rights Commission can investigate complaints of unlawful termination based on a person's sex, disability, race, age or sexual preference. However, the Human Rights Commission can only deal with federal laws and is not able to investigate complaints made under the Victorian *Equal Opportunity Act*.

Complaints to the commission are normally resolved through conciliation. Outcomes can include an apology, reinstatement to the job, compensation for lost wages or changes to internal policies.



USEFUL WEBSITE

Human Rights Commission www.hreoc.gov.au

Victorian Equal Opportunity and Human Rights Commission

The role of the Victorian Equal Opportunity and Human Rights Commission is to protect people's rights in relation to discrimination, sexual harassment and religious vilification. The commission provides a free telephone advice line, a complaint handling process, and education, training and consultancy services.

A person can make a complaint to the commission free of charge. The commission does not prosecute, make decisions or award compensation, but helps to resolve complaints by mutual agreement.

The commission engages in conciliation as a method of resolving disputes. It does not have the power to make orders, and it is therefore incumbent on the parties to be bound by the agreement.

If the complaint is not resolved, then the complainant can make an application to the Anti-Discrimination List of VCAT.

Victorian Civil and Administrative Tribunal

An employee can make an application to the Human Rights List of VCAT if the complaint is not resolved at the Victorian Equal Opportunity and Human Rights Commission. Under the *Equal Opportunity Act 2010*, a complaint can also be made direct to VCAT. There is no application fee for discrimination applications to VCAT's Human Rights List, and normally legal representation is not required. VCAT will use methods such as conciliation to resolve the dispute.

Courts

In some situations, an employee can apply to a court to have a termination matter resolved. The Industrial Division of the Victorian Magistrates' Court deals with claims concerning matters such as entitlements under a contract of employment or award. The jurisdictional limit of the Industrial Division is \$100 000.

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Dismissal

- 1 Distinguish between voluntary termination of employment and involuntary termination of employment. *(2 marks)*
- 2 What is unfair dismissal? Provide one example of a situation where a person may have been unfairly dismissed. *(2 marks)*
- 3 What is unlawful termination of employment? Provide one example of a situation where a person's employment has been unlawfully terminated. *(2 marks)*
- 4 Describe one way that a person may be discriminated against at work. *(2 marks)*
- 5 Look back at the case study 'Federal Court decision rules no discrimination' and state why you think this was not discrimination. *(1 mark)*
- 6 Look back at the case study 'When can you fire someone?' and answer the questions.
 - a Provide an explanation as to why Ms Manderson did not have a case for unfair dismissal. *(1 mark)*
 - b For what reason do a majority of unfair dismissal claims not proceed to court? Is this good or bad? Justify your answer. *(3 marks)*
- 7 Look back at the case study 'Female lawyer claims harassment and victimisation' and answer the questions.
 - a What occurred in this case? *(2 marks)*
 - b How do you think this could be discrimination? State the name of the Act that makes this type of discrimination unlawful. *(3 marks)*
 - c How would you decide this case if you were the member hearing the case for VCAT? Explain your decision. *(3 marks)*
- 8 Identify two places you could go to if you had a problem with unfair dismissal. Explain what assistance they can give you. *(5 marks)*
- 9 Describe two changes in the law that have taken place to try to improve the situation for workers. *(4 marks)*
- 10 **Investigation**

Using AustLII (www.austlii.edu.au), find the page where you are able to access recent decisions from the Human Rights List of VCAT. Follow the link to Victoria and search the Victorian Civil and Administrative Tribunal. Find a recent case where a person's employment was unlawfully terminated and answer the following questions.

 - a What are the names of the parties? *(1 mark)*
 - b Describe what happened in the case that gave rise to the unlawful termination of employment. *(2 marks)*
 - c What attribute resulted in the person being dismissed? *(1 mark)*
 - d What decision was made by the tribunal? Include in your answer if the applicant was successful and the remedy awarded. *(3 marks)*
 - e Do you agree with the decision? Justify your answer. *(3 marks)*

(Total 40 marks)



CHAPTER 12 WILLS AND INHERITANCE

OUTCOME

At the completion of this unit you should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- legal principles relevant to the selected area/s of law
- a contemporary issue for the selected area/s of law
- the capacity of the legal system to respond to demands for change
- methods and institutions for resolving disputes arising under the selected area/s of law.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area/s of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

KEY LEGAL TERMINOLOGY

administrator A person appointed by the court to administer the estate in cases of total or partial intestacy.

attestation The witnessing of a will.

attestation clause A clause at the foot of the will for the signature of the willmaker and the witnesses to the will.

beneficiary A person who receives benefits under the will.

bequest A gift of personal property by means of a will, usually not money.

devise A gift of real property (house or land).

die without issue Die without children.

estate All assets and all liabilities (that is, everything the willmaker owns and all their debts).

executor A person appointed to carry out the directions regarding property contained in the will.

grant of probate The giving of approval to the executor to deal with the estate after the registrar of probates or the Supreme Court has accepted the will as valid.

interested witness A person who is a beneficiary under the will, or whose spouse is a beneficiary.

intestate Dying without a will.

joint proprietors When two or more people own a property as joint proprietors (sometimes called joint tenants*), and one dies, the remaining joint owner automatically owns the whole property. One person's share of the property cannot be left to someone else in a will.

legacy A gift of money.

letters of administration The giving of approval to an appointed administrator to deal with the estate of a person who has died without a will. The registrar of probates or the

Supreme Court must be satisfied that there was no valid will.

probate parchment Document certifying that the will has been proved (declared valid).

real property Land (as opposed to goods) including vacant land, the family home, other real estate, business properties and farms.

tenants* in common When two or more people own a property as tenants in common (in equal or unequal shares), each owner can separately dispose of their portion of the property. Their share forms part of their estate and is an asset to be disposed of by a will.

testator A person who makes a will.

trust The holding of property for the benefit of another person.

* The term 'tenants' in this usage is not to be confused with rental tenancies or leases.

REASONS FOR MAKING A WILL

A **will** is a document giving legal effect to a person's wishes about the distribution of their possessions after death. A will allows a person to have control over the distribution process, backed by the force of law. When people make wills it is necessary for them to consider what will happen to their possessions and any debts (known as the **estate**). They must also consider what help and support they will give to any person who relies on them for maintenance and support (**dependants**).

The **residuary estate** is the term used to describe the property and assets left over once debts have been paid.

Making a will is important and allows people to control how their estate will be distributed after their death. A will enables people to:

- choose someone (known as the executor) who will oversee the distribution of the estate
- appoint a person to act as guardian to their children
- dispose of their possessions as they see fit.

Any legal instruction can be written into a will. For example, a person may ask that money be held in trust for infant children until the children reach 21 years of age. A person may want all their

possessions to go to a charity rather than family or they may bequeath their property to particular relatives, friends or employees.

If a person dies without a will (known as **dying intestate**), his or her assets will be distributed according to the rules set out in the *Administration and Probate Act 1958* (Vic.), which provides for the disposal of property to domestic partners and family members. In a family with many relatives, distribution of assets under the legislation can become complicated and unwieldy. If no relatives can be found, the estate will be handed to the state.

Failure to make a will can lead to hardship for family members or friends. People that the deceased would have wanted to look after may not be adequately catered for, and other relatives who would not have been considered if the deceased had made a will may end up getting some of the estate.

For example, the rules of intestacy divide a deceased's assets between the spouse and the children, and so the surviving partner may get less than expected or a single person may want a sibling or close friend to inherit their possessions rather than their parents.

The court can also appoint an administrator and order payment for the administrator out of the deceased's estate. While the administrator is usually a family member or relative, there is no guarantee that the appointee would have been the deceased's choice.

STATISTICAL SNAPSHOT

- The NSW Trustee & Guardian estimates that 45 per cent of Australians do not have a will.
- 97 per cent of the 410 people surveyed for a Monash University study into protecting elders' assets (2010) had a will. The mean age of the respondents was 78.
- In 2011, State Trustees (Victoria) estimated that 25 per cent of the estates it administers are problematic because the instructions in the will are poorly worded, not current or do not cover all the deceased's assets.
- State Trustees' research also showed that 75 per cent of Victorians under the age of 50 did not expect their will to be challenged. Of the people who thought a challenge was likely, 23 per cent believed the challenge would come from their children followed by siblings (15 per cent) and partners and ex-partners (12 per cent).
- According to the Victorian Law Reform Commission, in 2010–11 the Supreme Court issued grants of probate or letters of administration for 50 per cent of registered deaths. Approximately 7.35 per cent of these were issued letters of administration for total intestacy. The number of partial intestacy cases could not be calculated.

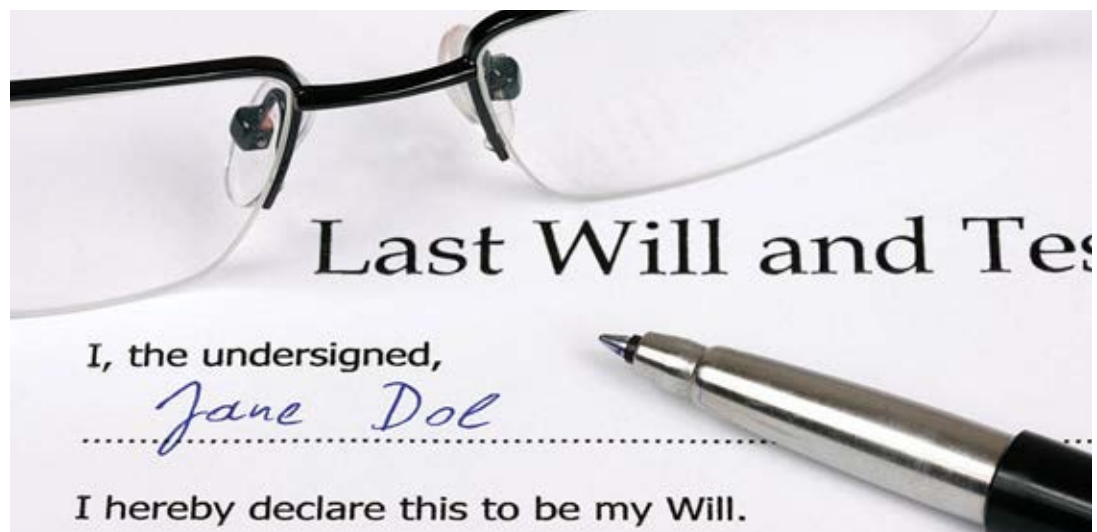


Figure 12.1
Last will and
testament

LEGAL PRINCIPLES RELATING TO WILLS AND INHERITANCE

The law relating to wills and inheritance is included in the *Wills Act 1997* (Vic.), which gives the requirements for making a valid will, and the *Administration and Probate Act 1958* (Vic.), which gives rules for the distribution of property when a person dies intestate.

As the disputes that arise under these Acts are between individuals, they come under the general category of civil law.

Dying intestate

To die intestate means to die without having made a will. A person dies intestate if:

- no will has been made
- a will has been made, but it is invalid because it is not properly executed. However, a court can still declare the will valid, provided the person intended the document to be his or her will
- a will distributes only part of the estate (a partial intestacy).

If no will is found, the deceased's bank, solicitors and the registrar of probates should be consulted to see if a will is being held. Private papers of the deceased should also be checked.

Robert Holmes à Court

When Robert Holmes à Court, one of Australia's wealthiest men, died of a heart attack in 1990, aged 53, he had his unsigned will in his briefcase. Fortunately for his widow, Janet, their four adult children waived their entitlements under the intestacy laws.

In the absence of a will:

- a court will appoint an administrator to oversee the distribution of the estate
- the state may appoint guardians for infant children or take them into care
- the property is divided according to strict rules.

CASE STUDY

Application for letters of administration

When a will cannot be found, an application **for letters of administration** must be made. The granting of letters of administration means the Supreme Court appoints a person to administer the estate who has the same function as the executor of a will. The administration includes such things as paying debts or selling property to distribute the proceeds.

The process for a grant of letters of administration begins with an advertisement published on the Supreme Court's website. The advertisement states that an application for letters of administration will be made in 14 days' time. The necessary documents are then lodged with the registrar for a grant of administration.

The administrator may be a relative or friend of the deceased. If there is no-one who is willing or able to apply, the State Trustees can assist.

Distribution of an estate when there is no will

When there is no will, the distribution of a deceased's estate will be done according to a hierarchy of surviving relatives or next of kin as outlined in the *Administration and Probate Act 1958* (Vic.).

The intestacy rules apply as long as the next of kin live longer (by any amount of time) than the intestate. Table 12.1 provides several examples of how a person's estate will be divided based on this generational hierarchy.

Domestic partners

Before 2001, de facto and same-sex partners could not inherit under the rules of intestacy as the rules only recognised marital relationships. The *Statute Law Amendment (Relationships) Act 2001* (Vic.) changed the law to recognise **domestic partners** and to give de facto and same-sex couples similar rights to married couples in relation to wills and inheritance. This change was recommended by the Victorian Equal Opportunity and Human Rights Commission in its 1988 report *Same-Sex Relationships and the Law*.

Table 12.1 Examples of the rules of intestacy (how a person's estate will be divided based on generational hierarchy)

Partner and no children	All the estate goes to the partner.
Partner with children	All personal chattels to the partner and the first \$100 000. If more than \$100 000 in the estate, the first \$100 000 goes to the partner plus one-third of the remainder. Two-thirds of the remainder goes to the children equally.
No partner and no children	To parents equally; if either has died, all to the surviving parent.
Children only	Shared equally.
No partner, but children and one child died before the deceased	Each living child is entitled to one equal share. Where there is a deceased child, the next of kin of that child take an equal part of that child's share.
No partner, no children and no parents	Shared equally between brothers and sisters.
No partner, no children, no brothers or sisters and no parents	To other next of kin, nearest blood relatives by degree (brothers, sisters and grandparents are of the second degree).
No next of kin	To the Crown (the state).

Note: 'partner' is defined as the person's spouse or domestic partner.

EXTRACT

Administration and Probate Act 1958 (Vic.)

3 Definitions

- **Partner** of a person who dies means the person's **spouse** or **domestic partner**.
- **Spouse** of a person who dies means a person who was married to the person at the time of the person's death.
- **Domestic partner** of a person who dies means a **registered domestic partner** or an **unregistered domestic partner** of that person.
- **Registered domestic partner** of a person who dies means a person who, at the time of the person's death, was in a registered domestic relationship with the person within the meaning of the *Relationships Act 2008* (see below).
- **Registered caring partner** of a person who dies means a person who, at the time of the person's death, was in a registered caring relationship with the person within the meaning of the *Relationships Act 2008* (see below).

- **Unregistered domestic partner** of a person who dies means a person (other than a registered domestic partner) who was living with the deceased on a genuine domestic basis (irrespective of gender), **and** had lived with the deceased for a period of at least two years immediately before the death of the person, **or** the couple has a child together who was under 18 years of age at the time of the person's death.

Source: adapted from *Administration and Probate Act 1958* (Vic.)

EXTRACT

Relationships Act 2008 (Vic.)

The *Relationships Act 2008* (Vic.) allows heterosexual and same-sex couples to register their relationship.

- A registered domestic relationship:
 - can be between two adults who are not married to each other or registered in another relationship, and one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature to the other but not for a fee or on behalf of another person or organisation
 - applies irrespective of whether the couple live under the same roof.
- A registered caring relationship:
 - is between two adults who are not a couple or married to each other but who may be related, and
 - one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature to the other but not for a fee or on behalf of another person, organisation or agency.

Source: adapted from *Relationships Act 2008* (Vic.)

If a person dies intestate leaving two partners

In some instances, an **intestate** (person dying without a will) may leave multiple partners. The deceased person may leave an **unregistered domestic partner** as well as a **spouse** or **registered domestic partner** or **registered caring partner** from a previous relationship. In such circumstances, the unregistered domestic partner may be entitled to a share of the estate. This will depend on the length of continuous cohabitation between the intestate and the unregistered domestic partner as outlined in table 12.2.

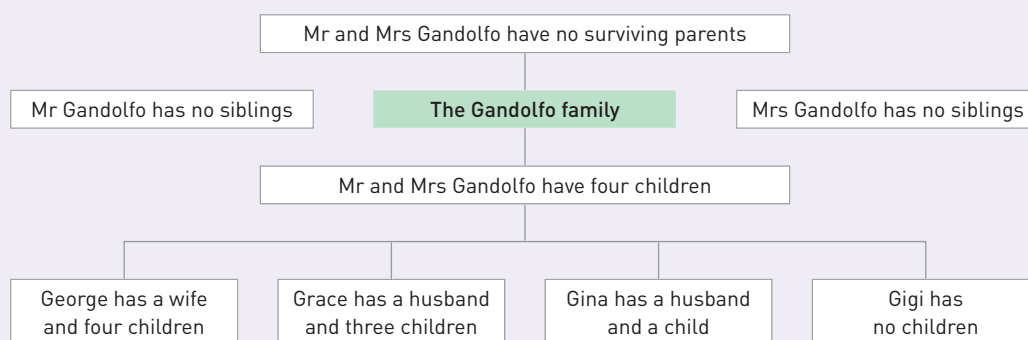
Table 12.2 Distribution of intestacy entitlements between two partners

PERIOD OF TIME THAT THE UNREGISTERED DOMESTIC PARTNER HAS LIVED AS THE PARTNER OF THE INTESTATE CONTINUOUSLY BEFORE THE INTESTATE'S DEATH	SHARE OF THE PARTNER ENTITLEMENT GIVEN TO THE SPOUSE OR REGISTERED DOMESTIC PARTNER OR REGISTERED CARING PARTNER	SHARE OF THE PARTNER ENTITLEMENT GIVEN TO THE UNREGISTERED DOMESTIC PARTNER
less than 4 years	two-thirds	one-third
4 years or more but less than 5 years	half	half
5 years or more but less than 6 years	one-third	two-thirds
6 years or more	none	all

LEARNING ACTIVITY 12.1

Dying intestate

- 1 Why do you think it is advisable to make a will? What problems are created when people die without a will?
- 2 How common is it for people to die without having made a will?
- 3 What impact does the improper execution of a will have on its validity? Explain.
- 4 Define a domestic relationship. What is an unregistered domestic relationship?
- 5 Look back at the case study 'Robert Holmes à Court'. Was his will valid? What happened in his case, and how would his estate have been divided under intestacy rules?
- 6 Explain who will inherit the estate in each of these situations.
 - a Enzo dies without a will and leaves a wife and three sons.
 - b Fatima dies without a will and has no known relatives.
 - c William dies intestate with a wife and no children.
 - d When Richard dies intestate, he has no partner but two children.
 - e Jessica and Thomas have been living together for 30 months. Thomas has a wife but has not got around to divorcing her. He does not have any children.
- 7 Study the Gandolfo family tree and then apply the rules of intestacy in each of the following scenarios to establish what would happen to the deceased's estate if a will does not exist.
 - a Mr Gandolfo dies and is survived by his wife and all his children.
 - b Mrs Gandolfo dies two years after Mr Gandolfo and is survived by all four children.
 - c Mrs Gandolfo dies two years after Mr Gandolfo and one year after her son's death.
 - d Mrs Gandolfo dies a long time after the deaths of her husband, her son George and daughter Grace. She lives with Bruno who has lovingly looked after her for the past 10 years. They have never married or registered their relationship.
 - e What steps need to be taken before the members of the Gandolfo family can be given their inheritance?



- 8 Read the case study 'James, Brenda and Sally' and answer the questions.
 - a Consider the rules of intestacy and decide how James' estate would be divided under these rules.
 - b What would the outcome have been if at the time of James' death:
 - i Sally and James had lived together for 36 months?
 - ii Sally and James had a child together who was a year old?
 - iii Brenda and James had previously registered their domestic relationship, which had yet to be revoked?

James, Brenda and Sally

James lived with Sally for 16 months before his death. They had known each other for more than three years and were engaged to be married. James had a previous de facto relationship with Brenda, which lasted 17 years. They had two children together (now aged 12 and 16) and Brenda's son from her previous marriage (now an adult) lived with them for most of that time. James and Brenda had not registered their relationship. He died without a will.

CASE STUDY

Requirements of a valid will

The person making a will is known as a **willmaker** or a **testator**. In Australia, the laws governing wills and inheritance vary from state to state. However, in all states the willmaker must be able to understand what he or she is doing and must provide specific instructions in writing.

Testamentary capacity

A willmaker must possess testamentary capacity; that is, a person must have the **mental capacity** to make a will. They must understand the purpose and the effect of the will when they sign it. If a willmaker is sick and wants to make or change a will, it may be necessary for the willmaker's doctor to swear an affidavit stating that the person is capable of understanding the nature of the will. Testamentary capacity means the willmaker knows:

- what the will is (a document saying what is to happen to their property when they die)
- in general terms, the amount and type of property they have
- in general terms, their moral obligation to provide for persons such as a domestic partner, children and certain family members.

The Supreme Court can approve a **statutory will** for a living person who does not have testamentary capacity. Usually, a family member, legal guardian or legal practitioner submits a draft will to the court for authorisation. Before authorising the will, the court must hear evidence and be satisfied the document reflects the likely intentions of the incapacitated person and that it is reasonable, in the circumstances, for the court to make or alter a will.

Over the age of 18

To make a will, a person must be over the age of 18. People under 18 years of age (minors) may make a will if they are married or have obtained a court order to authorise the making of a will.

Figure 12.2 A person under the age of 18 years cannot make a will unless they are married or obtain a court order.



Formalities of writing a will

A will must be written

In Victoria, people are required to make individual wills. This means each partner in a relationship must have a separate will. A will must be in writing; that is, handwritten, typed or printed. Wills cannot be digital or electronic because they could be edited.



Figure 12.3 A handwritten will

The will must be signed, witnessed and dated

The willmaker must sign the will in the presence of at least **two witnesses**. The two witnesses must then sign the will in the willmaker's presence but not necessarily in each other's presence. The signatures of the willmaker and the witnesses must appear at the foot of each page and it is recommended that the willmaker also sign at the end of the document. It is not always necessary for the witnesses to know that they are signing a will. Their purpose is to observe the circumstances under which the document was signed and be a witness to the signing of the will. Any competent adult can be a witness, including beneficiaries.

If a willmaker is too sick to sign or is paralysed, then another person can sign the will on his or her behalf and in his or her presence. This requires special wording to be included in the will.

Any alteration to the wording of a will after its signing will not be valid unless the willmaker and the witnesses sign in the margin alongside the alteration.

A will must be dated when signed. This date assists the court to determine whether it is the willmaker's most recent will, particularly in cases where multiple wills are found.

Supreme Court dispensing power

If a will (or alterations to a will) has not been written, signed or witnessed correctly, the Supreme Court can choose to dispense with these formalities and accept the will or changes therein as long as the court is satisfied that the person intended the document to be his or her will.

SAMPLE WILL

THIS WILL is the last will of [full name] of [address] [occupation].

- 1 I REVOKE all prior wills and testamentary dispositions made by me and I DECLARE this to be my last will.
- 2 I APPOINT [name and address] as sole executor of this my will and trustee of my estate (hereinafter called 'my trustee').
- 3 I APPOINT my trustee as guardian of my infant children.
- 4 I GIVE, DEVISE AND BEQUEATH the whole of my estate both real and personal whatsoever and wheresoever UNTO my trustee upon the following trusts:
 - (a) to pay all my debts, funeral and testamentary expenses, state and federal death and probate duties and taxes (if any)
 - (b) to give effect to the following gifts free of any duty or encumbrance:
 - (i) my [description of gift] to [full name, address and description of recipient]
 - (ii) the sum of [insert sum] to [full name, address and description of recipient]

(c) TO HOLD the residue of my estate for such of my children as survive me as tenants in common in equal shares absolutely upon attaining the age of eighteen years.
 IN WITNESS WHEREOF I the said [full name] have to this my will set my hand this [day] of [month] two thousand and [year].

SIGNED by the said [testator's full name])
 as and for [his/her] last Will in the) [Signature of testator]
 presence of us both being present at)
 the same time who at [his/her] request)
 in [his/her] sight and presence and in)
 the presence of each other have) [Signature of witness] [Signature of witness]
 hereunto subscribed our names as) [printed name] [printed name]
 witnesses:) [occupation and address] [occupation and address]

DID YOU KNOW?

A willmaker can choose to use the formalities prescribed in the UNIDROIT Convention Providing a Uniform Law on the Form of an International Will 1973 to write their will. The will is then valid in all countries that are party to the convention. UNIDROIT stands for the International Institute for the Unification of Private Law.

EXTRACT

The last will and testament of Whitney E. Houston

I, WHITNEY E. HOUSTON, residing in the State of New Jersey, declare this to be my Last Will and Testament and revoke all my prior wills and codicils.

FIRST

I direct that my funeral and cemetery expenses, the expenses of my last illness, all expenses of administration of my estate and all my debts (except mortgage indebtedness and indebtedness secured by any life insurance policy or otherwise secured) that are just and not barred by time be paid by my Executors from my residuary estate.

SECOND

A) I give my entire interest in all my household furniture and furnishings and other articles of household use or ornament located at any real estate used by me on a full or part-time basis for my residential purposes, together with all insurance policies thereon, if any (hereinafter referred to as my 'tangible personal property'), to any children of mine who survive, in such portions as my Executors, in their sole discretion may deem advisable, or sell the same, or any balance thereof, and add the proceeds to my residuary estate.



Figure 12.4

Whitney Houston left her estate to her daughter, Bobbi Kristina. While Bobbi Kristina is not named in the will, the singer stipulated that 'any child of mine who survives' will receive all furniture, clothing, personal effects, jewellery and cars, as well as the balance of the estate.

B) If no child of mine survives me:

- 1) I give all jewelry I own at my death to my mother, EMILY CISSY HOUSTON, if she survives me; and
- 2) I give the rest of my tangible personal property (or all of my tangible personal property if my mother does not survive me) to those of my mother, EMILY CISSY HOUSTON, my father, JOHN R HOUSTON, my husband, ROBERT B BROWN, my brother, MICHAEL HOUSTON, and my brother, GARY HOUSTON, as survive me, to be amicably divided among them as they might agree, in shares as nearly equal as possible.

Beneficiaries and gifts

A willmaker can give a gift to any number of beneficiaries in a will. A **beneficiary** is a person who will receive a benefit from a will. A **gift** can involve the whole of a person's estate or it can be a specific item or a sum of money. For example, 'I leave my collection of vintage toy cars to my brother, Timothy Smithens' or 'I leave \$10 000 to the Royal Society for the Prevention of Cruelty to Animals (RSPCA)'. The recipient is then free to deal with the gift as they see fit. Any property that is not nominated as a specific gift or used to pay a willmaker's debts is referred to as the **residuary estate**.

Conditional gifts

A willmaker can also make a **conditional gift**, particularly if they want to control how and when the beneficiary receives the gift. A conditional gift cannot make a person do something which would be against public policy; that is, a will cannot restrict a person from doing something which the person would ordinarily have a legal right to do. For example, it is acceptable for a willmaker to state that a beneficiary cannot access a gift of money until he or she attains 21 years of age. However, it is unacceptable to state that the beneficiary can only have the money if they do not remarry or if they practise a particular religion.

Mutual wills

Mutual wills are used in special circumstances where two people agree not to change their wills even after one person dies. For example, A and B agree to leave everything to the other and the survivor is to leave everything to C. If A dies, A's estate passes to B but B cannot then change his or her will to leave the estate to D. When B dies, the original agreement between A and B will be enforced and C will inherit the estate as per the agreement.

Survivorship

The *Wills Act 1997* (Vic.) states, as a general condition, that in order to inherit, a beneficiary must survive the willmaker by 30 days or more. This survivorship rule does not apply in intestacy cases. In 2013, the Victorian Law Reform Commission recommended that the 30-day survivorship rule should also apply to intestacy.

Taking care of your pets in your will

We hear of situations where people die leaving their pets with no-one to look after them. It is possible to plan for the welfare of pets in a will. To do this, a caregiver can be identified in a will with enough money provided to the caregiver to give ongoing care. It is possible to set up a legal trust fund for pets. It is necessary to state how the fund should be distributed if the pet dies. The RSPCA and the Animal Welfare League have pet bequest or animal legacy programs that take over the care of a pet until it is given a new home.

Buster, a tiger cat, heir to \$100 000

Buster, a tiger cat, was a victim of both the law and the media. He was originally heir to \$100 000 of his master's money. However, legal manoeuvres reduced the figure to \$40 000. The eight-year-old cat found the stress and strain of instant wealth too much and he died within a year of his windfall. His caretaker was his sole heir.

CASE STUDY

Appointing an executor and guardian

When a person makes a will it is usual for an **executor** to be appointed. An executor is a person appointed to carry out the directions regarding property contained in the will. The role of an executor includes:

- making funeral and burial arrangements
- paying debts
- arranging for the distribution of assets to the selected beneficiaries
- in general, representing the estate under the will.

The person appointed as executor should be someone the willmaker trusts and who is capable of managing the affairs of the deceased. This is particularly important where the willmaker sets up a **trust**. Willmakers may want money or property to be held in trust as security for beneficiaries who lack financial acumen or they may set aside money to fund a scholarship or a charity. In such cases, the executor may also be named as trustee. A **trustee** has effective control of the money and property held in trust and distributes it to the beneficiaries as specified. Alternatively a **trustee company** can be appointed to manage the trust.

If, in the event of the death of both parents, there are young children, the will needs to provide for the appointment of a **guardian**. A guardian is a person who has responsibility for the long-term welfare of a child and has all the powers, rights and duties that are usually vested in the child's natural parents.

As both parents are seen in law as guardians, if one parent survives the other, the surviving parent becomes the automatic guardian of the children, unless there is some special reason for this not to happen.

Changes to a will

It is sensible to review a will every five years or so to check that it is still current and reflects the testator's wishes. For major changes to a will it is better to remake the will and **revoke** (cancel) the previous one. Minor changes can be written in a **codicil** attached to the existing will. A codicil is a written amendment to a person's will, which must be dated, signed and witnessed just as a will would be, and must make some reference to the will it amends. A codicil can add to, subtract from or modify the terms of the original will. When the person dies, both the original will and the codicil are submitted for approval by the court (probate).

It is not necessary to make changes to a will when a change in address occurs or even if a person's name changes by deed poll. However, it is usually necessary to change a will when a person marries or when other circumstances change. For example:

- Children and grandchildren can be provided for in a general description such as 'all my children and grandchildren'. However, if individual children or grandchildren were named in the will, the will would need to be changed to include any additional children.



Figure 12.5 A lawyer can help you make changes to your will.

- If a specific gift is left to a beneficiary who dies before the willmaker, the will may need to be changed to leave the gift to someone else.
- It might be a good idea to review the will if the testator has accumulated considerably more property or assets or sold property or assets specifically named in the will.
- If a legally binding agreement (for example, a mortgage) is entered into concerning property then that takes precedence over anything contained in a will with respect to the property, and the will may need to be adjusted to take account of this change.

Revocation of a will

A will is revoked (cancelled) or no longer valid in the following circumstances:

- **You make a new will.** As soon as a new will is signed, the old one is automatically cancelled.
- **You destroy the will.** This can be done by tearing it up, burning it or otherwise destroying it.
- **You make an instrument of revocation.** You can make a statement that you wish to cancel your last will; this must be witnessed in the same way as a will.
- **The willmaker marries or remarries.** Marriage automatically cancels all previous wills unless:
 - the will was made in contemplation of the marriage
 - it can be shown that the willmaker intended to make the gift because of the marriage
 - the willmaker subsequently marries the person who is to receive the gift.

Divorce

Divorce will not revive a will made before marriage. Under S14 of the *Wills Act 1997* (Vic.), divorce invalidates any gift left to an ex-spouse and the appointment of the ex-spouse as executor in a will. The law treats the ex-spouse as if he or she died before the willmaker. The rest of the will is still valid, so people who divorce should make a new will.

CASE STUDY

Princess Di's will

Diana, Princess of Wales, did not revise her will following her divorce from Prince Charles in 1996. Her will gave very little instruction in regard to intellectual property rights, which are now extremely valuable. The potential tax ramifications of this could have been monumental, and her main beneficiaries, Prince William and Prince Harry, could have been denied access to many millions of pounds. However, her executors tried to ensure her estate was distributed as she would have wished.

Making a living will

A **living will** is a way of having your say about the type of treatment you want to receive, or not receive, if you become so incapacitated that you are unable to state your wishes. You can appoint a

person you trust to make health decisions on your behalf. For example, if you are in a coma with no chance of recovery, the person you have appointed can make the decision to turn off any life-support equipment, if this has been your wish.

There are two components to a living will. The first is a document instructing any relevant medical practitioners about the type of care you want or do not want to receive if you become incapacitated. The second document is a power of attorney appointing someone to act on your behalf. This can be a partner, relative or close friend.

LEARNING ACTIVITY 12.2

Making and revoking a will

- 1 Define the following terms:
 - a testator
 - b executor
 - c beneficiary
 - d estate
 - e codicil.
- 2 How will marriage affect the terms of a will?
- 3 Look back at the case study 'Princess Di's will'. Why is it important to change a will after a divorce?
- 4 How can a will that is not properly executed be declared a valid will?
- 5 Explain whether each of the following is an example of a valid will. Give reasons.
 - a Meagan, 16, writes a will as part of a class project.
 - b Mark deliberately lied when he asked two friends to witness his signature on his will. He told them it was a loan application.
 - c Ossie, 15, inherited a lot of money when his parents died. He asks a solicitor to process his will. In the will he leaves his estate to his carer rather than to his brother, with whom he has no contact.
 - d Joe suffered a stroke and cannot write. He dictated a will and then had his solicitor sign it on his behalf before witnesses.
 - e Rocky had a solicitor draw up his will. After he died, his solicitor realised that a mistake had been made. Rocky had only signed some of the pages in the will whereas the witnesses had signed all of them.
 - f Dominic uses a will kit to fulfil all the legal requirements of a will. He asks his sister and daughter (both over 18 years of age) to witness the will as they are the main beneficiaries.
 - g Gina, the main beneficiary in her sister's will, is also named executor.
- 6 What can be done to organise ongoing care of pets?
- 7 Look back at Whitney Houston's will. Who would inherit her estate if the daughter, Bobbi Kristina, had died before Whitney Houston?
- 8 Explain who will inherit the estate in each of these situations.
 - a John makes a will leaving his estate to his wife and daughter, then dies five weeks after his divorce.
 - b Roula makes a will leaving her estate to her brother. She then marries Tom and dies two years later. The couple did not make a will.
 - c Mickey leaves a valid will that names two beneficiaries.
 - d In a fight with his daughter, Alfonso tears up his will where she was the only beneficiary. This will, taped together again, was the only one found when he died.

- 9 Read the case study 'In the case of Yu' and answer the questions.
- Explain why the validity of this will may have been in doubt.
 - What is testamentary capacity and how was it shown to exist in this case?
 - Do you agree with the court's decision? Explain.

CASE STUDY

In the case of Yu

In the case of Yu (Queensland Supreme Court 2013), the deceased wrote his will in the notes application on his smartphone just before taking his own life. He typed his name instead of signing the document leaving all his possessions to family members. The Supreme Court declared the will valid because the judge was satisfied that:

- the will was in fact a written document
- the deceased had testamentary capacity because the deceased also left several farewell notes that showed sound reasoning in terms of how his estate should be handled after his death
- the document was intended to be the deceased's last will and testament – other than it not being signed appropriately, it was written as any other will would be written and appointed his brother as executor
- no-one had tampered with the document. The deceased was in a hotel room when he died. Electronic room-key records showed that no-one had entered the room between the time the will was created and the time the deceased was found.

- 10 Read the case study *Williams v. Ryan* and answer the questions.
- On what grounds was the will contested by relatives of the deceased?
 - What were the facts in the case and what did the court decide?

CASE STUDY

Williams v. Ryan

In *Williams v. Ryan* (Supreme Court of Victoria, 4 September 1998), the deceased's son alleged that the deceased was suffering from moderately severe dementia when she changed her will, deducting \$12000 from his share of the estate. On the basis of the evidence given by a doctor who had known the deceased for more than 25 years, the Supreme Court decided that the last will of the deceased was invalid due to lack of testamentary capacity.

- 11 Read the case study 'In the case of Coleman' and answer the questions.
- Why would the wife argue that the marriage revoked the will?
 - Why would the brother and sister argue that the will was made in contemplation of the marriage?
 - What was the court's decision?
 - Do you think the decision in the case was fair? Discuss.

In the case of Coleman (deceased); *re Coleman v. Coleman & Ors* (1975) 1 All ER 675

A man made his will, leaving the bulk of his estate to his brother and sister equally. He later married, but died about 12 months after his wedding. His widow, Muriel, argued that the marriage had revoked his previous will. His brother and sister argued that in his will he had left all his personal chattels plus \$10000 'to my fiancée Muriel', and that this will was therefore made in contemplation of the marriage to Muriel. If the will were made in contemplation of the marriage to Muriel, then it could not have been revoked by marriage.

The court decided that the words 'to my fiancée' could be sufficient to show that the will was made in contemplation of the marriage, but in this case it was more in expectation of the marriage and not in contemplation of the marriage. The marriage therefore revoked the will and the man died intestate, which meant that most of his estate would go to his widow, Muriel, rather than to his brother and sister (as appeared in his will).

CASE STUDY

- 12 Read the case study *De Gois v. Korp*. Do you think the court correctly interpreted the wishes of the deceased? Explain.

De Gois v. Korp VSC 326 (18 August 2005)

Maria Korp was assaulted and left to die in the boot of a car. Doctors said she would not recover from her vegetative state. She later died when life-support systems were turned off. The woman's husband, Joe, and his mistress were charged with her attempted murder. The mistress pleaded guilty while the husband continued to deny his involvement. Given these circumstances, Maria Korp's daughter, Laura De Gois, applied to the Supreme Court of Victoria to revoke all prior wills and to remove the husband as executor and beneficiary. The order was granted. The court believed the proposed revoking of prior wills and removal of the husband as executor and beneficiary accurately reflected the woman's likely intentions. The husband later committed suicide.

CASE STUDY



Figure 12.6
Maria Korp's children follow her coffin.

PROCEDURES AFTER THE WILLMAKER DIES

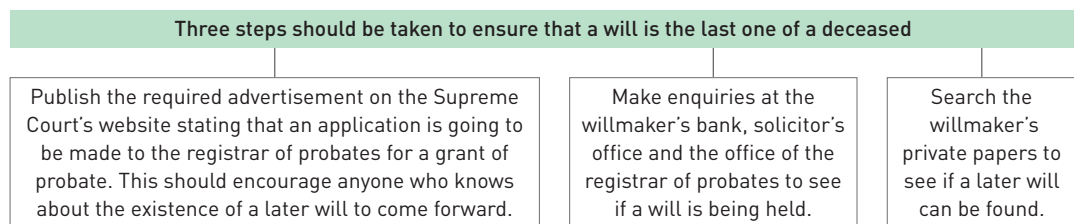
Finding the last will

When a will of a deceased person has been found it is essential to find out if it is the last will of the deceased. If there is a later will, the earlier one does not apply. A properly drawn will begins with a clause stating that the will is the final will of the deceased, for example:

This will dated 8 March 2013 is the last will of Jennifer Jones of 15 Denmark Close, Sale in the state of Victoria, Teacher.

Although this implies that there is a previous will, it is not necessarily the case. It also does not necessarily have to be the last will, as the willmaker might have decided to make another will after the date of this will. It is therefore important that a search is made to ensure the estate is being divided according to the last will of the deceased.

Under the *Administration and Probate Act 1958* (Vic.) it is an offence to conceal a will, or endeavour to retain or conceal a will with the intention of defrauding any interested person. It is also an offence to conceal or retain a codicil. The offence carries a penalty of 100 penalty units, two years' imprisonment, or both. If any loss is suffered as a result of concealing a will, the person concealing the will may be sued for damages.



What is probate?

Probate comes from the Latin word 'to prove'. Probate is the legal process for proving the validity of the will and gives legal status to the executor to deal with the deceased's estate. It is the executor's duty to apply for probate. The Supreme Court requires several things to be checked and special forms to be filled in before probate is granted.

Probate is usually required for large estates. A **small estate** does not require probate. For an estate to be considered 'small', its gross value must not exceed \$50 000 if beneficiaries are restricted to children, a partner or sole surviving parent, or \$25 000 where other persons will inherit.

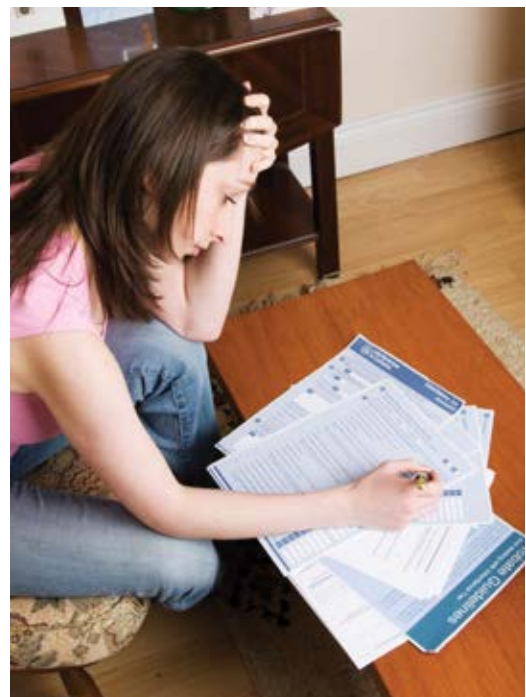


Figure 12.7 Filling out probate forms

If probate is needed, a decision has to be made about who should apply. If there is only one executor, he or she can apply or appoint someone else to do it on his or her behalf. Two executors can also apply, but usually one will be appointed.

Application for grant of probate

At least 14 days before making the application, the executor must publish an advertisement on the Supreme Court's website informing the public that such an application is going to be made. This allows others who believe there is a later will to come forward.

An application for a grant of probate is lodged at the **Probate Office**, which is part of the Supreme Court. It is a compilation of several documents including:

- **affidavits** – The executor makes a sworn statement stating that the willmaker has died and the will names him or her as executor. The executor must also swear that a proper search for other wills has been done and none were found.
- **exhibits** – The executor must present the following related documents: the will, the death certificate, a list of the deceased's assets and a copy of the mandatory advertisement.
- **originating motion** – In this document the executor formally requests a grant of probate. It provides the court with a summary of the deceased's personal details, the date of the will and the executor's personal details.



Figure 12.8
A Supreme Court judge

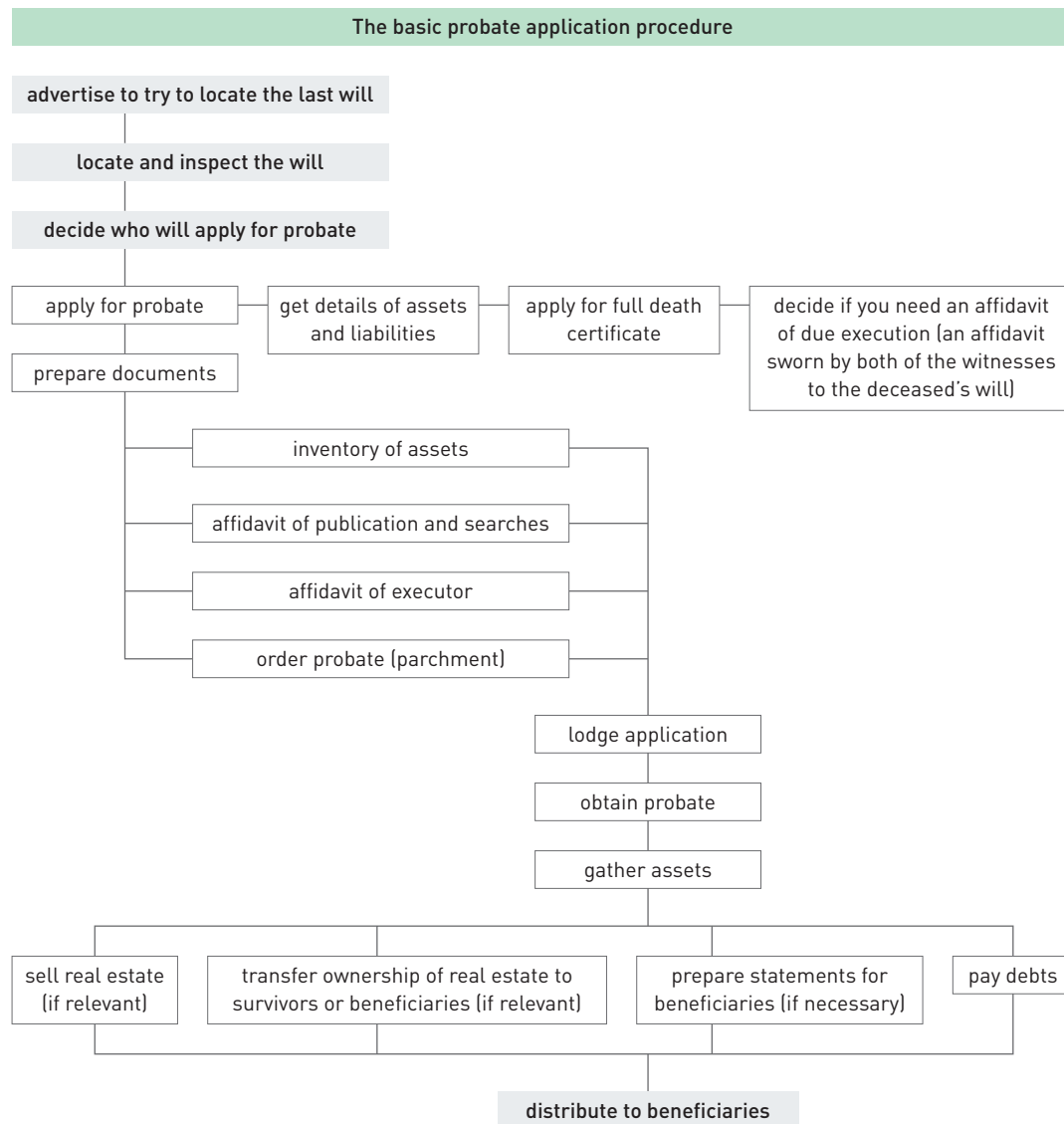
If the **registrar of probates** is satisfied that all the paperwork is correct, a **grant of probate** is given and the **probate parchment** is issued. This certificate proves the executor has the legal right to access and distribute the deceased's assets and property to beneficiaries.

If the will is in dispute, a notice of motion is filed and the Supreme Court will hold a formal hearing where a judge decides the issues in dispute.

Role of the executor

The executor's responsibilities are to:

- **arrange for disposal of the body** – Provision for the disposal of the body should be made in the will. If no provision has been made, the executor must make the decision.
- **locate the deceased's will** – This must be the last version.
- **obtain probate** – The executor applies to the Supreme Court for a grant of probate. To obtain probate of a will means to prove that it was the willmaker's last and final will.
- **locate assets** – The executor must locate all the assets in the estate and arrange for the distribution of these assets according to the requirements of the will.
- **pay debts** – The executor must ensure that all debts of the deceased are paid out of the estate before the estate is distributed to the beneficiaries.
- **pay funeral expenses** – The executor must ensure that the funeral expenses and associated costs are paid out of the estate.



LEARNING ACTIVITY 12.3

Procedures after the willmaker dies

- 1 Explain the steps that should be taken to determine whether a will is the last will of the willmaker.
- 2 What is probate?
- 3 When is probate not needed?
- 4 What is the probate parchment and what does the executor do with it?

5 Investigation

Use the Supreme Court's Probate Online Advertising System to find one advertisement notifying the public of the intention to apply for a grant of probate. Read the advertisement and write a report. In your report include:

- the name of the deceased and their last known address
- the date the application for probate will be made to the Supreme Court
- the name of the executor

- the name of the solicitors
- why probate is necessary
- an explanation of the processes of applying for probate
- an explanation of the role of the executor.

ISSUE – CONTESTING A WILL

In order that everyone's interests are protected, it may be necessary for the law to intervene to settle disputes that arise. If a person believes a will is invalid or that the distribution of the estate in a will is unfair then the person may contest the will. For example, a willmaker may choose not to give a gift to a child or a stepchild.

Depending on the circumstances, children omitted from a will may apply to the court for a family provision order, particularly if the willmaker had a moral responsibility to provide for these children. Similarly, a person may promise to take proper care of an elderly or sick person on the undertaking that the carer will be provided for in the will. If there is no provision in the will, then the carer could contest the will on the grounds of breach of contract.

The courts need to interpret the will and the willmaker's wishes in a manner that will do justice to the willmaker, the beneficiaries and the immediate family. In doing so, the courts need to interpret:

- the wishes of the willmaker (testator)
- the meaning of the words in the will
- the legislation that sets down guidelines for providing for the immediate family.

Invalid will

A person may contest a will if they believe that the will is invalid. Reasons for a will being invalid could include the following:

- The will was not properly executed; although a court can still declare the will valid.
- A later will exists or the will has been revoked.
- The will has been tampered with.
- The willmaker lacked testamentary capacity to make a will.
- The willmaker was under pressure from others to execute the will.

If a will is found to be invalid, the previous most recent will made by the deceased will apply. If there is no last will, the deceased will be treated as dying intestate, and the rules of distribution of the estate under the *Administration and Probate Act 1958* (Vic.) will apply.

If only part of the will is declared invalid, the offending portion is struck out, and the rest of the will still applies. This could be the result of part of a will not being executed properly; for example, something being added to a will but not witnessed.

Lack of testamentary capacity

Testamentary capacity means that a person is of sound mind and has the mental capacity to understand the nature and effect of writing a will. Our ageing population has given rise to increased claims related to a lack of testamentary capacity where willmakers suffer from conditions such as dementia and Parkinson's disease.

CASE STUDY

Omari and Omari v. Omari [2012] ACTSC (9 March 2012)

A Muslim woman challenged her mother's will on the basis that the will was made when the willmaker was suffering from dementia and the will did not express her mother's true wishes. The daughter challenged the will, which according to Islamic tradition, left full shares in the estate to the willmaker's sons and half shares to her daughters.

In 2002, the sons prepared a will and took their mother to a friend's café where the will was signed and witnessed. A Justice of the Peace was also present. The mother did not write or read in any language. The two witnesses and the sons read through the will and then explained it to her in Arabic. They said she expressed agreement throughout. The woman signed the will with a thumbprint on each page.

The willmaker's two sons said they had in no way tried to influence their mother. They said that their mother wanted a will in accordance with Islamic tradition and they decided to have a formal will written to avoid a family dispute. A copy of the will was handed to the Public Trustee Office and each son retained a copy.

The court found that the mother had been suffering from advanced dementia at the time she signed the will. Medical evidence showed that she had suffered the condition for a number of years and that it had gradually worsened over time. The will, which was the only will in existence, was declared invalid. The court also said the sons acted with proper intent as they believed they were carrying out their mother's wishes.

Undue influence

The common law doctrine of undue influence applies in cases where the willmaker was coerced or pressured into writing a will. A willmaker must have testamentary capacity in order to be subject to undue influence. The person influencing the willmaker must cause the willmaker to act contrary to their true wishes. Undue influence is difficult to prove. In the absence of the willmaker, it is difficult to show that the willmaker did not act freely, independently or voluntarily.

CASE STUDY

Two sisters cut brother out of estate

County Court Judge John Smallwood alleged that his two sisters exercised undue influence to persuade their mother to cut him out of her \$1 million estate. Ethel Mary Smallwood was 86 when she died in 2006. She left \$10 000 to each of 12 grandchildren, \$5000 to a great-grandchild and the sisters \$945 000. Two sons had predeceased her. The last will left no money to Judge Smallwood.

The court found that the allegation of undue influence had not been proved. According to the court, Mrs Smallwood well understood what she was doing when she made her will and this intention reflected her own wishes.

Application for family provision

If a person feels that a willmaker has not adequately provided for their maintenance and support, they can apply to the court for a redistribution of the deceased's estate. Under the *Administration and Probate Act 1958* (Vic.), **any person** for whom the testator had responsibility to make provision may make a claim so long as the testator had a moral obligation to the claimant. Such claims are often made by family members and dependents.

CASE STUDY

Contesting Heath Ledger's will

Heath Ledger's daughter Matilda was not mentioned in his will that was made years before her birth. According to his last known will, signed in 2003, the estate was to go to his mother, father, sister and two half-sisters.

After Heath Ledger's death, in response to some press reports about his will, filed in New York City on 28 February 2008, and his daughter's access to his financial legacy, his father, Kim Ledger, said that he considered the financial wellbeing of his granddaughter Matilda Rose the Ledger family's 'absolute priority' and her mother, Michelle Williams, 'an integral part of our family'. He added, 'They will be taken care of and that's how Heath would want it to be'.

Some relatives of Heath Ledger considered challenging the legal status of his will. It was signed before his involvement with Michelle Williams and the birth of their daughter and not updated to include them.

On 31 March 2008, Gemma Jones and Janet Fife-Yeomans published a report in *The Daily Telegraph* citing Ledger's uncle Haydn Ledger and other family members, who 'believe the late actor may have fathered a secret love child' when he was 17. This was later denied as just rumour.

It was reported in July 2008 that even though Ledger left everything to his parents and three sisters, it is understood that, under Western Australian law, Matilda is entitled to the lion's share of his estate.

Executors of the will, Kim Ledger's former business colleague Robert John Collins and Geraldton accountant William Mark Dyson, applied for probate in the West Australian Supreme Court in Perth, advertising for 'creditors and other persons' having claims on the estate to lodge them by 11 August 2008.

On 27 September 2008, Heath Ledger's father Kim stated that Matilda Rose would inherit the entire estate valued at US\$20 million. He was quoted as saying, 'There is no claim. Our family has gifted everything to Matilda'.



Figure 12.9
Heath Ledger

As a general rule, the wishes of the deceased are complied with unless the distribution does not meet with the basic requirements under law, or does not provide properly for family members who need support. For example, if one son gets \$100 000 and the other gets \$50 000, the will is left undisturbed as long as both have sufficient for their needs.

The courts have repeatedly stated that the legislation does not give them the right to make a new will, only to adjust the existing one. The court decides the merit of each application and takes into account:

- the willmaker's moral responsibility to provide for the applicant
- the type and length of any relationship and any contribution the applicant made to the willmaker's welfare or the willmaker's estate

- the size and nature of the estate, any debts owing and any gifts or benefits already given to the applicant
- whether the applicant has any disabilities, any earning capacity or access to other financial resources
- the age, character and conduct of the applicant or any other matter the court considers relevant.

Demand for change

Australia has long recognised the need to reform its succession legislation. A major problem with the law is that it is governed by each state and territory, and the rules for wills and intestacy are different in each jurisdiction. This has created confusion and a lack of uniformity in an age when people travel freely and own property interstate.

A gradual change in social norms and community expectations will often precede a change in the law. Behaviours that were once illegal are now tolerated if not accepted. The prevalence of divorce and different family structures has resulted in changes to the law of wills and the rules of intestacy. These reforms have improved the rights of de facto and same-sex couples whose personal circumstances do not fit the traditional family structure of a married man and woman with children.

The *Statute Law Amendment (Relationships) Act 2001 (Vic.)* and the *Relationships Act 2008 (Vic.)* allowed domestic partners (both heterosexual and same-sex couples) to register their relationship and gave domestic partners similar rights to married couples in a range of areas including wills and inheritance. Domestic partners are included as ‘next of kin’ within the rules of intestacy and are eligible for a share of the partner entitlement.

It was once thought acceptable for a willmaker to dispose of property as they saw fit. This is no longer the case, as a court can change a will to give provision to **any person** to whom the willmaker owed a moral obligation.

The law now allows dependent **stepchildren** to make an application for family provision if they have not been considered in a will. They are, however, excluded as next of kin under the rules of intestacy. The NSW Law Reform Commission looked at the arguments for and against the exclusion of stepchildren from the rules of intestacy. An extract of the commission’s report is shown below.

EXTRACT

NSW Law Reform Commission Report 116 (2007) – *Uniform Succession Laws: Intestacy*

STEPCHILDREN

Arguments for and against

It can be argued that the number of stepchildren in the general community has increased with the higher incidence of parents divorcing and subsequently remarrying, and that:

the traditional family structure of two parents and associated progeny all living together in the one home can no longer be taken as the norm, and the modern family structure quite often includes children from other relationships, who may become stepchildren upon subsequent marriage of one or other of their biological parents.

It may, therefore, be considered unfair that stepchildren are excluded from intestacy provisions when natural children are included.

However, in considering the question of stepchildren, it must be borne in mind that stepchildren of an intestate may well have two living natural parents. Some of the discussions around this point assume that one natural parent has died or otherwise removed themselves entirely from any responsibility for his or her offspring and the step-parent has chosen to be at least partly responsible for the upbringing of the stepchild ...

... There are other considerations to be taken into account. First, if stepchildren were to be entitled in intestacy, in some cases they could be seen as benefiting from a form of 'double dipping'. This is because, in addition to receiving a share of the intestate's estate, they could potentially be beneficiaries under each natural parent's will, or entitled to take upon their intestacy, and also potentially entitled, upon intestacy, to a share from the estate of any further spouses of their natural parents. Secondly, it is possible that a step-parent may be estranged from or never even have met his or her stepchild, especially if the marriage has taken place after the stepchild has become an adult.

Source: NSW Law Reform Commission Report 116 (2007) – *Uniform Succession Laws: Intestacy*, Sections 7.36, 7.37 and 7.40

Popple v. Rowe & Ors

The case of *Popple v. Rowe & Ors* (unreported) 20 March 1997 involved a willmaker who died in May 1995. His wife had predeceased him in 1982. There were no children of the marriage, but the wife had three children from a previous marriage. These children, who were never formally adopted by the willmaker, applied for a share of their stepfather's estate.

The Supreme Court held that 'children' meant any child within the testator's family structure, whatever that child's genetic origins, and certainly included stepchildren.

The Court of Appeal overruled that decision because the Victorian Parliament had expressly excluded stepchildren as eligible applicants (unlike most other Australian states).

CASE STUDY

Following *Popple v. Rowe & Ors*, and as a result of the problems relating to stepchildren, the law was amended under the *Wills Act 1997* (Vic.), which received royal assent on 2 December 1997. This Act made it possible for **any person** to make a family provision claim (including stepchildren).

Sometimes a change in social demographics, such as an ageing population, will see laws change to give vulnerable elderly people greater protection. As people get older they may suffer dementia, which diminishes their testamentary capacity, or they may be forced to rely on carers for daily support. This has led to the introduction of statutory wills for those people who lack testamentary capacity and has caused the Victorian Law Reform Commission (VLRC) to investigate whether the current rules for witnessing a will should be revised to protect the elderly from the undue influence of others.

Cultural differences can trigger problems in the application of the law requiring further consideration or law reform. For example, Indigenous people have a different concept of property ownership and kinship. Therefore, distribution of an Indigenous intestate's property based on laws written for non-Indigenous Australians may be inappropriate. An Islamic will may give rise to a similar clash in culture, which will be left to the courts to resolve. In Muslim culture, sons traditionally get more inheritance than daughters because they bear the responsibility of caring for their parents and unmarried sisters. This cultural difference is not reflected in Australian intestacy rules, which provide for an equal share of the estate between siblings. Furthermore, under the *Wills Act*, a child who feels their gift does not provide for their needs can ask the court to adjust the will in their favour.

Mistakes in drafting the law can create unintended anomalies. For example, in the *Administration and Probate Act 1958* (Vic.) the definition of ‘partner’ under the rules of intestacy does not include a registered caring partner. A registered caring partner cannot therefore inherit under these rules in their own right. Their ability to inherit on intestacy is restricted to situations where the deceased leaves multiple partners. The VLRC has recommended that the law be changed to remove this unintended restriction.

A specific event or legal case before the courts can also draw parliament’s attention to the fact that the law is out of date or out of kilter with community expectations.

The capacity of the legal system to respond to demands for change

In 1991, the Standing Committee of Attorneys-General (SCAG) agreed to develop uniform succession laws that would apply across Australia. The ensuing National Committee for Uniform Succession Laws wrote several reports on the issue. The committee worked for over 14 years to research and report on issues related to the law of wills, intestacy, family provision and the administration of deceased estates.

In its 1997 report on the law of wills, the National Committee presented a draft *Wills Bill* as a guide for legislative reform in each of the states. Around the same time, the Victorian Parliamentary Law Reform Committee conducted a review of the *Wills Act 1958* (Vic.) that also considered the work of the National Committee. As a result, it recommended 70 changes to the laws governing wills in Victoria. Most of these were included in the *Wills Act 1997* (Vic.).

Before making major changes to the law, the parliament will often ask a parliamentary committee or independent legal body to conduct a formal review and report on whether the law needs reform. These reviews will often involve broad community consultation to check that the law is in tune with community expectations. In 2012, the Victorian Attorney-General asked the VLRC to investigate a variety of issues related to the law of succession. In its final report the commission recommended that:

- the Victorian Law Institute provide legal practitioners with best practice guidelines on how to recognise and prevent undue influence during the preparation of a will
- when dealing with statutory will applications, the court must determine whether a person who lacks testamentary capacity should be independently represented in court
- the entitlement of all next of kin on intestacy should be clearly specified and the generational list of people who may inherit should conclude with the deceased’s first cousins
- in most cases, the next of kin under intestacy rules should be required to survive the deceased by 30 days – this rule already applies to beneficiaries in a will
- the definition of partner for the purposes of intestacy should include a registered caring partner
- where an intestate is survived by a partner and children, the partner’s legacy under the rules of intestacy should increase to \$350 000 (adjusted by formula to reflect the Consumer Price Index) plus one half of the remainder of the estate – furthermore, the children of a partner who inherits will not receive a share of the estate because those children could expect to inherit from their surviving parent later in life; the deceased’s children from other relationships will inherit if their surviving parent does not
- in intestacy, a partner should also be able to elect to buy any property (house, business, holiday home or farm) in the estate either with their share of the inheritance or other monies – this would **not** apply in cases where the deceased is survived by multiple partners

- where an intestate is survived by multiple partners, the partner's share is to be distributed equally or by agreement between the parties or a court order
- the moral responsibility test, which allows any person to make a family provision application, should be replaced with categories of people eligible to make an application.

Methods and institutions for resolving disputes – wills

Mediation

Mediation can address the underlying issues of any disagreement and offer a more cooperative, sound and effective method compared to the more adversarial and litigious alternative.



Figure 12.10
Resolving disputes through mediation

Unresolved disputes over wills could destroy or permanently damage family relationships. Through the use of mediation, wills disputes can be negotiated in a manner that honours each party and dignifies the memory of the deceased. Mediation for wills disputes helps to prevent damaging negative assumptions of the intentions of others, by encouraging each family member to openly express their hopes, needs, interests and concerns, while also being able to hear those of other family members. The cooperative process aids in understanding and leads to dispute resolution and an agreement that is acceptable to all.

There are companies that specialise in mediation for wills and inheritance disputes, such as Judy Courtin Mediation and Intermediate Dispute Management.

Family relationship centres

People with a dispute in relation to wills or inheritance can seek advice from a family relationship centre. The centre can give advice and can organise mediation if required.

Community legal services

Community legal services such as Fitzroy Legal Aid can give advice about wills and inheritance and can advise the parties to a dispute where to go for further assistance.

Lawyers

Most firms of lawyers will help with legal advice about wills and inheritance. Common areas where lawyers can help include:

- drawing up a will and helping settle an estate on the death of the willmaker
- advising parties on whether a will can be challenged or set aside
- representing parties in court proceedings on the validity or construction of a will
- representing parties in family provision applications
- acting for parties in actions against executors and trustees
- resolving disputes and drafting family arrangements.

The Supreme Court

If a dispute relating to wills and inheritance cannot be resolved in any other way, the matter can be taken to the Supreme Court for resolution. The court will give a decision that is binding on the parties.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Contesting a will

- 1 Who can contest a will and on what grounds can a will be contested? (3 marks)
- 2 Look back at the case study *Omari and Omari v. Omari* and answer the questions.
 - a Explain how the will in this case was made. (2 marks)
 - b What legal reason was used to contest the will? (2 marks)
 - c Is there another legal ground the daughter could have used to contest the will? Explain. (1 mark)
 - d How will the estate be divided now that the court has ruled the will invalid? (1 mark)
 - e How might the cultural differences present in this case create a dilemma in the law? (1 mark)
- 3 Look back at the case study 'Two sisters cut brother out of estate'. Use the facts in this case to illustrate how the concept of undue influence relates to wills. (2 marks)
- 4 Draw up a poster explaining what makes a will invalid. (4 marks)
- 5 Look back at the case study 'Contesting Heath Ledger's will' and explain the outcome in this case. (2 marks)
- 6 Look back at the case study *Popple v. Rowe & Ors* and read the case studies *Henderson v. Rowden* and *Sellers v. Hyde* and answer the questions.
 - a What was the decision of the Supreme Court in *Popple v. Rowe & Ors*? (1 mark)
 - b Why did the Court of Appeal overrule that decision? (1 mark)
 - c What change in the law took place to make it possible for stepchildren to inherit from their step-parents? (1 mark)
 - d In the light of this change in the law, explain the decisions in *Henderson v. Rowden* and *Sellers v. Hyde*. (2 marks)

Henderson v. Rowden VSC 267 (14 August 2001)

A 52-year-old man contested his late stepmother's will. He was unhappy that he only received one-eighth of her residual estate and her godchild received the rest. His father and stepmother had accumulated property during their marriage; however, the man did not live with his parents at this stage nor did he make any financial or other contribution to his father and stepmother's wellbeing. The stepmother did not maintain regular contact with the man after his father's death. The court dismissed his claim.

Sellers v. Hyde (2005) VSC 382

This case is about a claim by a 73-year-old foster daughter (Sellers) for proper maintenance and support from the estate of the willmaker, who raised Sellers as her daughter and sole child. Sellers' relationship with the willmaker became strained in about 2001 and this led to the willmaker's change of attitude towards Sellers. However, the Supreme Court viewed this as irrational and decided that provision should be made for Sellers.

- 7 Read the case study 'Man left his estate to his wife after 20 years of separation' and answer the questions.

- a Advise Barbara and John's three sons of their legal rights under the law of wills. (1 mark)
- b Advise Lyn or her daughter on their legal position in this case. (2 marks)
- c How would John's estate be distributed if he had died intestate? (2 marks)
- d Use the facts of this case to illustrate the importance of leaving an up-to-date will. (1 mark)

Man left his estate to his wife after 20 years of separation

John and his unregistered domestic partner, Lyn, had lived together for 13 years. John battled with cancer for five years before he died. Lyn looked after him during this time. They had bought a home together and for the last two years she did not work as he needed constant care. Lyn's 13-year-old daughter from a previous relationship thinks of John as a father; she was only a few months old when the couple first met. John was separated but not divorced from his wife, Barbara, who works as a teacher. They saw each other a few times a year when their three sons, aged 24, 21 and 19, celebrated their birthdays. John's will, made over 20 years ago, left his estate to his wife and sons.

- 8 Read the case study of *Vigolo v. Bostin*. Do you agree with the Court's decision in this case? Explain. (2 marks)

Vigolo v. Bostin HCA 11 (9 March 2005)

A 45-year-old man who was left nothing in his father's will asked the Supreme Court of Western Australia and then the High Court of Australia to change the will. The will left the father's \$1.9 million estate to his other four children. The son felt he had a moral claim to the estate equal to that of his siblings.

As the eldest son, the man left school at 16 and worked hard for low wages on the family farm because the father promised that the property would 'all be the son's one day'. They formed a partnership and accumulated property together but the partnership was dissolved when the father and son fell out 20 years later. The properties were sold and divided between the eldest son, his mother and his father. The mother gave the eldest son her share of the property and the eldest son then bought the father's share of the farm at market price. The eldest son later sold the property for over \$1 million. Before the father died, some five years later, the father drew up a new will leaving his estate to his other four children.

The son's claim was rejected. The court found that compared to his siblings he had been advantaged in his dealings with his father and that the father's verbal promises about inheritance rights expired when the partnership was dissolved.

- 9 Read the case study *Goodman v. Windeyer and Others*.
- a Explain why the court decided Mrs G should be awarded more than was allowed under her husband's will. (2 marks)
 - b What is the role of the court in these matters? (2 marks)

Goodman v. Windeyer and Others (1980) 144 CLR 490

Mr and Mrs G were married for five years before they separated. When Mr G later became ill, Mrs G returned to look after him. She gave him constant care for three years up to the time of his death. His will left his estate to his three children and gave Mrs G \$2000 for each year of her life or until she remarried.

She contested the will because the amount given was insufficient for her needs and did not take account of the care given in the last three years. The executors argued that Mrs G had been given adequate support but the court took into account the love and care she gave the deceased and awarded her a lump sum of \$50 000 and \$3000 a year for the rest of her life.

- 10 Briefly explain three factors that may trigger a change in the laws of succession (wills and inheritance). *(6 marks)*
- 11 Briefly explain the role of one law reform body and the impact of its work on wills and inheritance laws. *(2 marks)*
- 12 Discuss the ability of the law to respond to demands for change in relation to inheritance rights of the different types of partners and children in our society. In your discussion, comment on the current situation with respect to domestic partners and stepchildren/foster children and consider the advantages and disadvantages of:
 - the rights of partners and children to inherit under a will *(2 marks)*
 - the rights of partners and children to inherit if there is no will. *(2 marks)*
- 13 A friend has told you about a dispute relating to wills and inheritance. Explain two methods of dispute resolution. *(3 marks)*

(Total 50 marks)

ASSESSMENT TASK FOLIO AND REPORT

Internet exercise

Investigate the wills of a famous person on the Internet. Write a report on the will you have found. In your report include:

- the name of the person making the will
- the year the will was made
- the names of at least two beneficiaries under the will
- the name of an executor under the will
- whether a guardian of any children is appointed
- two gifts under the will
- if the person has died, whether anyone is contesting the will.

(Total 10 marks)

ASSESSMENT TASK REPORT

Making a will

- 1 Create an annotated visual display informing the public of:
 - the benefits of making a will
 - what is required for a valid will
 - the procedure for distributing a willmaker's estate
 - what happens to an estate if a person dies without making a will
 - changes in the law that have taken place in relation to wills in the last 10 years.
- 2 Present your findings as one of the following:
 - a poster or brochure
 - presentation slides
 - a multimedia presentation.
- 3 Accompany your presentation with a written report of the process.

(Total 20 marks)



CHAPTER 13

SPORTS AND THE LAW

OUTCOME

At the completion of this chapter you should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- legal principles relevant to the selected area/s of law
- a contemporary issue for the selected area/s of law
- the capacity of the legal system to respond to demands for change
- methods and institutions for resolving disputes arising under the selected area/s of law.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area/s of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

KEY LEGAL TERMINOLOGY

assault The direct or indirect application of force by a person to the body of another person, without lawful excuse and with the intent to inflict harm or being so reckless as to inflict harm.

contract A legally binding agreement where a promise (or set of promises) is exchanged for adequate consideration.

criminal negligence Actions of negligence that are so gross that they become a criminal matter.

domestic tribunal A tribunal set up by a private company or group rather than by parliament.

natural justice A common-law principle that states people must be treated fairly; for example, an unbiased decision-maker must hear any disputes.

trademark Logo or emblem used to identify a product or organisation.

vicarious liability A club, association or business can be held liable for the actions of an employee or voluntary worker as long as the worker does not act beyond their given duty or outside normal behaviour.

volenti non fit injuria A situation (often in sport) where the parties involved accept the dangers of a known and appreciated risk, either expressly or by implication.

THE PURPOSE OF THE LAW

Sports law is relevant to the administration of sport and a person's participation in sport whether they play at amateur, professional or international level. The legal issues that arise from a sporting activity can involve aspects of contract law, tort law, anti-discrimination law, trade practices law and criminal law.

In general, parliament and the courts do not make sporting rules and they do not resolve sporting disputes. These decisions are left to a sport's regulatory body or association. However, parliament and the courts may decide to make a new law or resolve a dispute when the sporting issue or activity involves criminal behaviour or the contravention of individual rights. For example, parliament has passed laws to outlaw match-fixing in sport.

CRIMES AMENDMENT (INTEGRITY IN SPORTS) ACT 2013 (VIC.)

In 2011, Australian sports ministers agreed to pass uniform legislation in each state and territory to outlaw match-fixing in sporting events. In Victoria, the *Crimes Amendment (Integrity in Sports) Act 2013* (Vic.) outlaws **race-fixing or match-fixing in sporting events** or any other event on which a bet can lawfully be made. It is illegal to gain a financial advantage or cause a financial disadvantage for another person by:

- knowingly or recklessly engaging in or facilitating conduct that corrupts or would corrupt a betting outcome of an event or part of an event contrary to the standards of integrity that a reasonable person would expect
- concealing such conduct, agreements or arrangements
- using this corrupt information for betting purposes.

Sporting associations and regulatory bodies

There are different sporting associations and regulatory bodies for each sport. To ensure the safety of participants and the integrity of their game, each **sporting association** or league has established

rules about who can play, when they can play and how they will play the game. These sporting associations also have **regulatory bodies** at local, state or national levels to deal any breach of their sporting code or rules.

The role of these sporting bodies is to:

- organise competitions and championships
- formulate the rules of the game
- outline player codes of conduct
- establish disciplinary bodies, often called tribunals, to resolve any problems or disputes.

Disciplinary procedures often involve breaches of the rules of the game that are contrary to the principles of sportsmanship and other inappropriate behaviours such as violence, discrimination, sexual abuse or drug use, which bring the sport into disrepute. Players who break the rules of the game may be asked to appear before a sporting tribunal.

Netball has regional, state, national and international regulatory bodies. Netball Australia is the national body for the sport of netball. It works with the state and territory associations to organise and regulate the sport.



Figure 13.1
Netball regulatory bodies

Sporting tribunals

A sporting tribunal hearing is not required to follow any specific legal process other than that outlined in the organisation's constitution and by-laws. A tribunal hearing is not expected to act as a court of law, but should conduct the hearing as quickly, informally and comprehensively as practicable. The tribunal hearing procedures should be clearly stated and accessible and enforceable to all.

These tribunals are not courts. In all cases, the tribunals are expected to resolve disputes in accordance with the principle of **natural justice**, as their decisions are binding and can have a significant impact on an amateur player's participation in the sport or a professional sportsperson's livelihood.

There should also be an avenue to appeal a sporting tribunal's decision. A superior sporting body usually hears these appeals.

NATURAL JUSTICE

Natural justice is a common-law principle that states people must be treated fairly. The law requires fairness from a person exercising an administrative power. This includes the right to be heard by an unbiased decision-maker. People need to know the nature of any allegation made against them and they should be given a fair chance to put their case or respond to allegations. Any decision or discretionary penalty imposed by a sporting tribunal must be reasonable in the circumstances.

Judicial review

A judicial review enables a person aggrieved by an administrative decision (or refusal to make a decision) to take a matter to court. A court can sometimes become involved if a sportsperson or club chooses to appeal a decision because the governing body or its disciplinary board or tribunal:

- did not follow the principle of **natural justice** in making the decision
- imposed a penalty disproportionate to the offence committed
- did not follow its own rules or there is a dispute as to the meaning of a rule
- acted beyond its official powers or jurisdiction
- makes a decision relating to an issue that is against the law; for example, cases involving discrimination.

If the court finds that a decision was not a lawful decision, it may set aside that decision. The normal process would be to send the matter back to the original decision-maker for a new decision.

CASE STUDY

Greg Williams

In the opening round of the 1997 AFL season, several players were reported after various incidents during the match or at half-time. After the final siren, Greg Williams became involved in a verbal dispute with Essendon's Sean Denham. He was seen to push the umpire. The AFL Tribunal found he had interfered with the umpire. Williams received a nine-match suspension for his involvement in the incident. It was argued that the suspension would damage Williams's reputation and he would lose about \$1.5 million if he had to miss the Grand Final.

The Supreme Court of Victoria overturned the suspension on the grounds that no reasonable tribunal could have found Williams guilty because there was no evidence he had intended to interfere with the umpire. The AFL appealed the decision to the Court of Appeal, which found in the AFL's favour, and the match suspension stood.

The systems and procedures of the AFL are now tighter and are more likely to follow the appropriate procedures such as providing players with natural justice.

In September 2013, Indian fast bowler Shanthakumaran Sreesanth was banned from playing cricket for life by the Board of Control for Cricket in India. He had been arrested and charged with spot-fixing of cricket matches. Sreesanth declared that the penalty was too harsh and a breach of natural justice.

CRIMINAL LAW

In some instances, players or sporting organisations may become involved in criminal activities such as match-fixing, assault or criminal negligence. These criminal activities are then subject to police investigation and may involve criminal proceedings in court.

Match-fixing

Match-fixing is often linked to illegal betting schemes. It involves players deliberately manipulating the results of a sporting event for their own or another person's financial advantage. The player agrees in advance to do (or omit to do) something during a game to influence the outcome. This makes the game's result predictable so winning bets can be made with certainty.

Match-fixing generally refers to fixing the final result of the game, although a type of match-fixing, known as **spot-fixing**, involves fixing small events within a match that can be gambled on, but are unlikely to prove decisive in determining the final result of the game; for example, bowling a no-ball during the third over of a cricket match.

Allegations of match-fixing are generally reported to the relevant sporting body and/or the police.

Match-fixing scandal in state-level soccer competition

In 2013, Victoria Police investigated allegations of match-fixing in Victorian Premier League soccer games. Football Federation Australia asked police to investigate suspicious activity at several matches involving the Southern Stars Football Club.

Police allege that a Malaysian national, Segaran Gsubramaniam, headed the match-fixing operation passing instructions to Southern Stars' coach, Zia Younan. Younan then approached several players who used their skills to manipulate the results of games. Police allege that an international betting syndicate relied on this match-fixing to collect over \$2 million in overseas winnings.

Defender Reiss Noel and goalkeeper Joe Woolley pleaded guilty in the Melbourne Magistrates' Court to match-fixing charges, under the *Crimes Amendment (Integrity in Sports) Act 2013* (Vic.). Noel and Woolley said they felt intimidated by the syndicate and made very little money from the match-fixing. The magistrate imposed fines of \$2000 and \$1200 respectively due to both players' cooperation with police, early guilty pleas and lack of prior convictions.

Gsubramaniam, who also pleaded guilty to engaging in conduct that corrupts a betting outcome, was remanded in custody to appear before the County Court. Younan and two other players, Nicholas McKoy and David Obaze, were also charged for their involvement in the illegal scheme.

In July 2014, Obaze was found guilty of fixing three Victorian Premier League games and was fined \$3000.

The international governing body of football, FIFA, has imposed worldwide lifetime bans to those charged.



Figure 13.2
Southern Stars
Soccer Club

Assault

Most sports present some type of risk to the players. A person who willingly participates in a contact sport or dangerous recreational activity accepts there is a certain degree of risk associated with these activities. For example, rugby players accept that during a game they will be tackled and may be injured. Players accept this risk as long as it is within the rules of the game. However, a deliberate punch from behind during a soccer game, for example, would not be seen as part of the game and could result in a charge of criminal assault.

CASE STUDY

Such breaches of the rules are usually dealt with by the relevant sporting tribunal unless the breach of the rule and the resulting injury are so far outside the rules of the game that the matter needs to be referred to the criminal courts. This is very rare.

CASE STUDY

Jockey found guilty of assault

In September 2013, champion jockey Danny Nikolic was found guilty of assaulting a fellow jockey and a police detective at the Caulfield Racecourse in January 2011. The Magistrates' Court heard that Nikolic punched jockey Mark Pegus several times.

The magistrate told the court Nikolic's behaviour did amount to assault and he was fined \$1500.

Criminal negligence

If there is gross negligence on the part of a sporting organisation, the organisation may itself be charged with criminal negligence. To prosecute in a case of criminal negligence it needs to be shown that the lack of care was so extreme that it was reckless. For example, a sporting body may be deemed criminally negligent if, through lack of proper care of its sporting facilities, the grandstand collapsed and caused serious injuries among spectators.

LEARNING ACTIVITY 13.1

The purpose of the law

- 1 Why is it necessary to have a regulatory body of a sport?
- 2 On what grounds might a sportsperson or sporting club appeal to the courts about a decision of a sporting tribunal?
- 3 What is natural justice?
- 4 Look back at the case study 'Greg Williams'. What was the outcome of this case? Why do you think procedures have been tightened up since this case?
- 5 Look back at the case study 'Match-fixing scandal in state-level soccer competition' and answer the questions.
 - a What occurred in this case?
 - b What action was taken by Football Federation Australia?
 - c What criminal offence was committed in this case?
- 6 Look back at the case study 'Jockey found guilty of assault'. Why do you think this case went to court?

TORTS AND SPORT

Negligence

People who sustain serious injuries while participating in sport or recreational activities may, in certain circumstances, sue their opponents or the organisers of the event under the law of negligence. To be successful in proving negligence the following elements must exist:

- The person who was negligent owed a **duty of care** to the person injured. (Was there a foreseeable risk?)

- The duty of care was **breached**. (Did the person who owed a duty of care act reasonably in the circumstances to avoid the risk?)
- The breach of the duty of care **caused** loss or damage.
- The plaintiff suffered **harm or loss** as a result.

Owners of sporting facilities or local councils may be sued if their recreational facilities are not fit for the purpose or carelessly maintained and a person is injured. Providers of sporting facilities owe the people using their facilities a duty of care and must ensure the facilities are maintained to a safe standard. Similarly, organisers of sporting events owe a duty of care to provide a safe environment for participants, spectators and officials.



Figure 13.3
Sporting facilities such as local cricket and football grounds must be kept in a safe condition.

Whether an action for negligence is successful will depend on the circumstances of the case. Generally, a person will be considered negligent if they fail to take reasonable steps to avoid a foreseeable risk of damage, injury or loss to another person.

A greater duty of care is owed when activities are risky or involve younger people or beginners in a particular sport or recreational activity. In such cases the court may expect the person running the activity to foresee that a person with little experience might be injured when participating in a risky activity that requires them to have a certain level of skill. For example, a gym coach may be considered negligent in forcing a novice gymnast to perform a complex manoeuvre that requires a high degree of ability.

O'Dea v. Jones (2013) County Court of Victoria

A novice kiteboarder fractured his heels and injured his back as a result of landing hard on the sand during a kiteboarding lesson on a Melbourne beach. The man can no longer participate in his preferred sports or do simple things, such as picking up his four-year-old child, and fears he will suffer arthritis later in life.

Before his first lesson, the man told his instructor he had previously had four kiteboarding lessons but was not asked how long ago. In the first lesson, the man was given a harness, which he fixed across the lower part of his body with Velcro straps. When the instructor attached a kite to the harness, the tension from the kite loosened the thigh strap on one leg, throwing the man off balance. The man happened to be holding the bar that manoeuvres the kite and the kite caught the wind and launched him into the air. The instructor shouted at him several times to 'let go' before the man crashed down onto the sand. If he had released the bar, the kite would have descended slowly.

CASE STUDY

A County Court judge found the owner of the kiteboarding business negligent. The court held that the plaintiff was owed a duty of care. The man was a novice kiteboarder with limited experience, therefore the risk of injury was foreseeable. The judge said the harness should have been maintained in a workable and safe condition, and it would have been reasonable to give the man instructions about what to do with the equipment should he find himself in difficulty. The court awarded \$1540 in special damages, \$8495 for loss of income and \$100 000 for loss of enjoyment of life.



Figure 13.4 A bungee jumper takes an acceptable risk, but would expect that the equipment has been well maintained and is in good working order.

A person who engages in a sport or recreational activity takes on the risks involved in the activity. Under the legal principle of **volenti non fit injuria**, the injured sportsperson has, either expressly or by implication, previously agreed to accept the dangers of a known and appreciated risk. For example, horse riding can be dangerous and it could be expected that the rider may fall. If, however, it could be shown that the riding school had not properly checked the saddle and the saddle was faulty, then the rider may have a claim for negligence.

The *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic.) allows consumers to sign a waiver, stating they are aware of and accept any obvious risk, when voluntarily participating in dangerous recreational activities such as bungee jumping or white-water rafting. The waiver does not protect the operator if there is a serious case of negligence. For example, people who run a white-water rafting activity will be legally responsible for any injury caused if they tell people it is safe to go out during a storm or give participants boats that are poorly maintained and not fit for the purpose.

Contributory negligence

Contributory negligence is when a defendant claims that the injured person was partly to blame for their injuries. The injured person should have been more careful and did not do what a reasonable person would have done in similar circumstances to avoid an injury. For example, a cyclist who is not wearing a helmet and is hit by a car may make a negligence claim against the driver. The driver could make the counterclaim that the cyclist partly caused his injuries as he should have been wearing a helmet. The court decides the degree of blame in such cases and awards compensation accordingly.

CASE STUDY

Nathan Bracken sues for negligence

In a legal action worth up to \$5 million, Bracken is suing Cricket Australia and three of its medical staff, claiming they failed to 'investigate, diagnose and treat' the right knee injury he suffered the day before a one-day match against England on 9 January 2007. Bracken was on a contract estimated to be worth \$400 000 a year at the time he was injured.

Bracken said the failure of the doctors to refer him for further examination by a specialist orthopaedic surgeon and to restrict him from training and playing ruined his career. He began legal action in 2012. In August 2013, he was granted access to confidential documents of Cricket Australia.

Doctors Trefor James and Simon Carter and physiotherapist Alex Kountouris argued in documents filed with the Supreme Court that Bracken contributed to his right knee injury. They said he failed to 'frankly disclose the extent of his symptoms' and did not tell them about the full extent of his problems. In its defence, Cricket Australia said that Bracken continued to play when he was 'either suffering from symptoms or concerned about his condition'.



Figure 13.5 Nathan Bracken and Cricket Australia fight it out in court.

Vicarious liability

In some instances a sporting club or association can also be held liable for the actions of an employee or voluntary worker; particularly if the worker does not act beyond their given duty or outside normal behaviour. This is known as the doctrine of **vicarious liability**.

A sporting club or the owners of a recreational facility may be held liable for something a worker does even if the club or owners are not specifically to blame. This is because the law says that there is a special relationship between the employer and the employee. An employer selects, appoints and trains an employee and may be responsible for the employee's conduct. The person injured has a better chance of recovering damages from a company, large sporting organisation or employer than from an employee with little means.

LEARNING ACTIVITY 13.2

Negligence

- 1 Read the case studies 'Failure to warn of danger' and *Foscolos v. Footscray Youth Club* and answer the questions.
 - a What are the elements of negligence? How do they apply to the decisions in each case?
 - b Would the defence of *volenti non fit injuria* be applicable in these cases? Discuss.

Failure to warn of danger

In *Woods v. Multi-sport Holdings Pty Ltd* (2002) HCA, a Western Australian man (experienced in outdoor cricket) lost sight in one eye following an injury sustained while playing indoor cricket. He sued the indoor cricket venue for negligence. He argued the venue should have provided a helmet

CASE STUDY

in addition to the gloves and groin protectors given to players, and it should have displayed signs warning players of potential eye injury.

The case was first heard in the state Supreme Court and then dismissed (3–2) on appeal in the High Court. The venue agreed it owed a duty of care to the cricketer but argued that it had not breached this duty of care because it had acted reasonably in the circumstances. The venue organised its games in accordance with accepted practice and within the rules of the game. At the time, helmets were not required as standard equipment as there was no suitable helmet on the market that could provide players with the necessary level of safety and comfort. Due to the confined space in which the game is played, one player wearing a helmet was a potential hazard to other players in the event of a collision. The court also ruled that being hit by a cricket ball in the game of indoor cricket was highly probable and an obvious risk to players, therefore the venue did not need to erect warning signs.

CASE STUDY

Foscolos v. Footscray Youth Club (2002) Victorian Supreme Court

Foscolos, 23, was a regular attendee at the Footscray Youth Club where he began wrestling under the coaching of Samuel Parker. Foscolos was injured in a practice bout with a more experienced wrestler, Hardip Bassi. Foscolos claimed that during the bout Bassi attempted a suplex throw where Foscolos was thrown over the top of Bassi. He sustained severe spinal injuries when his head hit the mat.

Both Parker and Bassi denied the suplex throw was used, but the judge did not believe their evidence. The suplex manoeuvre can be very dangerous. The court found the coach negligent because he should have been paying more attention during the bout and stopped it when he saw that the suplex manoeuvre was about to be used.

- 2 Read the case study 'Man left quadriplegic after diving incident'.
 - a How do the elements of negligence apply in this case?
 - b Explain the concept of contributory negligence using the facts of the case *Swain v. Waverley Council* (2002).
 - c Why did the High Court decide to uphold the jury's decision?

CASE STUDY

Man left quadriplegic after diving incident

In *Swain v. Waverley Council* (2002) NSW Supreme Court, Guy Swain sued the Waverley Council after he dived into the water at the beach and hit his head on a sandbar. He assumed the area was safe because he was swimming between the lifesavers' flags. He argued that the Council was negligent because it did not warn swimmers about the sandbar, which was an invisible danger. He was left a quadriplegic following the incident. At a trial before a jury, he was awarded \$3 750 000 in damages, after being found to have contributed to his injuries by 25 per cent.

In 2003, the Waverley Council appealed to the NSW Supreme Court of Appeal and argued there was insufficient evidence for the jury to decide that the Council had breached its duty of care. The Council argued that the sandbar was not a danger and did not warrant moving the flags or warning people. For some people, a sandbar is the safest place to swim. The Court reversed the decision.

In *Swain v. Waverley Municipal Council* (2005) HCA 4 (9 February 2005), Swain appealed to the High Court where the appeal was allowed 3–2. The judges ruled that it is up to the jury to decide questions of fact based on the evidence provided. The High Court found that the Court of Appeal erred in overturning the jury’s decision even if ‘in some ways, the jury’s verdict in this case was a surprising one’.

- 3 Look back at the case study ‘Nathan Bracken sues for negligence’ and explain why the defendants argued that there was contributory negligence in this case.
- 4 Look back at the case study *O’Dea v. Jones* and answer the questions.
 - a Explain how each element of negligence applies in this case.
 - b Explain why the concept of vicarious liability applies in this case.
 - c Would the outcome of this case be different if the injured man had signed a waiver before taking the lesson? Explain.
 - d What aspects of the case may have influenced the judge’s decision to award damages for loss of enjoyment of life?
- 5 Read the case study ‘Attack on golfer by kangaroo’. Compare and contrast how the elements of negligence were applied to this case by:
 - a the original court
 - b the appellate court.

Attack on golfer by kangaroo

Shorten v. Grafton District Golf Club Ltd
(unreported Supreme Court of NSW
Court of Appeal, 23 March 2000)

A 13-year-old golfer (Steven Shorten) and his friend were playing golf. They had played a number of times before on the golf course and had encountered kangaroos on each occasion. They were not aware that the kangaroos could be dangerous. The boy went into the rough to find his ball. He was confronted by a kangaroo much bigger than he was. The kangaroo grabbed him around the waist and knocked him to the ground. The kangaroo then began to jump up and down on him.

The trial judge thought the golf club had exercised reasonable care towards its patrons. The Court of Appeal held that the failure to warn golfers that kangaroos might attack players was a breach of the golf club’s duty of care, even though the risk was small.

The golf club gave evidence that in the 10 years before the attack on the boy, there had been almost 400000 rounds of golf played on its golf course and there had only been four previous attacks by kangaroos on golfers.



CASE STUDY

Figure 13.6

Kangaroos can be a danger on a golf course.

The Court of Appeal found that, although the golf club knew of the danger of attack, the club did not check the course for aggressive kangaroos and it did not warn golfers of the dangers. The court therefore found in favour of Shorten and awarded him damages.

After the attack, the golf club added the words 'Wildlife can be hazardous – do not approach' to the scorecards distributed to golfers using the course.

Defamation

Sports personalities have a vested interest in protecting their reputation because a lowering of their public image could have an impact on their ability to negotiate future player and sponsorship contracts. A defamatory statement, according to *The Law of Torts* by JG Fleming, is one that 'tends to lower a person in the estimation of his fellow men by making them think less of him'. The law of defamation aims to balance free speech with the right of an individual to enjoy a reputation free from an indefensible attack.

To prove defamation it must be shown that:

- a statement is defamatory
- the defamatory statement identifies or refers to the plaintiff
- the defendant published or communicated the defamatory statement to a third person (a person other than the plaintiff).

Defamation need only be implied and may be an indirect association. The person defamed need not be mentioned by name. It may be sufficient to prove that people reading the statement would reasonably conclude that it was about the plaintiff. A plaintiff may also be defamed as part of a group. The group must be sufficiently small for it to be recognised that the plaintiff is part of that group and that his or her reputation is lowered by reference to the group.

Defences to defamation

There are a number of defences relevant to defamation. They are:

- **justification** – When a statement is substantially true.
- **contextual truth** – When a number of statements are made and most are true. The truth of the more serious allegations overrides the falsehood in the less serious allegations, because the effect of the untrue statements on the plaintiff's reputation is insignificant.
- **absolute privilege** – When a statement is made during proceedings of parliament, parliamentary bodies, courts, tribunals or communications between husband and wife.
- **qualified privilege** – When the statement is made to a person who has a social, moral or legal interest to receive the information. The statement must be reasonable in the circumstances and made without malice.
- **public documents** – When the statement is a fair copy of a public document published by parliament, government, courts or tribunals. The extract must be published honestly and for the information of the public or for educational purposes.
- **fair report of proceedings of public concern** – When the statement is a fair summary of any public proceedings or public meeting; for example, parliamentary inquiries, court or tribunal proceedings, and meetings of political parties, sporting or trade associations and shareholders.
- **honest opinion** – When the defendant claims the statement is an expression of his or her honest opinion (as a commentator) rather than a statement of fact. The matter must be of public interest and the opinion must be based on proper material; that is, the statement is substantially true, is protected by privilege, is a fair report of public proceedings or relates to a public document.

- **innocent dissemination** – When a defendant passes on defamatory material without knowledge or control of the content; for example, librarians, booksellers and Internet service providers.
- **defence of triviality** – When the statement is unlikely to cause the plaintiff any harm.

NOTE

More information on the tort of defamation can be found in chapter 5.

LEARNING ACTIVITY 13.3**Defamation**

- 1 Read the case study 'Olympic cyclist suing for defamation' and answer the questions.
 - a What has occurred in this case to damage Mark French's reputation?
 - b What elements must be proved for a successful defamation case and how do these elements apply in this case?
 - c If you were acting for the Herald and Weekly Times, what defence would you use?
 - d Do you think the outcome in this case was fair? Discuss.

Olympic cyclist suing for defamation

In April 2010, Olympic cyclist Mark French initiated proceedings to sue the Herald and Weekly Times for defamation after being labelled a disgraced drug cheat.

The former junior world champion was banned from cycling for two years in 2004 and also suffered a lifelong Olympics ban after the Court for Arbitration of Sport found him guilty of using and importing banned substances. He was cleared of all charges on appeal the following year.

French is suing the Herald and Weekly Times for damages in the Victorian Supreme Court over two articles published in the *Herald Sun* newspaper in August 2004, which he claims tarnished his reputation. French's barrister, Paul Hayes, said one of the articles referred to his client as a disgraced drug cheat. French told the court, 'There's no greater slur to be cast upon a character of a sportsperson, especially a young sportsperson. It's a slur that sticks for a long, long time'.

Hayes said French was further defamed when the newspaper reported he had falsely alleged five other cyclists were taking banned substances. Hayes said his client denied being a drug cheat and had appealed against his ban but these facts were not included in the article. French also said that he had not alleged that other cyclists were injecting illegal substances.

On 28 April 2010, the Herald and Weekly Times was ordered to pay \$175 000 in damages and \$18 500 in costs to French after the Supreme Court found reports labelling him as a disgraced drug cheat were defamatory.

French also successfully sued radio station Triple M in 2008 for wrongly painting him as a drug cheat and labelling him un-Australian for naming other cyclists involved in injecting vitamins, which led to \$350 000 in damages and \$57 000 in legal costs.

**CASE STUDY****Figure 13.7**

Olympic cyclist Mark French sued the Herald and Weekly Times for calling him a drug cheat.

- 2 Read the case study *Cornes v. The Ten Group Pty Ltd* and answer the questions.
 - a Why does Mrs Cornes claim Mr Molloy's comment is defamatory?
 - b On what grounds did Mr Molloy and Network Ten defend the case and why do you think their arguments were dismissed?
 - c How was the defamatory statement in this case published and to whom was it accessible?

CASE STUDY

Cornes v. The Ten Group Pty Ltd & Ors (2012) SASCFC 99

Nicole Cornes successfully sued Network Ten and comedian Michael 'Mick' Molloy for defamation after he joked that she had slept with an AFL footballer. The trial judge awarded Cornes \$85 000 plus interest and costs. The case went to appeal on the grounds that an ordinary, reasonable viewer would have considered the comment a joke. The Full Court of the Supreme Court of South Australia dismissed the appeal.

In 2008, Molloy was a panellist on Channel Ten's *Before the Game* television program, which is hosted by a mix of sports journalists and comedians. The show aired in Adelaide, Melbourne and Perth. During an interview with AFL player Stuart Dew, the panel asked him about his ex-girlfriend and whether it was true that she had fallen in love with him because he tended a rose garden.

Following some light-hearted banter, a panel member said, 'No, Nicole Cornes wrote an article saying that she loved you because you had a rose garden and that you talked about tending your roses', to which Molloy added, 'And apparently you slept with her too'. Molloy's joke was quickly followed by denials from both Dew and another panel member.

Mrs Cornes is well known as an Adelaide *Sunday Mail* columnist and the wife of Graham Cornes, an AFL coach and commentator. She claimed that Molloy's comment would cause others to think wrongly of her as a promiscuous woman and an adulterous wife.

- 3 Read the case of *Ettingshausen v. Australian Consolidated Press* and answer the questions.
 - a Why do you think this case involved a claim for defamation? Explain.
 - b Do you think the decision in this case was fair? Give reasons for your answer.

CASE STUDY

Ettingshausen v. Australian Consolidated Press (1991) ATR 81–125

Andrew Ettingshausen, a former rugby league player, was successful in establishing that Australian Consolidated Press had defamed him by publishing a photograph of him in the nude. The photograph had been taken of him coming out of the shower after a match and was taken without his permission.

Figure 13.8 Andrew Ettingshausen, Australian former rugby league player and member of a world champion team



He claimed that this photograph lowered his reputation in the eyes of the public. The fact that the photograph was published implied that Ettingshausen had deliberately permitted a photo to be taken of him in the nude for publication in a magazine with widespread readership. He was awarded \$350 000 against the publisher. On appeal, the finding of defamation was upheld, but the amount of damages was said to be excessive.

- 4 Read the case study *Papaconstuntinos v. Holmes à Court* and answer the questions.
 - a Why did Mr Papaconstuntinos believe Mr Holmes à Court's letter damaged his reputation?
 - b How were the defamatory statements published and to whom were they addressed?
 - c Explain the application of the defence of qualified privilege in this case.
 - d Why did Mr Holmes à Court rely on the defence of qualified privilege rather than the possible defences of justification or honest opinion in arguing his case?

Papaconstuntinos v. Holmes à Court (2012) HCA 53

In 2005, businessman Peter Holmes à Court and actor Russell Crowe offered the financially strapped South Sydney District Rugby League Football Club (the Rabbitohs) a \$3 million rescue package in exchange for control of the club's management. The offer divided club members and was strongly opposed by Tony Papaconstuntinos, the director of the South Sydney Leagues Club, which was associated with, and shared the same building as, the Rabbitohs.

Papaconstuntinos was also employed at the Construction, Forestry, Mining and Energy Union. In 2006, Holmes à Court wrote a letter of complaint to the union's state secretary. In the letter he stated that Papaconstuntinos had repeatedly misled club members about the rescue package and that Papaconstuntinos was reasonably suspected of misusing funds, meant for the football club, for either his own benefit or that of the union.

Papaconstuntinos launched defamation proceedings in the NSW Supreme Court. Holmes à Court's case relied on the common law defence of qualified privilege, which requires that both the maker and the receiver of a defamatory statement have an interest in it being made. The trial judge ruled that Mr Holmes à Court did not have sufficient interest in making such statements. She commented, 'I do not think there was a pressing need for Mr Holmes à Court to protect his interests by volunteering the defamatory information' and awarded Papaconstuntinos \$25 000 in damages.

This decision was overturned in the NSW Court of Appeal, which ruled that Mr Holmes à Court did have a personal interest in making the statements as he wanted his financial proposal to succeed and that the concept of a 'pressing need' was irrelevant in proving qualified privilege.

Papaconstuntinos' subsequent appeal to the High Court was dismissed. The High Court affirmed the Court of Appeal's decision and ruled that the common law defence of qualified privilege requires the maker to have an interest in making the statement and the receiver to have an interest in hearing it. It does not require anything more.

CASE STUDY

Nuisance

The law of nuisance refers to unreasonable annoyance or interference with a person's use or enjoyment of land. In some instances a sporting facility may cause a nuisance due to excessive noise or projectiles entering an adjoining property.

There are two types of nuisance:

- **private nuisance** – A private nuisance is a civil wrong. It is the unreasonable, unwarranted or unlawful use of one's property in a manner that substantially interferes with the enjoyment or use of another individual's property.
- **public nuisance** – A public nuisance is generally a civil wrong, but in some cases it can also be a crime. It is an act or omission that endangers the comfort, health, lives, property or safety of a class of people.

To successfully pursue a claim for nuisance, it is necessary to establish:

- whether the act or omission created a substantial inconvenience
- whether the act or omission was unreasonable for the plaintiff to bear
- what actual loss or harm was caused.

Whether a nuisance exists depends on whether the activity causing the nuisance is reasonable given the nature of the locality. What is considered reasonable depends on the circumstances. For example, it would be reasonable for people who purchase a property close to a sporting facility to hear some noise on match days. The court will also consider any reasonable action that can be taken to abate the nuisance.

In general, the nuisance must continue after the defendant has learnt of the actual harm or substantial risk of future harm to the plaintiff, although on occasion an isolated incident causing physical damage can be considered a nuisance.

Defences to private nuisance

A defendant could claim that:

- the act or omission causing the nuisance is reasonable for the particular locality
- the act or omission causing the nuisance is authorised by law (this does not apply if negligence is involved)
- the nuisance has been allowed to exist for more than 20 years (this argument does not apply to trees).

LEARNING ACTIVITY 13.4

Nuisance

- 1 What is private nuisance?
- 2 What must plaintiffs prove for their private nuisance claim to be successful?
- 3 Read the case study *Campbelltown Golf Club Ltd v. Winton* and answer the questions.
 - a What defence to nuisance might have applied in this case? Explain your answer.
 - b Is the outcome of this case fair? Justify your answer.

CASE STUDY

Campbelltown Golf Club Ltd v. Winton (1998) NSWSCA

A couple purchased vacant land adjacent to a golf club in 1990. They built their home on the land. After moving into their home they found that the constant barrage of golf balls coming over the fence from the golf club seriously interfered with their enjoyment of their property. They complained of 1262 golf balls and numerous golfers coming onto their land. Entries from a diary kept by the homeowners in 1995 showed that from 1 January 1995 to 17 May 1995, 421 balls had come onto the property from the fifth fairway. Some of the golf balls struck the house and its windows, others came into the garden, and on one occasion a golf ball struck the homeowners' child.

The Court of Appeal held that homeowners living next to a golf course must expect some balls to enter their property. They were, however, not bound to accept having their property peppered with golf balls on a daily basis, which posed a threat, not only to their property, but also to their physical safety.

The court stated that the fact that the couple had built their home knowing that there was a golf course close by did not provide a defence to an action in nuisance, or provide a reason for damages to be reduced. The amount of \$15000 damages awarded by the court was held to be reasonable in the circumstances. The court also held that the golf club must relocate the fifth hole or provide appropriate screens.

- 4 Read the extract 'Mildenhall speedway track wins noise case against couple' and answer the questions.
 - a Explain the nuisance complained about in this case.
 - b Give three reasons to explain the court's ruling in the appeal case.
 - c Why did the judge say that the outcome would be a 'disaster' for the couple?

EXTRACT

Mildenhall speedway track wins noise case against couple

BBC News Suffolk, 27 February 2012

A Suffolk motor sports stadium has won its appeal against a couple who bought a house nearby and sued over the noise. Raymond Shields and Katherine Lawrence said they were unaware Mildenhall stadium was 500 yards away when they moved to West Row in 2006.

They won £20000 in damages from the stadium at the High Court last year, but the Appeal Court has overturned that decision. The couple was ordered to pay £85000 interim legal costs by the court.

The stadium is used for Mildenhall Fen Tigers speedway meetings, stock car racing and motocross, as well as for greyhound racing, and planning permission dates back to 1975.

At the High Court hearing last year, the couple was awarded the £20000 in their nuisance case against the stadium's owners and operators.

Lord Justice Jackson, one of three judges in court, said: 'The outcome of this litigation will be a disaster for the claimants, a fact which I regret'. On the other hand, their predicament is a consequence of their decision to purchase a house in an area where motor sports were an established activity. The noise of motor sports emanating from the track is an established part of the character of the locality.'

The couple's lawyers had argued that the noise from the stadium drove them out of their garden, forced them to change the layout of their home and to erect a wall made of straw bales around their home.

Speaking after the decision, David Coventry, one of the stadium's owners, said: 'This time last year I was faced with a draft judgment along the lines that restrictions would be so severe that we wouldn't be able to stage anything other than the quietest of things like tiddlywinks and greyhounds and we were facing £1 million in costs. The noise generated can be heard in the distance and everyone accepts that, just as they accept aeroplanes flying over every few minutes with RAF Mildenhall next door.'

Trespass to the person

The tort of trespass to the person includes assault, battery and false imprisonment.

Civil law assault

A civil law assault is any **direct threat** made by one person that places another person in reasonable fear of imminent contact. The threat must be **intentional**.

Threats that constitute an assault are usually actions accompanied by words. For example, if during a heated debate at a sports association meeting a club member approaches the chairperson with a clenched fist, pulls him out of his chair and says 'I'll punch your lights out' then this would be an assault.

A threat does not always need to be accompanied by words; actions alone can constitute an assault. For example, an angry cricketer who menacingly brandishes a cricket bat while chasing an unruly spectator off the pitch may commit an assault if the spectator feared being hit.

To prove the tort of assault:

- the defendant must pose a **direct threat** to the plaintiff
- the plaintiff must have **knowledge** of the threat
- the plaintiff must have **reasonable fear** of the defendant.

Defences to assault

In defending a claim for assault, a defendant could claim that:

- he or she did not pose a direct threat to the plaintiff
- the plaintiff had no knowledge of the threat
- the plaintiff was not in fear of his or her actions.

Battery

Battery is a **voluntary and direct act** by a person with the **intention** of causing contact with another person without their consent. There is no need to prove the person also intended to cause injury or harm. In many cases, the intention to make contact can be inferred from the person's overt actions.

Thus, assault is the threat of contact and battery is the actual contact. Assault and battery usually occur together, and are often combined in a single reference to an 'assault'. There can, however, be assault without battery, or battery without assault. In circumstances where a person is struck from behind, there is battery but no assault because the victim is unaware and does not fear imminent contact.

To prove the tort of battery:

- there must be **direct contact** with the body of the plaintiff by the defendant
- there must be **intention** to cause contact
- the act must be **voluntary**.

Defences to battery

In defence of a claim for battery, a defendant could claim:

- there was no direct contact with the body of the plaintiff
- there was no intention to cause contact with the body of the plaintiff
- the action was done involuntarily
- there was consent
- self-defence.

**Figure 13.9**

As a defence to battery, a defendant could claim that there was consent to contact being made.

False imprisonment

False imprisonment is the wrongful total restraint of the liberty of a person, directly brought about by another person. The act is usually intentional, although there may be actions for negligent or reckless false imprisonment.

LEARNING ACTIVITY 13.5

Trespass to the person

- 1 In each of the following scenarios decide whether trespass to the person applies. Give your reasons.
 - a Just after a golfer tees off, two other players appear on the fairway ahead. She calls 'fore' to warn them. One person is hit but not seriously injured by the ball.
 - b An AFL footballer takes a mark on the back of his opponent.
 - c A tennis player waves her racket menacingly at a ballboy and says, 'Run across my side of the court one more time and see what you'll get'. The ballboy later said he feared being hit.
 - d A hockey team does not like an opposing player because of his rough play. At the end of the game they lure the player to their changing room and lock him in for several hours.
 - e A man is angry because his billiards opponent deliberately makes a loud noise to put him off his shot. He walks up behind his opponent and hits his opponent with a cue.
 - f Two soccer players get into a fight on the field. One grabs the other by the throat. The other player responds with a headbutt.
- 2 Read the case study 'Trespass to the person for injured Aussie Rules player' and answer the questions.
 - a What occurred in this case?
 - b Why was the injured player able to sue for trespass to the person? Answer this question in relation to the elements that have to be proved for trespass.
 - c Explain the meaning of the term *volenti non fit injuria*. Why was this used as a defence in this case? Why was this defence not successful?

CASE STUDY

Trespass to the person for injured Aussie Rules player

In the case of *McNamara v. Duncan* (1979) 26 ALR 584, the plaintiff, a player of Australian Rules football, was injured during a game by a sharp blow to the head and sought damages for trespass to the person. Both parties agreed that an intentional blow was not part of the rules of the game.

The plaintiff sued the defendant for trespass to the person. He maintained that the defendant struck him intentionally. The defendant claimed the defence of *volenti non fit injuria*, maintaining that the plaintiff, by taking part in the game, consented to accept injuries that are part of the game. The plaintiff was successful. The court held that the plaintiff did not consent to receive a blow that was contrary to the rules of the game.

- 3 Read the case study 'Umpire wins \$172000' and answer the questions.
 - a What type of trespass occurred in this case?
 - b Refer to the key elements of trespass to explain what the plaintiff needed to prove for his case to be successful.
 - c Why were damages awarded?
 - d Do you think the outcome was just? Give reasons.

CASE STUDY

Umpire wins \$172 000

A former district football umpire was awarded \$172000 damages for injuries that resulted from being hit by a player in a shower after a match. The match was a senior game in the second division between Lancefield and Macedon. After the match, a player from the losing team went into the shower rooms, threatened the umpire and then hit him on the nose, forcing his head onto the tiles. The umpire received injuries to his nose, back, neck and jaw, and has since undergone several operations. He required regular painkilling medication. The incident led to stress in his marriage and sleeping problems. He was working as a contract painter, but had to go on an invalid pension because he was unable to perform his work.

The case went to the County Court, and the umpire was awarded \$160000 general damages, plus \$12000 interest. The liability for the damages was distributed between the player (65 per cent), the football club and the umpires' league (15 per cent), and the Riddell District League (5 per cent). This meant that the player would have to pay 65 per cent of \$172000.

VIOLENCE IN SPORT

Many sports contain some elements of violence or dangerous acts during play, such as tackling in rugby, ice hockey and boxing.

Boxing

The World Medical Association wants boxing banned. It considers boxing a dangerous sport because the game is based on opponents causing each other bodily harm. The Australian Medical Association (AMA) is also against all forms of boxing and would prefer it banned. However, if authorities allow it to

continue, the AMA suggests the sport be restricted to people aged 18 and over. Dr Bill Glasson from the AMA said, 'Boxing is not a sport; it is organised violence'.

Doctors oppose the sport because repeated punches to the head and body for any human are dangerous and can lead to brain injury. Multiple blows to the head can cause mini-fits and blindness.

Other people think that a ban on boxing would drive the sport underground; where there is potential for matches to take place without rules or appropriate medical attention. John Scida, a boxing trainer, says boxing is safer than most sports. He says horse riding and rock fishing are the deadliest sports and argues that boxing is pretty safe in comparison to other sports.

Female boxing

The first boxing matches between women were staged in London in the 1700s. Women's boxing was a display event at the third modern Olympic Games in 1904, but the sport was not sanctioned by the Amateur International Boxing Association until 1994. It was recognised as an Olympic event at the London Olympic Games in 2012. Female boxing is legal in Australia. In some countries there are laws against women boxing. Female participation in boxing is growing, particularly in the United States.

Some people believe women should not participate in a violent sport because it is unfeminine and unsafe. They argue that women are more likely to be hurt than men. Other people say that if women adequately prepare and train for a match and only fight women then they will be exposed to the same level of risk as male boxers and should be entitled to the prize money attached to a win in the ring.

There are special rules for women to protect them from harm. For example, female boxers in Australia wear breast protectors. In championship bouts, female boxers aged 17 and above fight three rounds of two minutes' duration, while men of the same age box four rounds of two minutes' duration. Some people who want to see the sport remain in its traditional form argue that the rules should be the same for men and women because otherwise people will not take the sport seriously.

Child boxing

In Victoria, children over 12 can participate in amateur boxing matches, although the AMA has suggested that boxing should be banned for all ages because of the dangers of participation. New South Wales has a minimum boxing age of 14 years.

DID YOU KNOW?

Muay Thai child boxing tournaments are extremely popular in Thailand. Boys and girls as young as eight compete in televised matches in front of large crowds. The children and their parents, who are often from the poorer rural areas, consider the sport safe and a good form of income.

Ultimate fighting

The **Ultimate Fighting Championship** (UFC) is a mixed martial arts (MMA) promotion company based in the United States that hosts numerous cage fighting events worldwide. US Senator John McCain once described it as 'human cockfighting' as matches take place in a cage.

MMA is 'multi-discipline fighting', in three five-minute rounds, incorporating everything from wrestling to ju-jitsu, boxing, karate and other martial arts. Advocates of the sport admit that, to the novice spectator, it could look as if there were no rules to the sport. This is because each MMA fighting organisation can make its own rules while adopting the general rules listed in the Unified Rules of Mixed Martial Arts, which prohibit hits to the groin, throat, back of the head or spine and eye-gouging or biting.

The sport of mixed martial arts is allowed in Victoria; however, fighting in cages is banned. The cages are also banned in Western Australia but their use is permissible in the other Australian states

for fear that the sport would otherwise go underground. Fight organisers say the ban is illogical because MMA cage fights are safer; the cage protects the fighters from falling or being thrown out of the fight ring. Cage fighting is the fastest growing sport in the United States, the United Kingdom, Australia and Japan.



Figure 13.10

'Ultimate fighting' arrived in Australia in February 2010 when 20 000 fans filled the Allphones Arena in Sydney to view the controversial sport for the first time.

Sociologist David Mayeda claims that MMA is popular with people who hold traditional views about gender and masculinity, where men are expected to be strong, dominant or violent. By its very nature, the sport excludes women and may promote misogyny. While MMA fighters are predominantly male, female MMA competitions do exist, particularly in Japan.

There have been several deaths in the United States attributed to the sport; with few serious injuries in Australia. Australian MMA fighter Elvis Sinosisic suggests that promoters look after their fighters because without them there would be no sport and no revenue. In contrast, doctors are apprehensive about this new sport. They argue that long-term injuries like those sustained in boxing may result from mixed martial arts fighting, but because the sport is relatively new these injuries have not yet come to prominence.

LEARNING ACTIVITY 13.6

Violence in sport

- 1 Should sport that is clearly violent and dangerous be allowed? Discuss.
- 2 Read the case study '13-year-old Perth girl boxing for Australian title' and answer the questions.
 - a Would this girl boxer be able to compete in matches held in Victoria and New South Wales? Explain.
 - b Discuss the advantages and disadvantages of female boxing. Make reference to this case where appropriate.

CASE
STUDY

13-year-old Perth girl boxing for Australian title

In November 2009, a 13-year-old Perth girl was set to make history as the youngest woman to fight for an Australian boxing title, prompting an outcry from doctors who want the sport banned. Haylee Verrier was a swimmer who took up boxing to build shoulder strength but was quickly identified as a natural boxer.

Verrier won her first major title at the 2011 Australian Amateur Boxing Championship against eight other opponents. In 2012, she was the Australian women's 60-kilogram division champion. She was too young for the London Olympics, which included women's boxing for the first time, but she has her sights set on competing in Rio de Janeiro in 2016.

3 Investigation

Investigate 'ultimate fighting' or 'female boxing' and write a report. In your report include:

- the rules of the sport
- the opinions of those for and against this type of sport, and the steps they have taken to promote or ban the sport.

4 Survey family and friends (approximately 10 people) to ascertain whether they support the sport of boxing.

- a Draft five questions to ask, which will help you explain the issue and collect people's views.
- b Write a brief report on your findings.

ISSUE – DISCRIMINATION IN SPORT

Discrimination is the act of treating someone less favourably than others. The *Equal Opportunity Act 2010* (Vic.) prohibits discrimination in sport except in certain circumstances. Similar provisions are contained in the following Commonwealth Acts:

- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth).

Equal Opportunity Act 2010 (Vic.)

The Victorian *Equal Opportunity Act* prohibits discrimination on the grounds of 17 attributes (as shown in the extract). Discrimination occurs when a person or a group of people is treated less favourably than others in the public areas of accommodation, **clubs and club membership**, disposal of land, local government, education, employment, goods and services, and **sport**.

A person who has been discriminated against can choose to pursue their case using either state or federal laws. The Victorian Equal Opportunity and Human Rights Commission and the Anti-Discrimination List of the Victorian Civil and Administrative Tribunal (VCAT) deal with discrimination complaints at state level, while the Australian Human Rights Commission deals with complaints lodged under a Commonwealth Act.

EXTRACT*Equal Opportunity Act 2010*

The Parliament of Victoria enacts:

PART 1 – PRELIMINARY**1 Purposes**

The main purposes of this Act are:

- (a) to re-enact and extend the law relating to equal opportunity and protection against discrimination, sexual harassment and victimisation and
- (b) to amend the *Racial and Religious Tolerance Act 2001* in relation to dispute resolution and
- (c) to make consequential amendments to the *Racial and Religious Tolerance Act 2001*, the *Victorian Civil and Administrative Tribunal Act 1998* and other Acts.

3 Objectives

The objectives of this Act are:

- (a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent
- (b) to further promote and protect the right to equality set out in the *Charter of Human Rights and Responsibilities*
- (c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation
- (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that:
 - (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society
 - (ii) equal application of a rule to different groups can have unequal results or outcomes
 - (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures
- (e) to enable the Victorian Equal Opportunity and Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions
- (f) to enable the Commissioner of the Victorian Equal Opportunity and Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Victorian Civil and Administrative Tribunal for resolution of such disputes.

PART 2 – WHAT IS PROHIBITED DISCRIMINATION?**6 Attributes**

The following are the attributes on the basis of which discrimination is prohibited in the areas of activity set out in Part 3 –

- (a) age
- (b) breastfeeding
- (c) employment activity
- (d) gender identity
- (e) disability
- (f) industrial activity
- (g) lawful sexual activity
- (h) marital status
- (i) parental status or status as a carer

- (j) physical features
- (k) political belief or activity
- (l) pregnancy
- (m) race
- (n) religious belief or activity
- (o) sex
- (p) sexual orientation
- (q) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

Source: *Equal Opportunity Act 2010* (Vic.)

While the areas of discrimination in **sport, clubs and club membership** are the most relevant to sporting organisations, the other areas of discrimination may also apply in certain circumstances. For example, a public golf club that has a policy of hiring only male groundskeepers is discriminating in the area of employment on the basis of sex. If the manager of the golf course's cafeteria refused to serve two Indigenous youths then this could be a case of discrimination in the provision of goods and services on the basis of race.

Discrimination in the area of clubs and club membership

The *Equal Opportunity Act 2010* (Vic.) states that a club cannot restrict access to membership or its facilities unless it can show that special circumstances apply. For example:

- **single sex clubs** – It is permissible for membership to a club to be restricted to one sex as long as this is clearly stipulated in membership rules.
- **clubs for minority cultures** – It is permissible for a club that operates principally to preserve a minority culture to restrict membership to people with the requisite attribute.
- **clubs for political purposes** – It is permissible for a club established for political purposes to deny a person membership on the basis of political belief or activity.
- **separate access for men and women** – If it is not reasonably practicable for men and women to enjoy the benefit of a club at the same time then the sexes must be given equivalent access to enjoy the benefit at a different time.
- **clubs for particular age groups** – It is permissible for a club that operates to provide benefits to people of a particular age group to restrict membership to people of that age group if it is reasonable to do so in the circumstances.

In addition to these statutory exemptions in sport and club membership, the Victorian Civil and Administrative Tribunal (Human Rights List) may grant (and subsequently renew) an exemption for up to five years to any organisation that can show good reason for the discrimination.

Discrimination at the MCC

A Melbourne man challenged the Melbourne Cricket Club's membership rule that allows long-time members to give up their right to a lady's card or guest card so that they can nominate a woman from the MCC membership waiting list. The man said that the rule was discriminatory. It

**CASE
STUDY**

was introduced to boost female MCC membership as the club has, in the past, been criticised for only having male members. When the MCC rejected the man's attempt to use the rule to nominate his brother for full membership, he took the case to the Equal Opportunity Commission and then to the Victorian Civil and Administrative Tribunal.

In *Mangan v. Melbourne Cricket Club (Anti-Discrimination)* (2006) VCAT 73 (8 February 2006), the tribunal declared the rule unlawful and ordered the MCC to review the rule to either allow men to be admitted in the same way as women or to abolish the rule. It also ordered the MCC to pay a 'modest' award of costs.

Discrimination in the area of sport

It is illegal to discriminate against another person because of an attribute listed in the *Equal Opportunity Act 2010* (Vic.) in the area of sport. This covers people who play, coach, umpire, referee or administer sporting activities and any person excluded from a sporting activity. However, it may be lawful to exclude a person from competitive sport because of:

- **competitive standards** – for example, a C-grade table tennis player cannot demand to be included in the A-grade competition if he or she has not qualified to compete at that level
- **age** – for example, a 21-year-old cannot expect to compete in a veterans' triathlon competition
- **disability** – for example, able-bodied athletes cannot compete in the Paralympics and vice versa
- **sex** – for example, a male tennis player cannot expect to play in the women's competition in the Australian Open because of the differences in build, strength and stamina of the sexes, particularly after the age of 12.

EXTRACT

Equal Opportunity Act 2010

Division 7 – Discrimination in sport

71 Discrimination in sport

A person must not discriminate against another person:

- (a) by refusing or failing to select the other person in a sporting team; or
- (b) by excluding the other person from participating in a sporting activity.

72 Exception – competitive sporting activities

- (1) A person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.
- (1A) A person may exclude people of one sex from participating in a competitive sporting activity if –
 - (a) participation in the activity is necessary for progression to an elite level competition; and
 - (b) the exclusion is necessary to enable participants in the activity to progress to national or international elite level competition.
- (1B) A person may exclude people of one sex from participating in a competitive sporting activity or restrict participation in a competitive sporting activity to people of one sex if –
 - (a) the exclusion or restriction is intended to facilitate participation in the activity by people of a particular sex; and

- (b) the exclusion or restriction is reasonable having regard to –
 - (i) the nature and purpose of the activity; and
 - (ii) the consequences of the exclusion or restriction for people of the excluded or restricted sex; and
 - (iii) whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.
- (2) A person may restrict participation in a competitive sporting activity:
 - (a) to people who can effectively compete or
 - (b) to people of a specified age or age group or
 - (c) to people with a general or particular impairment.
- (3) Subsection (1) (1A) and (1B) does not apply to a sporting activity for children under the age of 12 years.

Source: *Equal Opportunity Act 2010* (Vic.)

Sex discrimination in sport

If men and women played in the same competitions, it could mean that men would almost always win if physical strength gave a significant advantage. Under the *Equal Opportunity Act 2010* (Vic.), people of one sex may be excluded from participating in a competitive sporting activity in which the strength, stamina or physique of the player is relevant. This does not include coaching, refereeing or administration. This exception does not apply to sporting competitions for children under the age of 12.

In 2011, this law was changed to allow single-sex competitions if reasonable in the circumstances and the aim is to increase participation in a sport, or it is necessary to allow an athlete to participate in elite sport at both national or international level.

Woman fights to play lawn bowls with the men

Emily South fought the Royal Victorian Bowls Association (RVBA) for two years against sexual discrimination, because she was barred from playing lawn bowls in the men's pennant on Saturdays. Ms South was aiming to play for Australia and stated that the women's weekend bowling did not give her competition of a high enough standard. She said that the complaints from the men were more based on emotions rather than a claim that her physical stamina did not match that of the men.

The matter was eventually taken to the Victorian Civil and Administrative Tribunal (VCAT). RVBA argued that men had a distinct advantage over women because of their greater muscle bulk, which allowed them to project the bowl at greater speed. The tribunal decided that they could not exclude Ms South from playing men-only Saturday pennant competition. It was clear that lawn bowls was not a sport where 'strength, stamina or physique' was relevant to participants' ability to effectively compete.

The tribunal ordered that the RVBA delete from its rules the requirement that only males could be affiliated members. RVBA president Arnold O'Brien said he was disappointed about the decision.

In 2003, the RVBA applied to VCAT for an exemption to run single-sex competitions in some divisions. The tribunal awarded the exemption for state championship events (given that national and international squads are selected on a single-sex basis) but not for club championships and pennant events.

CASE STUDY

Sexual harassment

Sexual harassment is also strictly prohibited by Victorian and Commonwealth legislation. Examples of behaviour that could be sexual harassment include:

- a spectator making inappropriate and unwanted sexual comments towards a referee
- a coach giving an athlete a massage that involves unwanted sexual contact
- a team official staring and leering at an athlete
- a team manager asking players intrusive questions about sexual activity
- a club official 'wolf-whistling' or making sexual gestures towards a team member
- an athlete making repeated sexual invitations towards another team member when the person invited has refused similar invitations before
- a club publishing a sexist joke (or sexually explicit images) on its website
- team members conducting initiation ceremonies involving unwelcome sexual or sexist behaviour.

Disability discrimination

It is illegal to discriminate against a person with a disability or impairment. This includes those with physical, mental, psychological or intellectual impairment and people who suffer from a disease. However, a person who has not met the required competitive standards can lawfully be excluded from a sporting competition. For example, a person who has only one leg could compete against two-legged swimmers if they had qualified for the event in the same way as other competitors. As this is unlikely, disabled athletes usually compete in separate tournaments.

State and Commonwealth laws make it unlawful to:

- directly or indirectly discriminate against a person because of their disability
- harass a person because of their disability
- require a person with a disability to provide information that might be used to discriminate against them
- victimise a person because they have made a disability discrimination complaint.

There have been thousands of complaints lodged under the *Disability Discrimination Act* (Cth). Of the complaints that have been dealt with, a majority have been settled by conciliation. These complaints have led to a change in attitude towards people with disabilities and improved access for disabled people to buildings and sporting facilities.

CASE STUDY

Scooter access to club

A man was refused entry to his local club unless he could transfer unaided from his scooter to a wheelchair provided by the club. The club was concerned about the general safety of its members. Through conciliation, the club agreed to adopt a mobility devices policy under which scooters and other mobility devices would be permitted to enter as long as they complied with strict safety regulations such as a 3 km/h speed limit.

Racial discrimination

State and Commonwealth legislation make it unlawful to discriminate against a person on the grounds of race, colour or religious beliefs. It would therefore be unlawful to exclude someone from a sport because of his or her race.

Some people may argue that indirect racial discrimination appears in the make-up of various sporting teams. For example, it is unusual to see a Vietnamese-born cricketer. One explanation for this could be cultural preferences for a particular sport; for example, many Italian-born Australians choose to play soccer rather than Australian Rules football. The Australian Cricket Board is trying to break down cultural barriers by seeking participation from a more diverse group of Australians.

Examples of behaviour that could be offensive include:

- an athlete making fun of a teammate because of the teammate's race
- a coach imitating an athlete's accent
- a sports administrator telling a racist joke
- a referee calling a player an offensive name or using unsuitable language because of the player's race.

EXTRACT

Racial Discrimination Act 1975 (Cth) – Section 9

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Source: *Racial Discrimination Act 1975 (Cth)*

Example of indirect racial discrimination

A basketball club makes a rule that all athletes have to train on Fridays to be eligible for selection in the representative team. The rigidity of this rule inadvertently excludes a number of players (such as Muslim and Orthodox Jewish players) who cannot attend on Fridays because of religious commitments.

The players believe that, by imposing this rule, the club has indirectly discriminated against them. The club would need to make a more flexible rule or demonstrate why the requirement to train on Fridays is reasonable. Otherwise the club risks action being taken against it for indirectly discriminating against some of its members.

CASE STUDY

Racial vilification

Sport is a cross-cultural pastime and racial vilification of any kind is frowned on. Racial vilification is speaking in a menacing way and putting someone down because of their race, colour or national or ethnic origin.

Racial vilification laws

The *Racial Hatred Act 1995 (Cth)* amended the *Racial Discrimination Act 1975 (Cth)*. Under the amended *Racial Discrimination Act*, offensive behaviour based on racial hatred is prohibited. It is unlawful for a person to act, other than in private, in a way that is reasonably likely **to offend, insult, humiliate or intimidate another person** or a group of people, when the act is done because of the race, colour or national or ethnic origin of the other person or group. In April 2014, the Abbott Government suggested that this should be **changed to 'vilify or intimidate another person'** to fulfil an election promise to uphold the principle of free speech.

An act is not done in private if it causes words, sounds, images or writing to be communicated to the public, or is done in a public place, or is done in the sight or hearing of people who are in a public place.

The *Racial and Religious Tolerance Act 2001* (Vic.) deals with racial vilification. Under this Act it is unlawful to incite hatred, serious contempt, revulsion or severe ridicule.

AFL racial vilification policy

The Australian Football League is determined to send a strong message to the football community that racial vilification is unacceptable. A player, umpire or club can bring a complaint under the AFL's racial and religious vilification rule. If a complaint is brought, the AFL commission appoints a person who will try to get the parties to discuss the matter and work out an agreement.

If this confidential conciliation process is unsuccessful, then the matter is referred to the AFL Tribunal or the AFL Commission for a decision. The player's club can be fined up to \$50 000 unless it can show it took appropriate measures to prevent the vilification from happening.

CASE STUDY

Justin Sherman participated in conciliation

Western Bulldogs player Justin Sherman participated in a conciliation meeting to resolve a complaint that he racially vilified a Gold Coast Suns player during an AFL match. He agreed to give \$5000 to charity, complete an education program and support multicultural sporting initiatives. He also apologised to his opponent and received a four-match suspension.

CASE STUDY

Vilification of Adam Goodes

Sydney Swans player Adam Goodes said it was shattering to hear a 13-year-old Collingwood supporter call him an 'ape' during an AFL match. The young Collingwood supporter was escorted from the ground. The girl later apologised. Goodes explained that he was hurt 'not just by what was said, but by whom it came from'. The Indigenous footballer said more education is needed to stamp out racial vilification.

The incident was followed by an on-air gaffe by Eddie McGuire, president of the Collingwood Football Club. McGuire and another radio presenter were talking about a promotion for the hit musical *King Kong*. McGuire then quipped, 'Get Adam Goodes down for it, d'you reckon?' Amid public backlash, McGuire apologised to Goodes, explaining that he had made a mistake and that his comment was not intended as racial vilification.

Ironically, the first incident occurred during the AFL's Indigenous rounds, which aimed to celebrate Indigenous culture, and the second incident occurred not long after McGuire apologised to Adam Goodes for the Collingwood supporter's comment.

Twenty years earlier, St Kilda player Nicky Winmar lifted his football jumper to show Collingwood fans his skin after suffering racial taunts from the crowd.

Capacity of the legal system to respond to demands for change

Victoria's first anti-discrimination laws were enacted in 1977 to strengthen the rights of women in society. The *Equal Opportunity Act 1977* (Vic.) outlawed discrimination based on sex or marital status in employment, education, accommodation and the provision of goods and services. Since then, Victoria has steadily expanded its anti-discrimination laws to reflect changing social values. Over

time, individual cases involving discrimination gained media attention and highlighted that the law was out of step with current views and values.

Discrimination against people with a disability was banned in 1982, and discrimination based on religion, race and political beliefs was outlawed in 1984. Sexual harassment was also prohibited at this time.

It was not until 1995 that discrimination in sport was made illegal. The *Equal Opportunity Act 1995* (Vic.) extended the list of attributes, against which it was illegal to discriminate, to include age, parental status, carer status, industrial activity, personal association, lawful sexual activity, physical features and pregnancy. This Act also expanded the areas in which it was illegal to discriminate to include sport, clubs, local government and the disposal of land. In 2000, the list of attributes was again expanded to cover discrimination involving sexual orientation, gender identity and breastfeeding.

In 2010, the Victorian Parliament passed the new *Equal Opportunity Act*. This Act represents a significant shift in approach. Under the previous law, the Victorian Equal Opportunity and Human Rights Commission would resolve individual complaints of unlawful behaviour. Under the new Act, the commission's role is still one of education and resolution of individual complaints but with an added investigative role. The commission can conduct investigations when it reasonably suspects systematic discrimination and the victims are unable or unwilling to make a complaint to the commission or make a VCAT application.

To assist its investigations, the commission can seek a VCAT order to compel the attendance of parties and the production of documents. If the commission finds discrimination occurred, it can negotiate a resolution between the parties or bring proceedings before VCAT. It can report on its investigations publicly or alternatively to the attorney-general or the parliament. The commission can also intervene in court of legal proceedings that involved discrimination issues.

In 2012, the Gillard Government reviewed five Commonwealth anti-discrimination Acts and planned to merge them into a single Act. Following public criticism of the exposure draft, the consolidation Bill was shelved for redrafting. In the interim, the government passed an amendment to the *Sex Discrimination Act 1984* (Cth) to include protection from discrimination on the grounds of sexual orientation, gender identity and intersex status and to extend the ground of marital status to include relationship status.

In 2014, the Abbott Government flagged legal changes to make racial vilification a criminal offence at the Commonwealth level and to fulfil its election promise to uphold the principle of free speech by amending Section 18C of the *Racial Discrimination Act 1975* (Cth). This section makes it unlawful to publish material that **offends, insults, humiliates or intimidates another person** or a group of people because of the race, colour or national or ethnic origin of the person or group.

Proposed changes to the *Racial Discrimination Act*

In April 2014, the federal government proposed changes to the *Racial Discrimination Act 1975* (Cth) because the Act as it stands restricts free speech. This change was abandoned.

EXTRACT

Freedom of Speech (Repeal of S18C) Bill 2014 (Cth)

Section 18C is to be replaced with the following section:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely:
 - (i) to vilify another person or a group of persons; or
 - (ii) to intimidate another person or a group of persons,

- and
 - (b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.
- (2) For the purposes of this section:
 - (a) vilify means to incite hatred against a person or a group of persons;
 - (b) intimidate means to cause fear of physical harm:
 - (i) to a person; or
 - (ii) to the property of a person; or
 - (iii) to the members of a group of persons.

Source: *Freedom of Speech (Repeal of S18C) Bill 2014* (Cth)

Methods and institutions for resolving disputes – discrimination

Sporting tribunals

Sporting organisations have legal responsibilities in relation to harassment, discrimination and child protection. They also have a moral obligation to establish standards of appropriate behaviour and provide safe and respectful sporting environments. A tribunal hearing forms part of an organisation's complaints procedure and will assist the sporting organisation to manage complaints and issues as they arise. It also assists the organisation to implement the rules and regulations of the sport as set out in its constitution, by-laws and policy documents.

Courts

Some issues can be taken through the court system, such as when a player believes he or she has not been given natural justice in a sporting tribunal hearing or there has been a breach of the criminal or civil law.

CASE STUDY

Netball Australia's ban on pregnant players

In 2003, the Federal Magistrates Court (now known as the Federal Circuit Court) found Netball Australia had discriminated against Trudy Gardner. Gardner was banned from playing netball because she was pregnant. In November 2004, following this case, Netball Australia revised its policy with regard to pregnant players. The current position allows pregnant players to continue to play, although they are encouraged to discuss their decision to play with their medical practitioner.

The Victorian Equal Opportunity and Human Rights Commission

Issues of discrimination can be taken to the **Victorian Equal Opportunity and Human Rights Commission** (VEOHRC). The commission will attempt to reach a resolution through conciliation between the parties, although it will no longer do any investigation on behalf of the parties. The Australian Human Rights Commission will also try to help parties to resolve disputes relating to discrimination.

VCAT Anti-Discrimination List

As an alternative to conciliation by VEOHRC, or if such conciliation is unsuccessful, the dispute can be taken to the Anti-Discrimination List of the Victorian Civil and Administrative Tribunal (VCAT). VCAT will hear the dispute and make a binding decision.

Homophobia in sport

In 2013, tennis legend Martina Navratilova and former National Basketball Association player Jason Collins participated in a United Nations event entitled 'Sport Comes out against Homophobia' to celebrate International Human Rights Day and to combat homophobia in the world.

The Australian Football Player's Association launched a social media campaign to mark International Day Against Homophobia, both within football and in the wider community. In 2014, the Australian Football League extended its Respect and Responsibility program, which educates players on racial and religious vilification, to include information on the impact of homophobia.

In 2013, Football Federation Victoria joined with the Victorian Equal Opportunity and Human Rights Commission to host the Pride Football Australia tournament to show there was no place for homophobia in soccer. The commission has launched several initiatives to combat discrimination in sport. Its most recent campaign urges people to wear the commission's 'Fair go, sport!' rainbow socks to encourage supportive and inclusive sporting clubs, schools and workplaces.

CASE STUDY

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Discrimination

- 1 Explain the different ways people can be discriminated against in sport or in sporting clubs. *(1 mark)*
- 2 When is it lawful to exclude a person from competitive sport? *(2 marks)*
- 3 Look back at the case study 'Woman fights to play lawn bowls with the men'. Explain the outcome of this case. *(1 mark)*
- 4 When is it lawful to exclude a person from a club or association? *(2 marks)*
- 5 Read the case study 'Women-only time'. Do you think women-only recreational activities should be allowed? Discuss. *(2 marks)*

Women-only time

In 2006, Moreland City Council asked VCAT's permission to open the Fawcner Leisure Centre on a women-only basis between 3 pm and 7 pm on Sunday – a time when the centre is normally closed. The exemption was granted on the basis that it will give women, who would not otherwise have the same opportunities to use the centre due to cultural, religious or other reasons, a limited opportunity to do so.

- 6 Read the case study *Netball Victoria (Exemption) (Anti-Discrimination)* and discuss whether you agree with the decision. (2 marks)

Netball Victoria (Exemption) (Anti-Discrimination) (2005) VCAT 1934

Following the Football Australia report in 2005, Netball Victoria sought permission to be allowed to offer girls-only competitions for 12-year-olds and older. In 2005, VCAT granted Netball Victoria an exemption to organise separate boy and girl competitions for 12 and 13-year-olds. The decision was based on the fact that boys aged 12 and 13 are generally slightly stronger and have better ball skills, and a mixed competition at these ages would discourage girls from playing the sport.

- 7 Read the case study 'Sexual orientation discrimination' and answer the questions.
- Do you think people should be able to be excluded from a sport because of a person's sexual orientation? Explain. Use this case to illustrate your answer. (2 marks)
 - Identify the section of the *Equal Opportunity Act* that this action contravenes. (1 mark)

Sexual orientation discrimination

James, a keen football player, was a talented member of the local football team and one of the first picked. When James's sexual orientation became known by his teammates and coach, he was fired from the team.

- 8 Read the case study 'Player walks out on team in support of opposition player' and look back at the case study 'Vilification of Adam Goodes', then answer the questions.
- What is racial vilification? (1 mark)
 - How did racial vilification happen in the Adam Goodes incidents? (2 marks)
 - Select one case involving racial vilification in sport and explain how the complaint was resolved. (1 mark)
 - Do you think sporting codes or Australian laws do enough to resolve the issue of racial vilification? Give your reasons. (2 marks)

Player walks out on team in support of opposition player

In 2010, NSW State of Origin rugby player Timana Tahu quit the team in protest after the assistant coach, Andrew Johns, made a racial slur about Greg Inglis, a Queensland Aboriginal player. The disparaging personal remark about Inglis was made at a team gathering while Johns was talking about game tactics. Johns stood down from his coaching position, apologised to both Tahu and Inglis, and said he was extremely remorseful about making the comment.

- 9 Has discrimination occurred in each of the cases shown below? Give reasons for your answers. Apply the provisions of the *Equal Opportunity Act* to justify your answers. (7 marks)
- Michelle wants to play in a male darts competition, but she is refused entry because her application form was two days late.
 - Jackie, a male-to-female transsexual who has not yet begun the sex reassignment process, wants to play in the women's tennis competition.
 - Kzenja's basketball coach often takes her off the court and substitutes her with a much taller player.
 - Trudy, who is pregnant, is not allowed to play netball because the competition organisers fear that it will harm her unborn child.

- e Nick, a one-armed man, is told he cannot join a tenpin bowling league because the centre does not have appropriate facilities for the disabled.
 - f Pat, an Aboriginal man, tries to join the local surf-lifesaving club and is told, 'Your type are not really what the club is looking for in new members'.
 - g Matt is HIV-positive and applies to play in a country football league. His application is refused on the basis of his illness.
- 10 Read the case studies *Campagnolo v. Benalla and District Football League Inc.* and *Campagnolo v. Bonnie Doon Football Club Inc.* and answer the questions.
- a Explain the facts of these cases including the type of unlawful discrimination Campagnolo alleged in the 2009 and 2010 VCAT proceedings. Consider the required personal attribute and different areas of life (as specified in the *Equal Opportunity Act*) in your answer. (3 marks)
 - b Why did VCAT and the Supreme Court of Victoria dismiss Campagnolo's claim of discrimination and victimisation against the Benalla and District Football League? (2 marks)
 - c What issues did the Bonnie Doon Football Club raise in its defence to Campagnolo's claims of discrimination and victimisation? (1 mark)
 - d What was the tribunal's decision in the proceedings against the Bonnie Doon Football Club, and what reasons did the tribunal give for the decision? (1 mark)
 - e Why did the tribunal not award Campagnolo compensation after finding that the Bonnie Doon Football club discriminated against him? (2 marks)

Campagnolo v. Benalla and District Football League Inc. (2009) VSC 228

Ken Campagnolo claimed the Benalla and District Football League was vicariously liable for the Bonnie Doon Football Club's discrimination and victimisation against him on account of his bisexuality. According to Campagnolo, the league did nothing to stop the Bonnie Doon Football Club from removing him as a volunteer trainer. Campagnolo had been attending the club since 1997 and was open about his sexuality.

Publicity surrounding his involvement in a sexual discrimination matter with a government department in February 2007 brought his sexuality status into the public arena. The Bonnie Doon Football Club expressed reservations about continuing to use him as a trainer and gave him notice. Campagnolo alleged discrimination in the provision of services; particularly his free admission to, as well as travel expenses for, club games.

Campagnolo also claimed victimisation because Bonnie Doon's senior coach threatened Campagnolo during a visit to Campagnolo's home in the early hours of the morning. The coach wanted to discuss a *Sunday Herald Sun* article about Campagnolo's role at the club.

The Victorian Civil and Administrative Tribunal (VCAT) dismissed Campagnolo's case. The tribunal ruled that the league was not vicariously liable for the actions of the Bonnie Doon Football Club or its coach because neither acted as an agent of the league. Also, Campagnolo was a volunteer with the Bonnie Doon club, not the league. Campagnolo's appeal to the Supreme Court was also dismissed.

Campagnolo v. Bonnie Doon Football Club Inc. (2010) VCAT 647

In subsequent VCAT proceedings, Campagnolo alleged he was discriminated against as a club member and in the participation of a sporting activity. The tribunal decided that the Bonnie Doon Football Club directly discriminated against Campagnolo. VCAT found the club had three substantial reasons for Campagnolo's removal as a trainer, one of which was his sexual orientation.

The other reasons were a parent's threat to remove his son from the U17 team if Campagnolo was involved with the club, and rumours about Campagnolo allowing young people to drink and watch pornography in his home. The club also showed that Campagnolo was not a financial club member.

The tribunal also ruled that the senior coach's conduct could be considered victimisation, but the Bonnie Doon Football Club was not responsible for the coach's behaviour as he did not act in the course of his employment or as an agent of the club.

The tribunal acknowledged Campagnolo's hurt and disappointment at losing the right to volunteer as a trainer and to attend training and match days in that capacity. Even so, it did not award Campagnolo compensation as there was insufficient evidence to show his health, employment or income had been adversely affected by the discrimination.

11 Read the case study 'Discrimination due to the wearing of a hijab' and answer the questions.

- a What was FIFA's reasons for banning the wearing of the hijab in international women's soccer events? (1 mark)
- b On what grounds was the ban of the hijab considered discriminatory? (1 mark)
- c How was the issue resolved? (2 marks)
- d To what extent do you think the lifting of the ban is fair and reasonable? Give reasons for your answer. (2 marks)

Discrimination due to the wearing of a hijab

Soccer's world governing body FIFA banned Muslim headscarves (hijab) from regional and international competitions in 2007 due to safety issues, particularly the possibility of strangulation or an injury from the pins used to hold the scarves together.

The ban stopped several female soccer teams playing in international competitions despite winning the right to compete. Jim Forrest, president of Football NSW, issued a statement condemning FIFA's ban. He said the ban was a 'serious act of discrimination' and 'The girls don't regard the hijab as a cultural symbol or a political symbol. It is a religious obligation. They have no choice [but to wear it]'.



Figure 13.11
Capster headwear
used while playing
soccer

Farrah Khan, a spokesperson for the Canadian-based Right2Wear group was dismissive of FIFA's reason for the ban. She believes the ban was based more on 'Islamophobia' than safety issues.

Prince Ali Bin Al-Hussein of Jordan, a FIFA vice-president, warned that many women will be turned away from the sport if the ban continued. He put forward a Dutch-designed sport-friendly hijab, marketed under the name of 'Capster', as a means of eliminating any safety issues FIFA had about soccer players wearing the hijab.

In March 2012, FIFA's International Football Association Board unanimously agreed to allow a trial of the Capster headwear in matches, which resulted in the lifting of the ban in July 2012.

12 Look back at the case study 'Homophobia in sport'. Explain what is being done to help to stamp out homophobia in sport. (2 marks)

- 13 Describe two avenues of dispute resolution for sportspeople who have been discriminated against. (1 mark)
- 14 Discuss the capacity of the legal system to respond to demands for changes in the law in relation to discrimination. (3 marks)
- 15 'Anti-discrimination laws are ineffective in stamping out discrimination in sport.' Discuss. (3 marks)
- (Total 50 marks)

ISSUE – ADVERTISING, SPONSORSHIP AND SPORT

There is no doubt that sport is also a business and that the sports industry relies heavily on revenue from broadcasting rights, advertising and sponsorship. Media companies bid for the exclusive right to broadcast major sporting events in the hope of attracting advertising revenue from other companies who want to advertise their products during the broadcast.

Advertising at sporting events was considered such an influence on community perception and behaviour that Australia banned tobacco sponsorship of sporting organisations, teams and events in an effort to curb the health issues associated with the use of tobacco products. Some people have called for a similar ban on alcohol advertising in an effort to stop binge drinking and the violence associated with it.

Community complaints about children being exposed to advertising of sports betting during sports broadcasts led to an industry ban on the display and discussion of live odds during play.

Sponsorship of sporting events, teams and athletes

When a company or a government agency sponsors a sporting team it expects a return on investment in the form of positive advertising or greater community exposure. Most sponsors expect their brand or message to appear on the sporting organisation's website, tickets and team uniforms. A company may also buy the naming rights to a sporting venue. Two examples are Hisense Arena, a major sports and entertainment centre in Melbourne, and Etihad Stadium, also known as the Docklands Stadium.



Figure 13.12
Etihad Stadium
in Melbourne is
sponsored by Etihad
Airlines.

Successful sportspeople can also attract lucrative sponsorship deals to increase their income. A player’s endorsement or use of a product or service has the potential to influence consumer choice. For example, the Nike company has its sportswear and equipment endorsed by a range of sporting stars including basketball great Michael Jordan and tennis star Maria Sharapova.



Figure 13.13 Netball Victoria team with sponsors’ logos on uniforms

Table 13.1 What popular sportspeople earn from endorsements

SPORTSPERSON	ENDORSEMENT FEES (US\$)	SPORT
Tiger Woods	65 million	Golf
Roger Federer	65 million	Tennis
Phil Mickelson	44 million	Golf
David Beckham	42 million	Soccer
Le Bron James	42 million	Basketball
Kobe Bryant	34 million	Basketball
Mahendra Singh Dhoni	28 million	Cricket
Usain Bolt	24 million	Track
Maria Sharapova	23 million	Tennis
Rafael Nadal	21 million	Tennis
Derrick Rose	21 million	Basketball
Lionel Messi	21 million	Soccer
Cristiano Ronaldo	21 million	Soccer
Sachin Tendulkar	18 million	Cricket
Ernie Els	16 million	Golf
Roy McIlroy	16 million	Golf
Li Na	15 million	Tennis
Dale Earnhardt Jnr	13 million	Car racing
Serena Williams	12 million	Tennis
Valentino Rossi	10 million	Mortorcycle racing
Mani Pacquiano	8 million	Boxing

Source: Forbes.com June 2013



Figure 13.14
Torah Bright showing
Roxy sponsorship on
her snowboard

To attract major sponsorship deals, athletes rely on both on-field performance and off-field attributes and behaviour. Athletes may lose a sponsorship deal because they are no longer a top player in their game or because of unpopular off-field behaviour. For example, Gatorade withdrew its sponsorship of Tiger Woods when his clean image was tainted by the public revelation that he had an extramarital affair.

Sportspeople who behave poorly on or off the field and those who compromise their sporting integrity by taking performance-enhancing drugs will often be dropped by their sponsors. Sponsors do not want to be seen to encourage such behaviour and are worried about how their association with the athlete will affect their brand.

Swimming Australia loses sponsor

Following a scandal involving top swimmers taking the banned sedative Stilnox in a team-bonding session in the lead-up to the London 2012 Olympic Games, Swimming Australia has committed to ensuring that swimming returns to where it belongs, as Australia's number one Olympic sport. The London Games was the first time Australia failed to win an individual Olympic gold medal in the pool since the Montreal 1976 Olympics.

As a result of the problems being faced by Swimming Australia, electricity supplier Energy Australia pulled out of its five-year major sponsorship deal in June 2013, after just 18 months.

CASE STUDY

Drugs in sport and lost sponsorships

Australian and worldwide sporting groups ban the use of performance-enhancing drugs. The use of these drugs is considered cheating and they can affect an athlete's health. There have been numerous drug scandals and media reports that suggest the use of drugs in sport is a continuing problem.

In 2013, the Australian Crime Commission reported on the widespread use of hormones and peptides in a number of Australian sporting codes. It concluded that in some instances, athletes were using these substances on the recommendation of sports scientists, coaches or other staff and may have been administered in quantities that breached World Anti-Doping Agency (WADA) rules.

Advances in medical technology can assist athletes to recover from injury or enhance their sporting performance and can also be used to detect illegal drug use. WADA is an independent non-government organisation, funded by governments around the world. It aims to eliminate illegal drug-taking by sportspeople. WADA has developed an anti-doping code enforced by all sporting codes around the world. Similarly, the Australian Sports Anti-Doping Authority tests Australian athletes who compete at state and national level.

CASE STUDY

Lance Armstrong back-pedals on drug use allegations

In 2013, US cyclist Lance Armstrong revealed that he used performance-enhancing drugs from the mid 1990s to 2005, having denied vehemently and persistently all earlier allegations of illegal drug use. The US Anti-Doping Agency and International Cycling Union imposed a lifelong ban from the sport and stripped him of many of his sporting achievements including his seven Tour de France championships.

Armstrong lost sponsorship contracts with Nike, Trek Bicycles and Michelob Beer, and a US nutrition goods company removed his image from their packaging.

CASE STUDY

Essendon Football Club supplements scandal

In 2012, the Essendon Football Club hired sports scientist Stephen Dank to implement a supplements program that later sparked an eight-month media controversy, the threat of legal action from those involved, sackings and resignations at the club, and a joint Australian Football League (AFL) and Australian Sports Anti-Doping Agency investigation.

Throughout the controversy, the Essendon Football Club refuted any suggestion that players had been given performance-enhancing drugs. The club commissioned an independent internal review. It concluded that poor management practices had led to a 'disturbing picture of a pharmacologically experimental environment never adequately controlled, challenged or documented within the club in the period under review'.

The AFL charged the club with bringing the game of football into disrepute. The AFL concluded that no one involved with the supplements program had intended to put players at risk. However, the AFL believed the club had taken insufficient steps to adequately protect the health and wellbeing of its players and may have inadvertently exposed its players to potentially harmful substances.

The AFL Commission fined the club \$2 million and the team forfeited its place in the 2013 AFL finals. Essendon coach James Hird was banned from working with any AFL club for 12 months, senior assistant coach Mark Thompson was fined \$30 000 and football manager Danny Corcoran was suspended for six months.

Following the revelation of the controversy, sponsors took a watch-and-wait attitude. The then chief executive of the AFL, Andrew Demetriou, wrote to companies such as Toyota, Coca-Cola Amatil, Carlton & United Breweries and National Australia Bank, asking them to exercise restraint before deciding to abandon the AFL.

Copyright and trademarks

Copyright laws govern whether a person can legally copy material in official sporting publications or broadcasts. In some cases companies purchase the exclusive rights to reproduce this material.

The right to use a sporting logo is also protected in law. **Trademarks** are logos or emblems used to identify a product or organisation. The owner of the trademark has the right to its exclusive use. Legal action can be taken to protect an infringement of trademark rights. In 1995, an Australian manufacturer applied to register its RECDOK trademark in respect of footwear. Reebok, an international manufacturer of sportswear, was successful in opposing the application on the grounds that the new trademark RECDOK was designed with the intention of getting as close as possible to the lettering used in the widely known form of the REEBOK mark.

Nike trademark

In 1993, Nike asked the Federal Court to ban the trademarks of a Spanish cosmetic company called Nike. The Federal Court disallowed the application, saying that the matter should have been decided when the trademarks were registered.

CASE STUDY

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Sponsorship and advertising

- 1 Why is sponsorship important to sporting clubs, events and athletes? *(2 marks)*
- 2 Do you believe players have a right to earn 'additional' money through sponsorship? Discuss. *(2 marks)*
- 3 Read the case study 'Sponsorship conflicts – AFL' and explain the sponsorship conflict of interest that arose in this situation. *(2 marks)*

Sponsorship conflicts – AFL

Before the 2007 AFL Grand Final, there was a clash in the AFL's sponsorship arrangements and those of the Geelong Football Club. Toyota was a major sponsor of the AFL, and its cars were used in the grand final parade. As grand finalists, Geelong players had to travel in Toyota vehicles, but the Geelong club was reluctant to do this given its long-standing sponsorship history with Ford. Geelong's major sponsor, Ford, said they would not stop the Cats participating in the grand final parade.

- 4 Look back at the case study 'Swimming Australia loses sponsorship' and answer the questions.
 - a What occurred to prompt Energy Australia to take away its sponsorship of Swimming Australia? *(1 mark)*
 - b Discuss the problems that inappropriate behaviour by sportspeople can cause for sponsors. *(3 marks)*

- 5 Look back at the case studies 'Lance Armstrong back-pedals on drug use allegations' and 'Essendon Football Club supplements scandal' and answer the questions.
 - a Why did Lance Armstrong lose his sponsorship deals? Do you think this is appropriate? Give your reasons. *(2 marks)*
 - b What has occurred at the Essendon Football Club to cause concern for sponsors? *(2 marks)*
 - c What action did the AFL take to protect its sponsorship deals? *(2 marks)*
- 6 **Investigation**
 Use the Internet to identify the current sponsors of:
 - a one major Australian sporting event
 - b one national sports team
 - c two different sports champions
 - d two sporting venues with naming rights. *(4 marks)*
- 7 Read the case study 'Free-to-air TV and copyright' and answer the questions.
 - a Explain the dispute in this case. *(2 marks)*
 - b What was the decision of the judge in the original case in the Federal Court and what reasons did the judge give to justify the decision? *(4 marks)*
 - c Why were the football leagues determined to appeal the decision? *(2 marks)*
 - d What other method have they used to try and have this law clarified or changed? *(1 mark)*
 - e Explain the decision of the Federal Court of Appeal. Do you agree with the decision? Discuss. *(4 marks)*

Free-to-air TV and copyright

In 2012, the Australian Football League (AFL) and the Australian Rugby League (ARL) sought an injunction in the Federal Court against Optus Pty Ltd. The football leagues were concerned that free-to-air matches were able to be recorded and streamed near-live via the Optus TV Now service, to be watched online by Optus customers on their desktop computers or hand-held devices such as smartphones.

The football leagues accused Optus of breaching copyright laws by making illegal recordings of sporting matches and then providing online copies to their customers. The AFL and ARL had sold their online broadcasting rights to Telstra and believed that Optus' digital technology would devalue future broadcasting rights and associated revenue.

The Federal Court disagreed. The judge ruled that the customers, rather than Optus, were responsible for recording and sending the free-to-air TV programs to their mobile devices and that Optus merely provided the equipment. Under current copyright laws, a copy can be made of TV programs as long it is for personal use. The judge commented that consumers were not acting illegally and were doing no more than what most people would do when they record a program at home using video or DVD recorders.

The football leagues vowed to appeal the decision and lobbied the Federal Government to change the copyright laws as a result. The chief executives of both Tennis Australia and Cricket Australia also urged the government to review the law. In response, the government announced a review of laws relating to copyright and the digital environment.

On 27 April 2012, the Federal Court of Appeal reversed this decision, finding that Optus breached copyright law in broadcasting near-live matches on the Internet and hand-held devices.

AFL's then chief executive, Andrew Demetriou, said that he believed Optus had acted unethically and must stop offering a service it did not pay for. 'The court's decision upholds the sporting bodies' rights to secure Internet broadcast deals, which will ensure the financial health of Australian sport.'

- 8 Look back at the case study 'Nike trademark'. What concern did the sportswear company Nike have? How was this case decided? What problems could this cause in the future? (2 marks)
- 9 What do copyright laws govern? (2 marks)
- 10 What are logos? Find two examples of logos associated with the sports industry. (3 marks)
- (Total 40 marks)

ISSUE – CONTRACTS, SALARY CAPS AND FREE AGENCY

Most professional sporting clubs and associations have a **standard player contract** that serves as a model employment contract between players and their clubs. The contracts can be modified according to the special needs and talents of individual players. With the high salaries and sponsorship deals available to sportspeople, agents now represent many players. The relationship between the agent and the player is also likely to be governed by a written contract; however, sporting contracts may also involve a verbal promise.

For any contract to be legally binding, something must be exchanged for 'adequate consideration'. Adequate consideration is a benefit that one party receives which reasonably and fairly induces him or her to enter the contract. For example, a player agrees to play sport in exchange for a salary or prize money from the club or event organisers.

A contract comes into existence when:

- one person makes a proposal (**offer**) to another person
- the other person accepts the offer (**acceptance**)
- there is a benefit (something of value) that passes between the parties (**consideration**)
- there is **certainty of terms**; that is, the terms of the contract are clear and precise.

There must also be an **intention to create legal relations** (an intention to be legally bound by the contract) and the parties must be capable of understanding the terms of the contract (**capacity**).

Sporting contracts may involve agreements about salary, working conditions, player appearances, injury payments, player rules and codes of conduct and use of player image. An example of a sporting contract is the collective bargaining agreement negotiated between the Australian Football League (AFL) and the Australian Football League Players Association. This agreement allows players to enter into contracts with individual clubs, media groups or sponsors as long as these agreements do not prejudice the AFL or the player's club.



Figure 13.15
Cricketer Ryan Harris is contracted to Cricket Australia.

NOTE

For more information on contracts see chapter 8.

There are restrictions in the contracts that AFL players can enter into and on whether they can choose to move from one club to another. The clubs also have a salary cap; that is, a total amount they can pay to the players. The players often prefer 'free agency', which is the right to move around after they have completed their original contract without going into a draft.



Figure 13.16
The AFL collective bargaining agreement being explained to players

AFL draft, salary cap and free agency

The AFL draft, salary cap and decisions about whether to allow free agency are all issues that come under the rules of the game. However, they are also relevant to contract law and affect the ability of players to negotiate the contracts of their choosing. They can therefore potentially become legal issues.

AFL draft

In the AFL draft, clubs receive choices (picks) of new young players based on the position in which the clubs finish on the ladder during the previous season. The draft is held in November of each year. The selection is determined by reverse order, with the team that had the poorest performance during the season getting the first pick. This was introduced as an equalisation strategy to ensure that the best new players are not always recruited by the strongest or more successful clubs.

Salary cap

The salary cap or **Total Player Payments** is the total amount a club can spend on players on the playing list of the club. The cap is in place to keep salary costs down and to maintain a competitive balance across the league. It is an equalisation strategy that prevents wealthy clubs from stockpiling the best talent.

The sports that have adopted salary caps generally do so to protect the quality of the competition. They fear that a few dominant teams will consistently trounce weaker teams making the competition less spectacular for fans. The more evenly matched the contests, the more interesting they are to watch. This increases the value of the television broadcasting rights and subsequent advertising revenue. An uneven competition also threatens the financial viability of the weaker teams and the league because fans may not take up membership or they may gravitate to other sports or hobbies.

2012–2016 AFL SALARY CAP PER CLUB

2012	– \$8.787 million
	(7 per cent increase on the previous year)
2013	– \$9.139 million
	(5 per cent increase)
2014	– \$9.632 million
	(5.4 per cent increase)
2015	– \$9.92 million
	(3 per cent increase)
2016	– \$10.2 million
	(3 per cent increase)

Source: AFL Players' Association

EXTRACT

What is not counted when calculating TPP?

The AFL Total Player Payments do not count:

- relocation expenses paid to first-year draft choice players, rookies or other players required to relocate and first-year draft choice players and rookies who are delisted within the first two years
- airfares for visiting parents and taxi fares (to attend training, matches and functions) for players under 18 that are paid by the club
- bereavement assistance (up to \$2000)
- a percentage of football payments made to players on the veterans list
- football payments to a rookie list player promoted to replace a player on the long-term injury list
- payments made under additional service agreements to players (and associates)
- testimonial payments
- match payments for AFL finals series matches
- airfares and accommodation expenses for one person per player playing in the grand final
- 50 per cent of football payments made to nominated rookie list players
- premiership prize money
- top five draft pick recognition payment.

Source: AFL Players' Association

Melbourne Storm breach of salary cap

In April 2010, the National Rugby League stripped Melbourne Storm of the club's 2007 and 2009 Telstra Premierships, the 2006–2008 minor premierships and its 2010 competition points after confirming a series of salary cap breaches amounting to at least \$1.7 million over five years.

The club lost all competition points won in 2010 and the right to accumulate points for the rest of that season. Statistical records show Melbourne Storm's wins and losses but no competition points.

CASE STUDY

The club was also fined \$500,000 and was forced to return \$1.1 million in prize money, which was distributed evenly among the other 15 clubs.

The Storm's two major sponsors, ME Bank and superannuation fund HOSTPLUS, both walked away from the club after the news, saying they were shocked by the club's behaviour.



Figure 13.17
Melbourne Storm
2009 Premiership

Free agency

The AFL introduced a restricted form of free agency in 2012. AFL trade rules allow clubs to exchange players and potential draft selections during the AFL's trade week held each October. The pre-season national draft follows in November, where clubs continue to select players, including new players to the league, using an AFL predetermined process. Before 2012, AFL players were unable to sell their talents to the highest bidder because the clubs controlled player transfers to other teams.

Players, like other people in the workforce, wanted the right to decide where they work. The AFL Players' Association (AFLPA) suggested that players should have free agency; that is, the right to move clubs after they have completed their original contract without being subject to pre-season draft processes. A player may want to play for a particular club or in a particular state, or they may be motivated to move clubs for personal, family or financial reasons.

Free agency gives players options and the right, at some point in their career, to exercise control over their professional occupation. Mechanics, lawyers, teachers and even AFL coaches change jobs at the end of their contracts without their ex-employer controlling or benefiting from the process. The AFLPA stated that players should not be considered as assets that can be bought, sold or traded at the whim of a club. The AFL said that free agency could undermine the evenness of the competition. They argued that player poaching, witnessed in European soccer, plus sky-rocketing wages among players, could put the public off the game.

In Australia, rugby league, rugby union, soccer and basketball all have free agency for their players, although team choice is limited by a salary cap. In the United States, basketball, baseball, ice hockey and the National Football League (NFL) also have free agency, as do all the professional soccer leagues in Europe, although generally without the restrictions of a salary cap. While each sporting code's free agency arrangement differs, commentators suggest that none of these sports have suffered since its introduction. It seems they have enjoyed increases in the number of clubs, supporters and key revenue streams.

A downside of free agency is its potential impact on a player's club loyalty. A club may put a lot of time and effort into grooming young players only to have them go to a new club once out of contract. Another disadvantage is that players will lose the right to be paid as veterans of a club, because of their long service to that club. Veterans are able to have a portion of their salary excluded from the salary cap. However, proponents say that free agency is more about choice and self-determination than money.

In general, restricted and unrestricted free agents can consider offers from other clubs during the post-season period. The AFL free agency rules are as shown in table 13.2.

Table 13.2 AFL free agency rules

LENGTH OF SERVICE WITH A CLUB	STATUS	FREE AGENCY RULES
A player who has seven years or less service at the club, is out of contract and is delisted by his club	Free agent	- The player can accept the best offer from a rival club and move automatically to this club. - The original club does not receive any compensation pick for the loss of this player.
A player who has eight years or more service at the club, is NOT one of the top 25 per cent highest paid at his club and is out of contract for the first time OR A player who has 10 years or more service at the club and is out of contract for a second (or further) time	Free agent	- The player can consider the best offer from a rival club. - His original club does NOT have the right to match the offer and the player can automatically move to the new club. - The original club will receive a compensation pick for the loss of the player.
A player who has eight years or more service at the club, is one of the top 25 per cent highest paid at his club and is out of contract for the first time	Restricted free agent	- The player can consider the best offer from a rival club BUT his original club has the right to match this offer. - Where his original club matches the offer, the player can remain with the club, seek a club trade or enter the draft. - Where his original club does not match the offer, the player can automatically move to the new club. - The original club will receive a compensation pick for the loss of the player.
A player who has seven years or less service at the club and is out of contract	NOT a free agent	- The club has the right to retain the player. - The player may only move clubs via a club trade or the draft.

CASE STUDY

Luke Ball 2009 AFL draft prospect

Luke Ball is an AFL inside midfielder. He was drafted by St Kilda as the number two pick in the 2001 draft. Since that time he has shared the club's best and fairest award, won All-Australian selection in 2005 and captained the club in 2006–07. He moved to Collingwood at the end of 2009 and played in the Collingwood premiership team in 2010.

Ball left St Kilda and placed himself in the national draft. He expressed his wish to join Collingwood. He attempted to get to Collingwood during trade week, when the clubs trade player contracts. This did not occur because Collingwood was unable to strike a satisfactory deal with St Kilda.

In the 2009 draft, Melbourne took new young players: Tom Scully as the number one pick and Jack Trengove as the number two pick. Ball was a little different from other 2009 AFL draft prospects in that he already had seven years of senior AFL experience. Collingwood secured Ball at pick 30, granting the former St Kilda captain his wish to join Collingwood through the AFL's national draft.

Under current free agency rules, Luke Ball cannot leave Collingwood unless he is out of contract after eight years or more service with the club, he is out of contract and the club has delisted him or he retires.



Figure 13.18

Luke Ball (No. 12) playing for Collingwood meets his old team, St Kilda.

Institutions for resolving disputes relating to contracts

Free agency and salary caps are part of the AFL rules that apply to AFL players. These rules are established by the AFL, which is not able to make laws that are enforceable through the courts. Likewise, tribunals that regulate sporting competitions are not legal bodies. They are known as **domestic tribunals**. However, a matter can be taken to the Supreme Court if it can be shown that a tribunal:

- has not followed its own rules
- has not acted fairly
- has made a ruling that is not within its power to make.

The principles of natural justice apply to all decisions of domestic tribunals, unless it can be shown that these rules have been excluded from a player's contract (that is, that they are inconsistent with the terms of the contract).

The Supreme Court

If a contract has been breached, or there are disputes over the terms of a contract, the dispute can be taken to court for a resolution to be reached. Very often the court that hears such disputes is the Supreme Court of Victoria. This applies to sportspeople's contracts that set out conditions of their engagement and to sponsors that engage the services of sportspeople.

The Court of Arbitration for Sport

The Court of Arbitration for Sport (CAS) is an international arbitration body set up to settle disputes related to sport. Its headquarters are in Lausanne, Switzerland. There are additional courts located in New York and Sydney, with ad hoc courts created in Olympic Games host cities as required.

CAS will hear a dispute when a sporting code or contract has specified that the Court of Arbitration for Sport will settle any disputes that may arise. The court can hear contractual or commercial disputes (sponsorship, player transfers and employment contracts) or appeals resulting from disciplinary proceedings related to doping or on-field violence. The court will hear the case and then make an award that is binding on the parties.

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Contracts, salary caps and free agency

- 1 What do sporting contracts usually regulate? (1 mark)
- 2 Read the case study 'Verbal contract did not exist' and answer the questions.
 - a What occurred in this case? (1 mark)
 - b List the main elements of a contract. Using the possible contract referred to in this case, explain the offer, acceptance and consideration that would exist in such a contract. (3 marks)
 - c Why did the court rule that a contract did not exist in this case? (1 mark)

Verbal contract did not exist

In *Francis v. South Sydney District Rugby League Football Club Ltd* (2000) FCA, an injured rugby player sued his club after his coach promised to re-sign him for the next season if he delayed surgery and resumed play within three weeks. The club did not re-sign the player at the end of the year and the player sued for breach of contract but was unsuccessful in his claim.

The Federal Court ruled that a verbal contract did not exist because the coach did not have the authority to make the promise, the player should have known that the club might overrule the coach, and in accepting the coach's offer, the player did not exchange something (consideration) for the promise, he was merely adhering to the terms of his current contract.

- 3 Read the case study 'Dispute over contract' and answer the questions.
 - a Why could the Bradford Bulls only take one player and not both Orford and Walker? (1 mark)
 - b How did this dispute arise? Whose contract was being breached in this case? (2 marks)
 - c What was the final outcome? How would this case have been decided if a suitable outcome was not found? (2 marks)

Dispute over contract

Matt Orford is a professional rugby league player. Orford played with the Northern Eagles before joining the Melbourne Storm and later the Manly-Warringah Sea Eagles. He was captain of the Sea Eagles in 2008 when they beat Melbourne Storm to win the grand final.

Orford was considering a two-year deal with the Sea Eagles, but instead accepted a big-money deal from the premier English rugby league Bradford Bulls. The deal, which was reportedly for \$1.5 million over three years, was thrown in doubt when a dispute arose involving Gold Coast winger Chris Walker.

Unwanted by the Titans, Walker also signed a two-year deal with Bradford, worth a total of \$400 000, but the Bulls refused to lodge the official contract with the English RFL after signing Orford. Under the rules of the English Super League, Bradford has a five-player import quota. They already had four overseas players under contract, which meant they could take Orford or Walker but not both.

Walker's agent, Chris Orr, demanded that the Bradford Bulls honour their deal with Walker. Orr claimed the Bulls agreed to recruit his man but backed out when Orford became available. Orr said he would lobby the English Rugby League to block Orford's move to Bradford. The eventual outcome was that Walker was signed by the French Catalan Dragons.

- 4 What are Total Player Payments rules (salary caps)? (2 marks)
- 5 Do you think the practice of imposing Total Player Payments is a fair process for the players, the clubs and the competition? Discuss. (4 marks)
- 6 Look back at the case study 'Melbourne Storm breach of salary cap' and explain why and how the Melbourne Storm Rugby Club was penalised for breach of salary cap rules in 2010. Do you think the outcome in this case was fair? Explain. (3 marks)
- 7 Look back at the case study 'Luke Ball 2009 AFL draft prospect' and answer the questions.
 - a What did Luke Ball have to go through to get transferred to Collingwood from St Kilda? (1 mark)
 - b Under the free agency rules, what options does Luke Ball have if he wishes to leave Collingwood? (1 mark)
- 8 Read the article 'AFL clears Buddy Franklin's \$10m move' and answer the questions.
 - a Why is this contract described as 'extraordinary'? (1 mark)
 - b Explain how the contract has been structured to allow the Sydney Swans Football Club to comply with salary cap rules. (2 marks)
 - c Why is Franklin described as a 'restricted free agent', and what rules governed his negotiations with both the Hawthorn and Sydney football clubs? (4 marks)

AFL clears Buddy Franklin's \$10m move

Greg Denham, *The Australian*, 9 October 2013

Lance Franklin is officially a Sydney Swan after his \$10m contract was cleared yesterday by the AFL and Hawthorn opted not to match the extraordinary offer.

Following an investigation by the league's legal, integrity and compliance departments, the AFL ratified the long-term contract offer from the Swans for the restricted free agent, subject to certain conditions being met.

He will be presented as a Swans player at the SCG this morning. Coach John Longmire said last night the forward was worthy of the extraordinary contract. 'Lance is a champion player and we are really excited that he wants to continue his outstanding career at the Swans,' he said. 'We understand that nine-year contracts are rare in AFL football, but so too are players of the quality of Lance Franklin.'

The Hawks will receive a compensation pick immediately following their first selection in the national draft. The AFL's deputy chief executive Gill McLachlan told the league's website that the Swans had taken an astounding gamble. 'We've made sure that the board members ... understand the risk they are taking with this contract,' he said. 'I'm not sure we could do much more than that. We don't have any authority to step in and stop boards from making decisions.'

The AFL looked at the deal to make sure it did not breach rules relating to conduct prejudicial to the draft, player movements and the total player payments (TPP) provisions. AFL general counsel Andrew Dillon said the league had examined a draft of the contract and interviewed the key parties. It is also understood the league deemed the deal to be in the spirit of its laws, a rarely used judgment that had the potential to stop Franklin's move to the Swans.

Franklin's contract is heavily loaded in years four, five and six when Sydney will be relieved of its high-payment obligations to Kurt Tippett. As well, it will take into account the departures of Adam Goodes, 33, Ryan O'Keefe, 33, and Rhys Shaw, 32, who are in the twilight of their careers.

Franklin will earn far less in his first three years at Sydney than he did at Hawthorn this season – where his was paid about \$900 000 – but he will have the capacity to earn as much as \$1.8 million annually in consecutive seasons in the middle years of his contract.

Dillon said the AFL acknowledged that the nature of the nine-year deal was an unprecedented commitment of TPP funds to a single player over such a contract length, and as a result it sought written guarantees from all members of the Sydney board as well as its senior management ...

- 9 Explain the concept of free agency in league-based sports. Discuss the advantages and disadvantages of free agency in sporting leagues like the AFL and the impact free agency rules have on the rights of players, the clubs and the league. *(8 marks)*
- 10 Explain the role of the Court of Arbitration for Sport and the Supreme Court with respect to contracts in sport. *(3 marks)*

(Total 40 marks)



CHAPTER 14 TENANTS AND THE LAW

OUTCOME

At the completion of this chapter you should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- legal principles relevant to the selected area/s of law
- a contemporary issue for the selected area/s of law
- the capacity of the legal system to respond to demands for change
- methods and institutions for resolving disputes arising under the selected area/s of law.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

KEY LEGAL TERMINOLOGY

bond Money paid to a landlord by a tenant at the start of a tenancy as security to cover any future damage to the premises by the tenant.

condition report A report giving a list of rooms in premises with a description of the condition of each room.

eviction order An order by the Residential Tenancies List of the Victorian Civil and Administration Tribunal (VCAT) ordering a tenant to leave rented premises.

landlord An owner of property who leases (rents) that property to a tenant under a lease agreement in exchange for the payment of rent.

lease A legal agreement under which a property owner allows a tenant to use the property for a specified period of time and rent.

rent A stated return or payment for the temporary possession or use of a house, land or other property, made by the tenant or user to the owner, usually at fixed intervals.

tenancy agreement A legal document outlining the terms and conditions of the tenancy; it protects the rights of both the tenant and the landlord (also referred to as a lease or rental agreement).

tenant Someone who pays rent to use land or a building that is owned by someone else.

TENANTS AND LANDLORDS – RIGHTS AND RESPONSIBILITIES

The rights and responsibilities of landlords and tenants are set out in the *Residential Tenancies Act 1997* (Vic.). The Act applies to a range of **property rented primarily for residential purposes**, for example houses, apartments, rooming houses and caravans. It also covers site agreements where a tenant owns a movable dwelling but rents the land it sits on.

A landlord or tenant who fails to comply with the obligations set out under the Act can be prosecuted under criminal law and a penalty may be imposed (usually a fine). Consumer Affairs Victoria can give advice to landlords or tenants who may have a problem under the Act. This office is also responsible for educating the public about tenancy rights and obligations.

The Act does not usually cover:

- business premises
- crisis accommodation
- holiday accommodation
- rooms in hotels or motels
- rooms associated with educational or training facilities
- rooms associated with health and residential services.

EXTRACT

Residential Tenancies Act 1997 (Vic.)

1 Purposes

The main purposes of this Act are –

- (a) to define the rights and duties of landlords and tenants of rented premises; and
- (b) to define the rights and duties of rooming house owners and residents of rooming houses; and

- (c) to define the rights and duties of caravan park owners, caravan owners and residents of caravan parks; and
- (d) to provide for the inexpensive and quick resolution of disputes under this Act; and
- (e) to provide for the establishment and jurisdiction of the Residential Tenancies Tribunal; and
- (f) to provide for a centralised system for the administration of bonds; and
- (g) to provide for the establishment of the Residential Tenancies Bond Authority; and
- (h) to provide for the regulation of caravan parks and movable dwellings.

Source: *Residential Tenancies Act 1997* (Vic.)

Renting a property

This chapter mainly covers the law in relation to tenancy agreements for houses and apartments. When anyone rents or leases a property, whether it is a house or a flat, it is usual practice for the landlord and the tenant to sign a tenancy agreement, and for the tenant to pay a bond and a month's rent in advance.

Tenancy agreement

A tenancy agreement (or **lease**) is an agreement under which a property owner (also called a **landlord**) allows a tenant to use the property for a specified period of time in exchange for rent. It can be either a written or oral agreement.

Most landlords use a prescribed standard written agreement. It sets out the conditions of the tenancy including the amount of rent and the method of payment. The agreement may last for a fixed term (such as a six-month agreement) or it could be a periodic agreement (such as a month-to-month arrangement).

A fixed-term agreement gives better security for both the landlord and the tenant. The tenant will benefit because the landlord will find it harder to evict the tenant during the period of the lease. The landlord is protected because if a tenant decides to leave before the fixed term is completed, the tenant may have to continue paying the rent, or pay the costs of re-letting the property. Tenants should, therefore, only sign a lease for a fixed term if they are sure they want to stay for the full period of the lease.

Landlords must ensure that the property is easily connected to water, electricity and/or gas supply. The property owner must pay local council property rates and water or sewerage service fees. The tenants will pay for any water, electricity or gas used, particularly in properties which have separate meters. The tenants must contact the relevant utility provider to have these services connected in their name and pay any associated costs. Tenants are responsible for all costs associated with telephone services.

The landlord may choose to deal with the tenant directly or through a property manager who is usually a real estate agent. Sometimes the landlord or agent will ask for a holding deposit. If the prospective tenants do not sign the tenancy agreement for the property within 14 days, then this holding deposit must be refunded. When the tenants sign the agreement they will be asked to pay bond money and rent in advance.

Rent in advance

In most tenancy agreements it is common practice for at least one month's rent to be paid in advance. The amount of rent in advance payable may differ based on the type of accommodation and the weekly rent payable (see table 14.1).

Bond

A **bond** is paid by the tenant to the landlord at the start of the tenancy. It is money held as security just in case the tenant causes damage to the property or does not pay the rent. If the tenant complies with the tenancy agreement and leaves the property in a similar condition to when they took possession, the tenant is entitled to a refund.

The landlord, or their agent, must lodge the bond money (or instalments) with the **Residential Tenancies Bond Authority (RTBA)** within 10 days of payment. The tenant must be given a completed bond lodgement form, which shows that the landlord has lodged the bond with the RTBA. At the same time, both parties to the tenancy agreement fill out and sign a condition report, which documents the state of the property at the start of the tenancy.

Table 14.1 The bonds and rent in advance limits for different types of accommodation

TENANTS RENTING A HOUSE OR APARTMENT (TENANCY AGREEMENT)	ROOMING HOUSE RESIDENTS	CARAVAN PARK RESIDENTS	TENANTS RENTING A SITE FOR A MOVABLE DWELLING OTHER THAN A CARAVAN
Bonds			
- If rent is less than \$350 per week then the bond cannot exceed one month's rent. - A landlord can ask for more than one month's rent when: - the rent is over \$350 per week - the tenancy agreement states the property is the landlord's home and that the landlord will live in the property at the end of the lease. - the landlord has a fixed bond order from VCAT.	The bond cannot exceed 14 days' rent.	- A bond is paid when there is a written agreement allowing a person to use a caravan park as their main place or residence. - The bond cannot exceed 28 days' rent for the caravan site and/or the caravan hire.	- If rent is less than \$350 per week then the bond cannot exceed one month's rent. - A landlord can ask for more than one month's rent when: - the rent is over \$350 per week - the tenancy agreement states the property is the landlord's home and that the landlord will live in the property at the end of the lease - the landlord has a fixed bond order from VCAT.
Rent in advance			
- For properties where rent is paid weekly, the rent in advance cannot exceed 14 days' rent. - For properties where the rent is less than \$350, the rent in advance cannot exceed one month's rent. - More than one month's rent in advance can be charged where the rent is over \$350 per month.	Rent in advance cannot exceed 14 days' rent.	The resident cannot be charged more than 14 days' rent in advance for the site and/or 28 days' rent in advance for the caravan hire.	Rent in advance cannot exceed one month's rent.

Source: *Residential Tenancies Act 1997* (Vic.)

RESIDENTIAL TENANCIES BOND AUTHORITY

The Residential Tenancies Bond Authority (RTBA) is a statutory authority of the Government of Victoria, administered within the Department of Justice. The RTBA is established by the *Residential Tenancies Act 1997* to hold all Victorian residential tenancy bonds, including those applying to long-term caravan and rooming house residents.

BOND LOAN SCHEME

The Victorian Department of Human Services offers a bond loan scheme for low-income earners who are able to secure a rental property but cannot afford the bond.

People eligible to receive this interest-free loan must:

- meet income and asset limits
- not own or part-own residential property, except in specific circumstances
- have Australian permanent residency status
- repay all outstanding charges from previous bond loans or public housing tenancies, and
- ensure that the rent on the property does not exceed 55 per cent of the household's income.

When the tenancy ends, the bond money is repaid directly to the Department of Human Services. However, the loan recipient will be required to pay back any money the landlord withholds due to unpaid rent or damage to the property.

Condition report

A condition report is required whenever a bond is paid. A condition report is a checklist documenting the state of the property when the tenant takes possession. It provides details of the quality and cleanliness of the property's rooms and of its fixtures and fittings such as appliances, cupboards, lights, carpets, blinds and tiling.

Tenants should check this report very carefully. Any disrepair, stains, marks on the walls and so on should be accurately described in the condition report. Otherwise the tenant may be blamed for having caused them. Tenants are responsible for any damage they do to the property. At the end of the tenancy, the cost of repairing any damage caused by the tenant and reasonable cleaning costs are taken out of the bond.

One copy of the report is kept by the landlord and one copy is kept by the tenant. If any changes need to be made to the checklist, these should be signed by the landlord or agent on both copies.

Discrimination

Under the *Equal Opportunity Act 2010* (Vic.) it is unlawful to discriminate directly or indirectly because of some actual or assumed characteristics when accommodation is being rented. These characteristics include age, race, marital status, gender identity and impairment. See chapter 13 for more information on this Act.

CASE STUDY

Problems experienced by the disabled

Wheelchair-bound Philip Smallman found himself homeless. He said, 'I had money to rent, but I just couldn't find anything so I floated for a while. I just went into survival mode and coped from day to day. It was a pretty tough time'. He lived in his car for three months. Many of the places he found were not suitable, and when he did find something he was rejected. One of the agents tried

to persuade him not to put in an application for a place because he had 'had a bad experience with people in wheelchairs'.

Mr Phillip Ripper, executive officer at the advocacy group Attendant Care Coalition, said it was common for people with disabilities to live in cars or move between emergency accommodation shelters. According to Ripper, private landlords dislike people with disabilities. 'There is a lot of ignorance and prejudice that works against people with disabilities in the private rental market,' he said.

Condition Report

Residential Tenancies Act 1997

Please print neatly

Address of premises Postcode

Name of landlord Name of agent (if applic)

Name of tenant(s)

Landlord/agent section				Tenant section	
Each item has been given a column description of 'clean', 'undamaged', 'working'. Tick each column that applies to the item and make any necessary comments.				If you disagree with the landlord's/agent's report of an item, make a comment in this section. You should also note here anything which seems unsafe or may be an injury risk.	
Tick if applicable					
Room and Item	Clean	Undamaged	Working	Landlord/agent comments	Tenant comments
Entrance Hall	Doors				
	Walls				
	Windows/screens				
	Blinds/curtains				
	Ceiling				
	Light fittings				
	Floor coverings				
	Power points				
Loungeroom	Built in cupboard				
	Doors				
	Walls				
	Windows/screens				
	Blinds/curtains				
	Ceiling				
	Light fittings				
	Floor coverings				
Kitchen/Meals	TV/power points				
	Doors				
	Walls				
	Windows/screens				
	Blinds/curtains				
	Ceiling				
	Light fittings				
	Floor coverings				
	Power points				
	Cupboards/drawers				
	Bench tops				
	Tiling				
	Sink/disposal unit/taps				
	Hot plates/stove top				
	Griller				
Oven					
Exhaust fan/rangehood					
Dishwasher					
	Doors				
	Walls				
	Wardrobe/drawers				

Figure 14.1
Extract from a
condition report

LEARNING ACTIVITY 14.1

Renting a property

- 1 What is the purpose of the *Residential Tenancies Act*?
- 2 What is a lease or tenancy agreement?
- 3 Explain the terms 'bond' and 'condition report'.
- 4 What happens to bond money that is paid by a tenant?
- 5 Explain the bond loan scheme. How can it help low-income earners?
- 6 How can a condition report protect the landlord and the tenant?
- 7 Why do you think it is necessary to pay rent in advance?
- 8 Look back at the case study 'Problems experienced by the disabled' and answer the questions.
 - a Why did Philip Smallman suffer discrimination?
 - b How could the Victorian Equal Opportunity and Human Rights Commission assist in the Smallman case? Explain.
- 9 What is the role of the *Equal Opportunity Act 2010* with respect to tenancy matters?
- 10 Read the case study 'Renting a flat' and highlight any issues or problems in this situation.

CASE STUDY

Renting a flat

Eden and Abby found a two-storey townhouse that they wanted to rent. The rent was \$300 per week. They agreed to pay it weekly. The landlord told them they would have to pay one month's rent in advance, plus a bond of \$600. They had a quick look around the property before moving in and the place seemed OK. They signed a one-year tenancy agreement.

Protection and responsibilities of tenants

The law provides for the protection of tenants against landlords. Many people live in rented properties that are not being adequately maintained. Landlords may delay carrying out repairs or repairs may be done in a manner that is cheap but not effective. Each time the landlord breaches his or her duties and obligations the tenant can take action. People who are renting may not be aware of their rights or may feel powerless to act.

HINTS FOR TENANTS WHEN DECIDING TO RENT

- Be cautious of house-finding companies – they charge a fee and are not always successful in finding a place.
- Always check the premises thoroughly before signing a lease. It is a good idea to have another person with you as a witness to the condition of the place and any promises that may be made by the agent.
- Make sure that any lease you sign is for a reasonable time.
- Get advice about bond assistance if finding bond money is proving difficult.
- Tenants who feel their rent is too high can write to the Director of Consumer Affairs Victoria for a rental assessment.

The role of the Tenants Union of Victoria

The Tenants Union of Victoria is an independent, non-government organisation that informs and educates tenants about their rights. The aim of the Tenants Union and its officers is to improve the status and conditions of tenants and represent their interests in relation to tenancy law and policy-making.

The Tenants Union provides legal assistance and advice for tenants of private and public residential properties and residents of rooming houses and caravan parks in Victoria. Disputes between landlords or agents and tenants may be resolved by contacting the Tenants Union. They will represent tenants in disputes relating to tenancy matters.



Figure 14.2
Tenants Union logo

EXTRACT

Tips for tenants

At the beginning of the tenancy:

- seek professional advice if any tenancy issue is unclear
- read and sign the 'Residential Tenancy Agreement' and keep a copy
- read the Consumer Affairs Victoria guide *Renting a home: A guide for tenants*
- thoroughly check that the premises are completely safe and check the condition of the property – it is a good idea to take photos of the property to keep a record of any pre-existing faults or damage
- if paying a bond, complete and sign the condition report and keep a copy
- pay the bond to the landlord or agent and sign the bond lodgement form
- keep a copy of the Residential Tenancies Bond Authority (RTBA) receipt; this assists in reclaiming the bond
- comply with all parts of the Residential Tenancy Agreement
- comply with all regulations connected with the *Residential Tenancies Act 1997*
- check responsibilities regarding the cost of water usage and sewage disposal
- to rectify any situation, contact your landlord or agent before taking further action
- seriously consider insuring the contents of your premises against fire and theft
- make arrangements with any people sharing the premises to make regular payments towards the bills, rather than sorting them out when they leave. This can lead to one person leaving the rental property and another being left with all the bills such as telephone, electricity and repair bills.

Source: adapted from *Renting a home: A guide for tenants and landlords*, Consumer Affairs Victoria, 2005

Note: while there is a new guide for tenants and landlords, this information is still useful.



Figure 14.3
Leased properties

Responsibilities of tenants

The tenant must:

- pay the rent on time and in accordance with the rental agreement
- pay the cost of the actual water used and sewage disposal unless the landlord has agreed to pay these charges
- pay for the electricity, gas or oil they use, if there is a separate meter
- keep the premises clean
- be careful not to cause damage other than reasonable wear and tear
- notify the landlord or agent as soon as possible if any damage is done – it is best for the tenant to report this in writing and keep a copy
- avoid causing a nuisance (for example, annoying the neighbours with persistent noise)
- make sure visitors do not cause a nuisance
- make sure the premises are not used for any illegal purpose
- give the landlord or agent a key immediately after changing any lock – tenants are obliged to get permission from the landlord if they wish to change locks, but if permission is denied they can apply to the Residential Tenancies List for a determination
- get the landlord's written permission to install fixtures, make additions or alterations, or do renovations
- allow the landlord or agent to enter to carry out duties under the agreement, value the property, show the property to prospective buyers or lenders or tenants, test a reasonable belief that the tenant has not met his or her responsibilities as a tenant, and make one general inspection in any six-month period.



Figure 14.4
Signing a lease

Urgent and non-urgent repairs

Urgent repairs relate to things such as blocked toilets, gas leaks, dangerous electrical faults, burst hot-water services, badly leaking roofs and flood damage. If the landlord or agent cannot be contacted, or if the landlord does not agree to carry out urgent repairs immediately, the tenant may arrange for them to be done.

The tenant must have taken reasonable steps to give the landlord or agent the opportunity to carry out the repairs before going ahead with them. The landlord is liable to reimburse the tenant for the reasonable cost of the repairs, or \$1800, whichever is less. If the tenant cannot meet the cost of the repairs, or the repairs cost more than \$1800, or the landlord refuses to pay the cost of the urgent repairs, then the tenant can apply to the Residential Tenancies List of the Victorian Civil and Administration Tribunal (VCAT) for an order requiring the landlord to comply.

The landlord is obliged to keep the premises in good repair. This may require non-urgent repairs. Tenants should not deal with non-urgent repairs; instead, they should give the landlord written notice advising the landlord that non-urgent repairs are required. If the landlord has not carried them out within 14 days of receiving the written notice, the tenant can apply to Consumer Affairs Victoria for assistance. They will negotiate on the tenant's behalf. If these negotiations are not successful, an application can be made to the Residential Tenancies List of VCAT.

Entry to the property

A landlord or agent may enter the premises as long as the tenant has agreed to the time and was consulted in advance. Landlords or their agents are obliged to give at least 24 hours' notice of such visits and restrict the visit to between 8 am and 6 pm on days other than public holidays. The landlord may visit the property to effect repairs, carry out maintenance, show prospective buyers around, value the property or make a general inspection.

LEARNING ACTIVITY 14.2

Protection and responsibilities of tenants

- 1 Explain the role of the Tenants Union of Victoria.
- 2 What are urgent repairs?
- 3 Read the case study 'Eden and Abby find problems with their rented home' and answer the questions.
 - a What problems have Eden and Abby found with their home?
 - b What other document should Eden and Abby have completed and signed at the beginning of the lease?
 - c What can a tenant do if urgent repairs are needed?

Eden and Abby find problems with their rented home

Eden and Abby signed a lease for a two-story townhouse. They were not given a copy or any other paperwork. About three weeks into the tenancy, large water stains started to appear on the ceiling of the study located directly below the bathroom. They reported this to the landlord several times and he always said he would send someone around to look at it. He never did. The couple stopped using the study and the shower in the bathroom above it for fear that the downstairs ceiling would collapse if it became waterlogged. They would shower at their neighbour's house or at the local pool.

CASE STUDY

- 4 What can the tenant do if he or she has paid for urgent repairs but the landlord or agent refuses to reimburse the costs?
- 5 Is it possible for a tenant to make additions or alterations to a property? Explain.
- 6 Create a brochure or multimedia presentation that gives advice to people thinking of renting a property.

Protection and responsibilities of landlords

The law aims to protect landlords from poor treatment by tenants. Sometimes tenants leave without paying rent, and the bond may not cover the rent owed. It may be difficult to get an unsuitable tenant to leave a property. Damage caused to the property may be more than the bond being held.

Pursuing a previous tenant may be extremely difficult. Managing agents can record a tenant's poor renting behaviours on a National Tenancy Database used to 'blacklist' bad tenants and to screen potential tenants. If a managing agent accesses such information to screen potential tenants then the tenant must be given details of the listing. Tenants cannot be listed for exercising their rights under the *Residential Tenancies Act* and they can apply to VCAT to have inaccurate or out-of-date information removed.

EXTRACT

Tips for landlords

At the beginning of the tenancy:

- read and sign the Residential Tenancy Agreement; keep a copy and also give the tenant a copy.
- give the tenant a copy of the Consumer Affairs Victoria guide on renting a home in Victoria
- thoroughly check that the premises are completely safe
- if taking a bond, complete and sign the condition report; keep a copy and also give a copy to the tenant.
- give the tenant your name and the address to which documents are to be sent and the agent's full name and address
- complete and sign the bond lodgement form which requires the tenant's signature; keep a copy and also give a copy to the tenant.
- forward the bond money (or any instalments) and a copy of the bond lodgement form to the RTBA
- ensure the RTBA receipt is received and keep a copy
- comply with all parts of the Residential Tenancy Agreement
- comply with all regulations connected with the *Residential Tenancies Act 1997*
- to rectify any situation, contact your tenant before taking further action.

Source: *Renting a home: A guide for tenants and landlords*, Consumer Affairs Victoria, 2005

Note: while there is a new guide for tenants and landlords, this information is still useful.

Responsibilities of landlords

The landlord is responsible for ensuring the property is vacant, clean and in good repair at the start of the tenancy. If this is not the case, and the tenant has not moved in, the tenant is entitled to terminate the tenancy. A tenant should therefore check the premises before moving in.

The landlord must ensure the property is safe to live in. If the landlord does not fulfil his or her duty of care and a tenant is injured then the landlord could be sued for damages. For example, if a landlord had refused to repair a driveway that had been badly damaged by tree roots, and a tenant fell over the roots and was badly injured, the tenant could sue the landlord for damages under the law of negligence.

The landlord is legally required to give all prospective tenants:

- a booklet outlining the rights and responsibilities of tenants and landlords
- a copy of the tenancy agreement and the condition report (if a bond is paid) filled in and signed by the landlord
- a statement in writing of the landlord's full name and the address to which documents are to be sent, as well as the agent's full name and address if there is an agent.

Consumer Affairs Victoria publishes a booklet outlining the rights and responsibilities of tenants. This booklet is very useful for people who rent for the first time. The landlord or the landlord's agent should give the booklet to all prospective tenants.

Under the *Residential Tenancies Act 1997* (Vic.) the responsibilities of a landlord are clearly set out.

RESPONSIBILITIES OF A LANDLORD UNDER THE *RESIDENTIAL TENANCIES ACT 1997* (VIC.)

Landlords' responsibilities include:

- giving the tenant 60 days' written notice of any rent increases
- paying local council property rates
- paying sewage and water drainage service fees
- paying initial installation or connection costs for electricity, gas or oil (if there is no separate meter the landlord also has to pay the charges for use)
- keeping the premises in good repair including carrying out urgent and non-urgent repairs as required
- reimbursing the tenant for urgent repairs up to the value of \$1800 if the expense was reasonable
- making sure all the doors to the outside and all the windows have locks or can be secured in some other way
- giving the tenant a key immediately after changing any lock
- avoiding disturbing the tenant unnecessarily
- giving the tenant proper notice of intention to enter the premises.

EXTRACT

Back-up for bad tenants

Bina Brown, *The Age*, 13 March 2011

Louise Mercer learnt the value of landlord insurance the hard way. She thought she had taken out landlord insurance on an investment property, before her tenant decided to stop paying rent.

It was only after the tenant left the property some weeks later that Louise ... discovered the tenant and his uninvited dog had also trashed the house.

'I thought we had insurance but there was some miscommunication with the property manager at the time and we discovered there was no insurance in place,' Louise says.

'We had renovated 18 months earlier and were hoping to sell it while the market was buoyant. But, instead, we were repainting the whole place, repairing doors and walls, recarpeting and getting new light fittings the tenant had wrecked.'

The loss of rental income plus the cost of the repairs came to about \$15000. Then there was the cost of flying to the property and taking time off to organise the repairs. Meanwhile, the property market in that area dropped off and the opportunity to sell was missed.

LEARNING ACTIVITY 14.3

Protection and responsibilities of landlords

- 1 Look back at the article 'Back-up for bad tenants'.
 - a What characteristics make a person a 'bad tenant'?
 - b What costs do bad tenants create for landlords?
 - c What can landlords do to protect themselves from the financial effects of bad tenants?
- 2 How does the *Residential Tenancies Act* balance the landlord's proprietary rights with a tenant's right to privacy?
- 3 List four responsibilities of a landlord.
- 4 What is a landlord legally obliged to give a prospective tenant?
- 5 How many days' notice is required before a rent increase can take place?
- 6 Read the case study 'Landlord liable' and answer the questions.
 - a What occurred in this case?
 - b What decision did the trial judge reach?
 - c Explain the final outcome of the case.

CASE STUDY

Landlord liable

In the case of *Northern Sandblasting Pty Ltd v. Harris* (unreported 14 August 1997 FC 97/034), a tenant brought an action against a landlord and the electrician who had repaired a stove in her rented property. This action was on behalf of her nine-year-old friend, Nicole, who went outside to turn off a water tap that supplied a garden sprinkler. She was electrocuted while standing in bare feet on wet grass. She suffered severe brain damage and was left in a vegetative state.

The trial judge found the electrician was liable under the law of negligence and assessed damages at \$1.2 million. The landlord was found not to be negligent. However, on appeal, the Court of Appeal and then the High Court (by a majority of four to three) held that the landlord was also liable under the law of negligence.

The High Court held that the landlord was in a position to control the state in which the premises were let and therefore owed a duty to the tenants to eliminate defects in the premises prior to the tenants moving in. The court held that had the switchbox been inspected before letting, the defect would have been detected.

- 7 'The provisions of the *Residential Tenancies Act* favours the rights of tenants over those of landlords'. To what extent do you agree with this statement?
- 8 Imagine you work for the Tenants Union of Victoria. For each situation below, explain a person's rights under the *Residential Tenancies Act 1997*. If you need further information you could refer to the Act at www.legislation.vic.gov.au or information provided on the Consumer Affairs Victoria and Tenants Union of Victoria websites.
 - a Rita spoke to an estate agent about renting a property and paid an application deposit. The next day she found a better place and wants her deposit back.
 - b Julie's landlord put her rent up twice in the last six weeks.
 - c Max's landlord is slow to fix the toilet in his rented home. It does not flush.

- d When Zena's lease expired, her landlord deducted \$300 from her bond money for damage to a wall. Zena knows the damage was not there on the day she moved out of the flat.
 - e Margaret's landlord regularly checks her backyard without notice.
 - f Simon and Chew are always behind in their rent. They owe two months' rent.
 - g The roof on Martina's rental home blew away in a storm and she is unable to live in the house. The estate agent says she will have to pay rent regardless as she has a five-year lease.
 - h Within a month of Tony and Chris taking out a two-year lease on a property, Tony gets a promotion and the family needs to move interstate.
- 9 Match the terms and organisations with the most appropriate definition.

managing agent	a government-run fund that lends low-income earners money to pay a bond
landlord	gives legal advice about tenancy issues to all tenants, boarders, lodgers and caravan park residents
bond loan scheme	a government organisation that gives advice to consumers, residential tenants and landlords
condition report	a rental agreement
lease	a document that records the state of the property each time a tenant takes possession of or vacates a property
Consumer Affairs Victoria	services like gas, electricity, telephone and water
Tenants Union of Victoria	money that ensures that the tenant pays some costs towards any damage they might do to a property
bond	a person who rents a house, apartment or flat for residential purposes
tenant	a person who owns residential rental property
utilities	the person who handles the rental of the property on behalf of the landlord

SHARING ACCOMMODATION

A person wishing to share a house or flat either enters a co-tenancy, in which all tenants have equal status, or a subletting arrangement, where there is a 'head tenant' and 'a subtenant or subtenants'. A head tenant's name is on the lease and he or she is responsible to the landlord. Subtenants are responsible to the head tenant in much the same way.

Co-tenancy

Co-tenancy is when all the people who share the rental property are named in the tenancy agreement. Each person named can be held responsible for the full amount of rent, the bond and any breach of the tenancy agreement. This means that if one co-tenant is not fulfilling their responsibilities under the lease then the other tenants can be held liable.



Figure 14.5
Shared
accommodation

The landlord must be notified when a co-tenant no longer lives at the property and the co-tenant's name should be removed from the tenancy agreement. If another person takes the place of the co-tenant then the new person's name should be added to the lease. If a landlord refuses to allow a new co-tenant, the other tenants can apply to the Residential Tenancies List for an order waiving the consent of the landlord.

Subletting

Subletting or subtenancy happens when one person (head tenant) signs a tenancy agreement and then invites another person (subtenant) to move in or share tenancy. The head tenant has the responsibility of fulfilling the terms of the tenancy agreement. For example, the original tenant lives in the property and rents a room to a subtenant, or the original tenant moves out temporarily and sublets the property to a subtenant within the period of the original lease.

In such cases, the head tenant acts as a landlord to the subtenant, so the head tenant can take the property or room back provided he or she acts according to the law. If the head tenant takes any bond money from the subtenant, then the head tenant must lodge this money with the Residential Tenancies Bond Authority (RTBA). Disputes between head tenants and subtenants can be referred to Consumer Affairs Victoria and the Residential Tenancies List of the Victorian Civil and Administrative Tribunal (VCAT).

Under the *Residential Tenancies Act 1997* (Vic.), a tenant cannot sublet rented premises without the landlord's written consent and the landlord cannot unreasonably withhold this consent. If the landlord does withhold consent, the tenant can ask VCAT to review the landlord's decision. If the property is sublet without the landlord's consent then the landlord can give the subtenant notice to vacate within 14 days.

Rooming houses, mobile homes and caravans

Rooming houses, caravans and mobile homes come under the jurisdiction of the *Residential Tenancies Act 1997*.

A **rooming house** is any building where the total number of people renting rooms in the premises is four or more. Residents may have exclusive occupancy or they may share a room. They may share other facilities such as toilets, bathrooms, kitchens and common rooms. Rooming house owners must comply with minimum standards as specified in the *Residential Tenancies (Rooming House Standards) Regulations 2012* (Vic.). These standards ensure rooming house amenities comply with basic standards for privacy, safety and security. A statewide rooming house register enables government agencies to enforce regulatory requirements that apply to rooming houses.

Caravan park residents may fall under the provisions of the Act if they have entered into an agreement with the caravan park owner to live permanently at the caravan park or the person has

occupied the caravan site as their main residence for 60 days or more. Caravan park residents should be given a booklet outlining the rights and responsibilities of owners and residents.

Site tenants own their movable home but rent the land on which it stands. These relocatable dwellings do not include caravans or other mobile homes that can be registered for use on roads. The owner of a movable home can sign a long-term site agreement allowing them to live in either a caravan park or another type of residential park. A five-day cooling-off period (where the resident can change their mind) applies to site agreements. Site tenants have a right to form a residents' committee.

Disputes between landlords and tenants living in rooming houses, caravan parks or in other types of residential parks can be referred to Consumer Affairs Victoria or the Victorian Civil and Administrative Tribunal (VCAT).

Lodgers or boarders are different from rooming house residents. A lodger usually pays to live in a room in a property owner's home. The rent is inclusive of all costs. The property owner keeps overall control of the house and the lodger can be asked to leave at any time. Lodgers and boarders are not tenants under the *Residential Tenancies Act 1997*.

LEARNING ACTIVITY 14.4

Sharing accommodation

- 1 What is a co-tenancy?
- 2 What is subletting?
- 3 What are the advantages and disadvantages of both co-tenancy and subletting?
- 4 What is a rooming house?
- 5 When will a caravan park resident be afforded rights under the *Residential Tenancies Act*?
- 6 Who are boarders or lodgers?
- 7 Michael's two-bedroom apartment is rented to a couple of students, but he knows from neighbours that up to six people are living there. What rights does Michael have as the landlord to object to this? Explain.

8 Investigation

You would like to move out of home and perhaps rent a house, flat, caravan or room. Collect information about renting and your rights as a tenant and develop an action plan detailing how someone would go about finding suitable accommodation. In your investigation you should:

- consult the newspaper or local estate agent websites and collect information about the type and cost of accommodation available in your local area for different types of accommodation
- gather information from a range of sources (books, magazines, pamphlets, the Internet etc.) about your rights and responsibilities as a tenant, rooming house resident or boarder.

Using the information you have gathered in your action plan, write a report that covers:

- an explanation of the different types of rental accommodation available
- a comparison of the rights of renters for each type of rental accommodation
- the costs associated with each type of rental accommodation
- your preferred type of rental accommodation and your reasons for selecting it
- a landlord's expectations and responsibilities for your preferred type of rental accommodation
- an explanation of whether you think a renter of your preferred type of rental accommodation should be afforded more rights.

ENDING A TENANCY AGREEMENT

A tenancy agreement can be ended by:

- the agreement of all parties.
- a tenant giving written notice to the landlord or agent that they intend to leave the premises.
- a tenant before moving into the premises if the premises are not in good repair or are unfit to live in
- a landlord or agent giving notice to the tenant that they wish them to vacate the premises by issuing a notice to vacate.

If the parties cannot agree, the tenant or landlord can apply to VCAT to resolve the issue.

A tenant must generally give 28 days' written notice if they intend to leave rented premises. This must be done even if the property is rented for a fixed term. If a tenant moves out before the end of a fixed-term lease they may need to continue to pay rent for the property unless the landlord finds another tenant. The period of notice may be reduced in exceptional circumstances where:

- the tenant has proof the property is unsafe, partially destroyed or uninhabitable (immediate notice)
- the landlord breaches a specified duty on several occasions (14 days' notice)
- the tenant has special needs which require crisis accommodation or personal care (14 days' notice or at the end of a fixed-term lease).

Notice to vacate

A landlord can give a tenant a 120-day written notice to vacate for no reason. If there is a particular reason, such as the landlord's intention to occupy, sell, reconstruct, demolish or use the premises for business, the landlord must give the tenant 60 days' notice to vacate. The landlord must also give 60 days' notice if the tenant is to vacate the property at the end of a fixed-term lease of six months or less or 90 days' notice for tenancy agreements greater than six months.

The landlord must give 14 days' notice if the lease is being cancelled because the rent has been unpaid for 14 days, the tenant has not complied with breach of duty notices, the property has been sublet without the landlord's consent or the premises are being used for illegal purposes. A landlord can require the tenant to vacate immediately if the tenant has caused malicious damage or put neighbours in danger, or the premises are unfit for habitation.

Tenants have a right to challenge a notice to vacate if it is not given properly or they disagree with the reasons given. If the tenant does not leave the premises at the end of the time given on the notice to vacate, the landlord or agent can seek an **eviction order** at VCAT. An eviction order is an order by the Residential Tenancies List of VCAT ordering a tenant to leave rented premises. Once an eviction order is granted, the landlord can ask the police to legally remove the tenant. Only the police can evict a tenant. It is illegal for a landlord to physically turn out a tenant, or to lock out a tenant.

Claim on the bond

The landlord or owner can claim part or all of the bond money for:

- any damage done to the property and fixtures, but not reasonable wear and tear
- cleaning expenses
- any bills that the tenant left for the landlord to pay, which should have been paid by the tenant
- unpaid rent or rent lost due to abandonment of the property.

When the tenant and the landlord agree on the amount of bond money to be refunded they will both sign a **bond claim form** authorising the **Residential Tenancies Bond Authority** to release the bond money to the persons nominated on the form. It is illegal for landlords or their agent to ask a tenant to sign a blank bond claim form.

If the landlord and tenant cannot agree then the landlord must, within 10 business days, make a claim for the bond money before the Victorian Civil and Administrative Tribunal (VCAT). If a landlord refuses to return the money paid by way of bond after being ordered to do so by VCAT, it then becomes a criminal matter because he or she is in breach of a VCAT order. In such circumstances, the Magistrates' Court can impose a fine on the landlord.

Goods left behind

If a tenant leaves non-perishable, valuable personal goods behind, the landlord or agent must take reasonable care of them and store them for 28 days. They cannot refuse to return them to the tenant, even if the tenant owes rent. Personal documents (mail, photos, certificates) must be kept for at least 90 days. The tenant is responsible for paying the landlord for storage of goods and documents.

EXTRACT

Ending a tenancy

Tenants

At the end of a tenancy:

- give the correct amount of notice when planning to leave
- pay the final rent
- contact utility providers to have the final accounts for the telephone, gas, water and electricity sent to you and pay the final bills
- leave the premises in good order and in the condition in which you found them, fair wear and tear excepted
- take all your belongings with you
- keep the condition report in case any disputes arise
- if you have paid a bond, reach agreement with the landlord or agent regarding the return of the bond
- complete and sign the bond claim form, stating any agreed division of the bond money, and keep a copy
- make sure the completed bond claim form is sent to the RTBA. Confirm with your financial institution that the RTBA has credited the bond money to your account
- leave a forwarding address with your landlord or agent, the RTBA (on the bond claim form) and Australia Post.

Landlords

At the end of a tenancy:

- keep the condition report in case any disputes arise
- reach agreement with the tenant about the bond money
- complete and sign the bond claim form
- keep a copy of the bond claim form

- ensure the completed bond claim form is sent to the RTBA
- apply to VCAT within 10 business days if no agreement on the bond is reached
- comply with the *Residential Tenancies Act 1997* regarding the tenant's belongings and personal documents.

Source: *Renting a home: A guide for tenants and landlords*, Consumer Affairs Victoria 2005

LEARNING ACTIVITY 14.5

Ending a tenancy agreement

- 1 State how many days' notice must be given to vacate rented premises in the following situations.
 - a Edith's rented house is flooded during heavy rains and is uninhabitable.
 - b Eddie has not paid the rent for three weeks.
 - c Edwina's do-it-yourself renovation to her rented home without her landlord's permission caused massive damage.
 - d Elijah is a landlord and constantly insists that his tenants give him access to his rental property without due warning. He has ignored several breach of duty notices.
 - e Elizabeth is a landlord and wants to sell her rental property.
 - f Earl has a mental disability and needs to reside in a special facility.
 - g Effie has come to the end of her fixed-term lease which she does not want to renew.
 - h Elana and Emmanuelle have set up a hydroponic marijuana farm in the bedrooms of their rental property.
- 2 In what circumstances could a tenant challenge a notice to vacate?
- 3 What steps must a landlord take to evict a tenant?
- 4 What must a landlord do with goods or documents left behind by a tenant?
- 5 Read the case study 'Right of the Department of Housing to evict' and answer the questions.
 - a Why is the *Charter of Human Rights and Responsibilities* relevant in this case?
 - b What was the decision of VCAT in this case?
 - c How could this decision affect many other people in public housing?

CASE STUDY

Right of the Department of Housing to evict

Warfa Sudi, a former Somali refugee, and his three-year-old son were asked to vacate their rented townhouse, which belonged to the Department of Housing. The property had previously been leased to Sudi's mother who had died from cancer. Before her death she applied for the lease to be transferred to her son but the Department of Housing rejected her application on the basis that rent was owed. When the Department of Housing tried to evict Sudi, he took the matter to the Victorian Civil and Administrative Tribunal (VCAT). He believes that the eviction is unlawful and a breach of his human rights.

In a landmark decision, VCAT ruled that public tenancy agreements had to be consistent with the *Charter of Human Rights and Responsibilities*.

Under the charter, a person has the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'. Unlike private landlords and property owners, the Director of Housing is a public authority and is legally obliged to comply with the charter.

The Department of Housing appealed the decision. The Victorian Court of Appeal ruled that only the Supreme Court (not VCAT) had jurisdiction to decide whether the Director of Housing's issuing of an eviction notice complied with the Victorian *Charter of Human Rights and Responsibilities*, so the VCAT decision was invalid.

METHODS AND INSTITUTIONS FOR RESOLVING DISPUTES

Tenants Union of Victoria

The Tenants Union of Victoria was formed over 30 years ago to promote and protect the rights of tenants and residents in all forms of residential accommodation in Victoria. The Tenants Union aims to help individual tenants and to work for social change to improve conditions for tenants in the future. It offers a free and confidential service for any private or public tenant and any caravan park or rooming house resident.

The Tenants Union offers a number of services to tenants. It may:

- help to fill in forms or agreements related to tenancy
- advise on specific problems, such as repairs or rent increases
- negotiate and advocate on a tenant's behalf with the landlord or real estate agent
- assist or represent tenants at the Victorian Civil and Administrative Tribunal
- talk to community groups about tenants' rights.



USEFUL WEBSITE

Tenants Union of Victoria www.tuv.org.au

Consumer Affairs Victoria

If the Tenants Union cannot help, tenants can contact Consumer Affairs Victoria, which will give advice about a tenant's rights and whether there is a genuine claim. The most common tenancy complaints made to Consumer Affairs relate to excessive rent increases, the failure of landlords to effect non-urgent repairs and the non-return of goods or personal items left behind in vacated rental property. Consumer Affairs discusses its own assessment of the situation with both the tenant and the landlord and may help the parties reach a resolution to the dispute through conciliation.

Consumer Affairs Victoria provides a mobile service that travels throughout regional Victoria as well as metropolitan and regional offices. It will give advice on a range of tenancy issues, such as:

- rental repairs
- rental evictions
- rental bonds
- rent increases
- late rent payments
- caravan parks
- rooming houses.

**USEFUL WEBSITE****Consumer Affairs Victoria** www.consumer.vic.gov.au

Residential Tenancies List of VCAT

If it is not possible to resolve a tenancy dispute with the help of either the Tenants Union or Consumer Affairs Victoria, the next step is to take the complaint to the Residential Tenancies List of the Victorian Civil and Administrative Tribunal (VCAT). Landlords can also use the assistance of Consumer Affairs Victoria or take disputes to the Residential Tenancies List. A person can choose to go straight to VCAT if they prefer rather than trying other avenues first.

The Residential Tenancies List is a quick, cheap and informal method of resolving disputes between tenants and landlords or real estate agents. It can also hear disputes between residents and caravan park owners or residents and rooming house owners.

The landlord and tenant are each given the opportunity to present their case in an informal atmosphere. Several types of disputes can be taken to the Residential Tenancies List, including disputes relating to the following issues:

- **bonds** – Decide whether the landlord has been fair in reclaiming bond money.
- **repairs** – Order landlords to make necessary repairs or to reimburse tenants for urgent repairs.
- **privacy** – Order that a landlord not visit or inspect the property without giving proper notice (if the landlord is abusing his/her right of entry).
- **rent** – Determine whether a rent increase is excessive or unfair.
- **leases** – In cases of severe hardship, a tenant can apply to the tribunal to end a fixed-term lease early.
- **evictions** – Order the tenant to leave the property, give the tenant extra time to leave, or dismiss a notice to vacate.
- **compensation** – Order that the tenant or the landlord pay compensation if the other party has suffered loss or damage as a result of the tenant or landlord not meeting their obligations.

Hearings are conducted in a relaxed and informal atmosphere. Normally inquiries will be made as to whether the parties have reached, or can reach, a settlement enabling orders to be made by consent. Where settlement cannot be reached, the parties and any witnesses, in turn, take an oath or make an affirmation and give their evidence. The tribunal member may ask questions or permit the other party to ask questions of people giving evidence; that is, to cross-examine witnesses.

**USEFUL WEBSITE****VCAT Residential Tenancies List** www.vcat.vic.gov.au/disputes/residential-tenancies

LEARNING ACTIVITY 14.6

Methods and institutions for resolving disputes

- 1 Explain two ways the Tenants Union of Victoria could help you if you were a tenant and you had a dispute with your landlord.
- 2 What is the role of Consumer Affairs Victoria? Is it able to help tenants and landlords to resolve disputes? Explain.
- 3 Explain three types of orders that the Residential Tenancies List of VCAT can make.

CAPACITY OF THE LEGAL SYSTEM TO RESPOND TO DEMANDS FOR CHANGE

Tenancy laws have changed with time. Originally there were few restrictions on landlords, and some tenants found themselves being exploited by landlords who were in a position of greater power.

The law relating to residential tenancies has evolved to give tenants more rights. The *Landlords and Tenants Act 1958* (Vic.) gave little protection to tenants and was replaced by the *Residential Tenancies Act 1980* (Vic.). There was much public debate when this law was first proposed. The Law Institute and the Real Estate Institute of Victoria argued that the law took away property owners' rights, while others such as the Tenants Union of Victoria and women's refuge groups called for an end to tenants having to put up with unfair conditions and treatment.

Despite a number of amendments to the original Bill put before parliament, the Act did outline tenants' rights. These rights were later extended to people living in caravan parks (1988) and people living in rooming houses (1990). An amendment to the Act in 1997 established the Residential Tenancies Bond Authority. Estate agents and landlords now have to lodge all bond money with this authority to ensure it is available for return at the end of the lease.

Greater demand for rental accommodation and more private investors entering the rental property market have triggered changes in residential tenancy laws over time. These changes aim to balance the demand from tenants for more security or privacy with the needs of landlords to protect their assets. Before each major amendment, a parliamentary working group, task force, committee or law reform body investigates the need for legal change and makes recommendations at the request of parliament or the relevant government minister.

Amendments to the *Residential Tenancies Act*

There have been several amendments to the *Residential Tenancies Act* in the last decade. These changes:

- improved the rights of people who rent a caravan as their principal home
- introduced the limit of two rent increases per year
- clarified that exemptions under the Act only apply to student accommodation providers formally affiliated with educational or training institutions
- specified that landlords must hold goods, left behind by tenants, for limited periods of time
- extended the rights of residents in rooming houses to residents in shared rooms
- regulated the use of residential tenancy databases, used to 'blacklist' bad tenants, so the information recorded is both fair and accurate
- mandated that people who own their own movable dwelling (other than a caravan) and sign a long-term site agreement in a residential park or village must be given a written agreement, a pre-contractual period of at least 20 days to consider the site agreement, a five-day cooling-off period, at least one year's notice if they are asked to vacate for no reason and the right to form a residents' committee which the park owner must consult when proposing changes to park rules
- imposed a duty on landlords or agents to report to local council if they believe their property is being used as an illegal rooming house
- introduced minimum standards for rooming houses to ensure properties have fire-safe plans, safety switches, sufficient power outlets, fire-safe doors, locks on doors and windows and window coverings. Rooming houses must be registered with the local council who can inspect properties to ensure minimum standards are met.

Changing the law to meet changing conditions – rooming houses

Due to decreasing housing affordability across metropolitan Melbourne, housing and welfare organisations reported an increase in the number of poor-quality rooming houses springing up in ordinary suburban houses. The prevalence of these properties and the substandard conditions they offered to low-income households was the subject of extensive media reporting. These changing economic and social conditions were a precursor to law reform that standardised accommodation in rooming houses. The issue also exemplifies how the broader community can constrain the government to change the law.

CASE STUDY

Deaths in rooming house

Leigh Sarah Sinclair and Christopher Alan Giorgi died in a fire in a rooming house. The coroner found there had been a failure in the administration of applicable building code fire safety, planning and rooming house regulations. There had also been a failure to maintain electrical wiring and electrical components. The coroner recommended that the law specify minimum standards for rooming houses.

A coalition of organisations and individuals, who were committed to improving rooming houses in Victoria, started the Call This a Home? campaign to advocate for safe rooming houses. The group published a website and created a social media presence, posters, postcards and other publications explaining the current situation and their recommendations for legal reform, most notably, the introduction of minimum standards for rooming houses.

By July 2009, over 40 organisations had signed on to the campaign. Before this campaign, HomeGround Services and other homeless agencies had conducted a survey of over 200 rooming house residents and an audit of 16 rooming houses in the inner Melbourne area. Their report concluded that rooming house residents were living in substandard accommodation with limited tenure, privacy, security and safety.

The Call This a Home? campaign attracted considerable media attention and caused the Victorian premier to announce that the Victorian Rooming House Taskforce would be established to advise the government of appropriate reform measures.



Figure 14.6

This property is below the standard required for rental properties

The taskforce included members of the Call This a Home? campaign, local government, the Real Estate Institute of Victoria, and representatives of tenants, housing and community groups such as the Tenants Union of Victoria, the Council of Homeless Persons, the Victorian Council of Social Services, the Registered Accommodation Association of Victoria, the St Kilda Rooming House Issues Group, Yarra Community Housing and the Community Housing Federation of Victoria.

In October 2009, in response to the Victorian Rooming House Taskforce's report, the Victorian Government announced that it would spend \$77.2 million on boosting the supply of

quality rooming house accommodation and cleaning up the state's poorly regulated rooming house sector. The Victorian Parliament passed the *Residential Tenancies Amendment Act 2010*. The aim of this Act is to:

- enforce a new set of minimum standards for rooming house operators, which will be mandatory from March 2013
- ensure all rooming houses are registered with local councils so that they can be inspected
- provide that failure to comply would result in a \$7140 fine for individual landlords or \$35 700 for body corporates.

The Greens are campaigning for the standard of rental properties to be safer, more efficient and more affordable. The National Rental Affordability Scheme aims to increase the affordability of rental properties and impose conditions on landlords, ensuring that properties meet a minimum standard.

EXTRACT

Outcome of court proceedings brought against Mr Frank Cassar

Media release, The Hon Michael O'Brien MP, Minister for Consumer Affairs,
Thursday, 26 April 2012

Minister for Consumer Affairs Michael O'Brien has welcomed the outcome of court action against a rogue rooming house operator.

In late June 2011 the Director of Consumer Affairs Victoria commenced legal proceedings against Mr Francis ('Frank') Cassar, Betta Housing Pty Ltd and its director, Mrs Sandra Cassar, for failing to meet their legal obligations as landlords. Final orders have now been made in these proceedings.

The court action followed an investigation initiated by tenants' complaints. The tenants were living in private rental accommodation owned and managed by the Cassars and Betta Housing Pty Ltd.

On 8 August 2011, the Supreme Court made interlocutory orders to restrain Mr and Mrs Cassar and Betta Housing from letting out and managing residential premises, other than through a licensed estate agent.

Mr Frank Cassar died in late October 2011 and the proceedings were amended to join the executor of his estate.

The Supreme Court on Tuesday ordered the defendants to pay costs to Consumer Affairs Victoria and compensation of more than \$6000 to seven individuals who were previously tenants at properties managed by the Cassars.

The Court also ordered that Mrs Sandra Cassar and Betta Housing be restrained from:

- letting any residential premises to any other person other than through the agency of a licensed estate agent
- granting any residency right in any residential premises to any other person other than through the agency of a licensed estate agent
- collecting or directly receiving any monies from a residential tenant or rooming house resident
- directly negotiating any residential tenancy agreement or the granting of any residency right to any other person and
- otherwise dealing directly with any residential tenant or rooming house resident.

Mr O'Brien said that this case demonstrates the Coalition Government's commitment to enforcing laws designed to protect rooming house tenants.

'Rooming house landlords who flout the law will not be tolerated,' Mr O'Brien said.

'This case was taken to protect the Cassars' tenants and to put an end to ongoing misconduct. The permanent injunctions and the compensation and costs orders now bring the matter to an end.'

In 2009, Mr Frank Cassar was found guilty in the Melbourne Magistrates' Court in relation to nine charges, including failing to lodge bonds and failing to comply with Victorian Civil and Administrative Tribunal (VCAT) orders.

For further advice and information on rooming houses, visit www.consumer.vic.gov.au

Balancing the rights of tenants and landlords

The law attempts to balance the rights of landlords with those of tenants. Landlords would argue that they buy property for investment and if their investment does not make a profit they need to increase the rent or ask the tenants to vacate the premises so that the property can be sold. They also say their investment needs to be protected from tenants who damage the property.

In contrast, the Tenants Union of Victoria suggests some landlords exploit tenants, forcing them to tolerate substandard living conditions because they cannot afford to rent elsewhere. The Tenant's Union wants the government to pass laws that better protect the rights of tenants and shield tenants from exploitative landlords. The Tenants Union of Victoria advocates that the *Residential Tenancies Act* should provide a minimum standard for **all** rental accommodation, which ensures a tenant's:

- **health and safety** – The property is to be weatherproof, damp proof and vermin proof; have fly screens on all windows, adequate power outlets, lighting from both natural and artificial sources, and adequate ventilation; be equipped with a stove top and oven, safety switches and smoke alarms; and have hot and cold running water, adequate rubbish removal and all fire risks eliminated.
- **security and privacy** – The property should have deadlocks on external doors and locks on all windows, curtains or blinds, and a separate letterbox.
- **energy efficiency** – The property is to be insulated and equipped with an energy-efficient heater and with window coverings to provide some insulation and privacy.

Greg Barber, a Greens member of the Victorian Legislative Council also champions the rights of tenants. In 2009, he tabled a private member's Bill before parliament to introduce minimum health and safety standards and energy and water efficiency standards for all rental properties. The *Residential Tenancies Amendment (Housing Standards) Bill 2009* was not passed because it did not have the support of the Victorian Government at the time. Mr Barber argued the change in the law was necessary to avoid other deaths like the tragic deaths of Chase and Tyler Robinson, and because renting is no longer a temporary situation for many people.

CASE STUDY

Tragic deaths due to faulty gas heater

Two young brothers, Chase (8) and Tyler (6) Robinson died in their sleep as a result of carbon monoxide poisoning. They were found by their mother who woke severely affected by the gas.

In the investigation into the boys' deaths, the coroner found that a build-up of lint and soot caused a gas heater in their rented home to malfunction, creating a high level of carbon monoxide in the home. She concluded that the landlord's failure to service the heater was understandable because there was no indication that there was a problem with the heater and most people in the community were unaware that gas heaters could malfunction in this way.

The coroner recommended that Real Estate Institute of Victoria members encourage landlords to have a qualified gas fitter check, clean and service gas heaters in their residential properties every two years. The coroner also recommended an amendment to the Consumer Affairs publication *Renting a home: A guide for tenants and landlords* to warn prospective tenants that they should ask landlords about the service history of gas heating appliances.

The coroner also applauded the boys' parents for their work in raising community awareness about the issue. The Chase and Tyler Foundation works in partnership with Energy Safe Victoria to raise community awareness of the dangers of faulty gas heaters, their potential to produce poisonous carbon monoxide gas and the need to have gas heating appliances serviced every two years. The foundation is also campaigning for approved carbon monoxide detectors to be fitted in all homes with gas appliances.

The Tenant's Union of Victoria has also suggested the *Residential Tenancies Act* should be changed to:

- require landlords or property managers to be licensed – this licence can be suspended or cancelled in cases where there is a serious breach of the provisions in the *Residential Tenancies Act* or the *Equal Opportunity Act*
- ensure all private rental properties are reasonably accessible to the disabled
- give tenants 90 days' notice for rent increases (rather than 60 days currently), restrict rent increases to once every 12 months (rather than 6 months currently) and in line with the Consumer Price Index (CPI)
- introduce a mandatory cooling-off period for residential leases so that tenants have a chance to review the terms and conditions of their lease
- abolish the 'no reason' notices to vacate
- allow tenants to keep pets unless the landlord can show that keeping pets is unreasonable in the circumstances
- extend the required written notice period (currently 24 hours) before landlords can enter premises.

In 2014, the Victorian Law Reform Commission announced it will review the *Residential Tenancies Act*. Its terms of reference, for this review, are restricted to particular aspects of the law. Its work will include an examination of:

- a tenant's right to privacy, security and possessory rights under the Act
- whether landlords or their agents can legally photograph and publish images of a tenant's possessions in cases where the property is being advertised for lease or sale
- the adequacy of access provisions for landlords and their agents when the property is being advertised for lease or sale
- the effectiveness of current avenues of dispute resolution available to tenants, landlords or their agents.

LEARNING ACTIVITY 14.7

Capacity of the legal system to respond to change

- 1 Explain how the rights of tenants have improved over time.
- 2 Why might there be conflicting attitudes in relation to tenancy issues?
- 3 Look back at the case study 'Deaths in rooming house' and answer the questions.
 - a What occurred in this case?
 - b How has the law changed to meet changing conditions in rooming houses?

- 4 Look back at the article 'Outcome of court proceedings brought against Mr Frank Cassar' and answer the questions.
 - a Explain why Consumer Affairs Victoria became involved in this case.
 - b How does the court's decision assist Betta Housing Pty Ltd's past and future tenants?
- 5 Do you believe the balance between the rights of landlords and the rights of tenants is appropriate? Discuss.
- 6 Look back at the case study 'Tragic deaths due to faulty gas heater' and answer the questions.
 - a What occurred in this case?
 - b What change in the law are the parents of Chase and Tyler fighting for?
- 7 Explain three changes in tenancy laws recommended by the Tenants Union of Victoria.

ISSUE – RENTAL AFFORDABILITY AND HOMELESSNESS

Tenants are a diverse group. Those who suffer from the problem of rental affordability vary from tenants in public housing to tenants in the private rental market.

According to Australian Bureau of Statistics (ABS) census data (2011), 29.6 per cent of private dwellings are rented. The ABS Survey of Income and Housing (2011–12) shows that all private renters paid an average of \$347 or 20 per cent of their gross weekly income on rent, while low-income earners spent an average of \$295 or 30 per cent of their gross weekly income on rent. The survey estimates that 38 per cent of males and females in low-income households experience rental stress. A household is considered to be in rental stress if the rent it pays exceeds 30 per cent of its gross income.



Figure 14.7
Protesting about high rents

The lack of affordable rental accommodation is linked to the broader socioeconomic issues of housing affordability, employment and family composition. The high cost of housing coupled with employment instability means fewer people can afford to buy a home or they delay their purchase and rent for longer. These people compete with more traditional tenants who are either on low incomes or need to temporarily live away from home for employment or educational purposes.

Young singles, those living in group households, childless couples or single-parent families are now staying in rental accommodation longer. Some do not aspire to the 'great Australian dream' of owning their own home, preferring the freedom and mobility associated with rental accommodation. For others, the high cost of housing has put paid to this dream. The 10th Demographia International Housing Affordability Survey (2014) reports that median housing prices have increased at a much greater rate than median household incomes, particularly in Australia. The survey found that housing affordability has deteriorated across Australia and that housing is severely unaffordable in both Melbourne and Sydney.

DID YOU KNOW?

In February 2014, the Real Estate Institute of Victoria estimated the median rent for a house in Melbourne was \$400 per week.

The increasing demand for rental properties has led to higher rents, causing financial stress for tenants at the lower end of the rental market. This means that some sections of our community find it more and more difficult to afford housing of any type. In particular, people on low incomes who suffer mental illness, family breakdown, family violence, unemployment or homelessness tend to experience the most hardship. The government provides assistance to those whose socioeconomic circumstances cause them to live without shelter or in inadequate housing.

According to the ABS, 42 per cent of renter households received some form of housing assistance from the government. The Australian Productivity Commission's 2014 *Report on Government Services* estimates that in 2013, there were 331 033 households renting public housing and 65 632 households living in community housing.

Table 14.2 Mean housing cost per week in Australia, 2000–12

TYPE OF HOUSEHOLD	2000–01 \$	2002–03 \$	2003–04 \$	2005–06 \$	2007–08 \$	2009–10 \$	2011–12 \$
Owner without a mortgage	31	32	32	34	37	37	40
Owner with a mortgage	299	315	359	400	427	430	432
Renter – state/territory housing authority	99	104	106	120	117	126	136
Renter – private landlord	235	243	250	265	297	322	347

Source: ABS cat. no. 4130.0

Rent assistance

Commonwealth Rent Assistance scheme

People who receive a Centrelink payment (any government pension or benefit) may be eligible to receive rent assistance. Extra money is provided to these low-income households to offset the cost of a private rental agreement. Payments are not available for public housing leases.

Public housing

State and territory governments and community organisations offer affordable public housing, which is reserved for people on low incomes who are in inappropriate, unsafe or unhealthy accommodation or who would otherwise be homeless. Most public housing rents are set at market levels with eligible low-income tenants receiving a government subsidy so that they pay no more than 30 per cent of their gross income in rent.

National Rental Affordability Scheme

The National Rental Affordability Scheme is a Rudd–Gillard (Labor) Government initiative to stimulate private investment in new affordable rental dwellings. Investors who build or buy new homes under this scheme receive a tax rebate (approximately \$10 000 per year for 10 years) as long as the property is rented to eligible tenants with low or moderate incomes at a rate that is at least 20 per cent below the prevailing market rate.

Many developers have used the scheme appropriately to build affordable houses and sell them to buyers interested in investing in the private rental market. While the scheme is largely achieving its purpose, there are concerns that the program is being abused by some property developers and being used inappropriately to build student housing rather than providing affordable housing for low- and middle-income earners. These criticisms have triggered a review of the scheme by the Abbott (Coalition) Government.

Overcrowding

There is no single standard measure of residential overcrowding in Australia. However, the accepted rule is that single occupants over the age of 18 each have a separate bedroom. While couples may share a bedroom, it should sleep no more than two people. Households that do not meet this standard are considered to be overcrowded.

Severe overcrowding in housing is a potential fire hazard and a risk to people's health and wellbeing. People living in sustained crowded conditions have difficulty accessing hot water, showers and other washing facilities. It also has the potential to increase household or neighbourhood tensions and facilitate the spread of infectious diseases. Overcrowding, particularly in high-rise buildings, is a safety hazard for occupants who face imminent danger because they cannot vacate the premises quickly in times of emergency.

The lack of housing affordability has led to the practice of 'couch-surfing', where people sleep on someone's couch on a temporary basis, and 'hot-bedding', where a number of people use the same bed in rotating shifts because they cannot afford a room of their own. Both these practices lead to overcrowded housing.

EXTRACT

More 'couch-surf' as homelessness surges

Caroline Schelle, *The Age*, December 2013

'Couch-surfing' is on the rise in Australia with a new report finding that people staying with friends and family on fold-outs has increased by 26 per cent.

In the last financial year an extra 15 000 people have been turned away from homelessness services, with an average of 250 women, 150 men and 90 children refused help each day. More than 36 per cent of people were seeking help due to high rent and financial difficulties, while requests from those over the age of 55 was up by 14 per cent.

Chris Middendorp, manager of Sacred Heart Central, believes that couch-surfing can often be overlooked as an issue because of its 'romantic' name. 'The reality is there often is no couch; the reality is people sleeping on the floor of a bedsit or sleeping in a kitchen', he said.

He said housing affordability is a major issue for many couch-surfers. 'Private rentals are getting more and more expensive and it's very difficult for people to find places to live.'

Dr Bruce Redman of the Salvation Army said people are being forced to relocate frequently and for longer periods to ensure accommodation. 'We're finding that the period of time that people are spending couch-surfing is increasing, it can be a week or so but it's now heading into longer periods of time', he added.

Women fleeing from domestic abuse are most at risk of being long-term couch-surfers, with 63 per cent affected by homelessness.

Homelessness

According to the Australian Institute of Health and Welfare approximately 244 000 Australians were assisted by specialist homelessness services in 2012–13. Of these people, 54 per cent were at risk of homelessness, 46 per cent were homeless and 22 per cent were without shelter when they first asked for support. However, agencies were not able to meet all requests.

Eighty-four per cent of homeless people dealt with by specialist agencies are born in Australia and 81 per cent are receiving a government payment or benefit. Only 11 per cent of the homeless are employed and, of these, 59 per cent work part-time. The most common reasons given by the homeless for their predicament were financial difficulties (40 per cent), family violence (30 per cent), housing crisis (28 per cent) and inappropriate dwellings (24 per cent).

Data from the 2011 Australian census indicated that:

- there were 105 237 homeless people in Australia in that year
- 56 per cent of the homeless were male and 44 per cent were female
- 25 per cent of Australia's homeless population (26 744) are Aboriginal and Torres Strait Islander people



Figure 14.8

The St Vincent de Paul Society says middle-income families are vulnerable to being made homeless.

- over 6 per cent of homeless people (6314) sleep in makeshift dwellings or tents or sleep out, while 20 per cent stay in supported accommodation for the homeless
- 43 per cent of homeless people are between 12 and 35 years of age.

Specialist homelessness services are provided by non-government agencies funded by Commonwealth, state and territory governments. These agencies provide assistance to people who are homeless or at risk of homelessness in a range of areas including community services, health services, drug rehabilitation services and housing assistance.

Homeless assistance services may provide crisis and longer-term accommodation, assistance with living skills and financial management, counselling and advocacy. Specialist services may also work with specific groups of people (for instance young people, family violence victims or the mentally ill). Agencies often work in partnership with other services to provide services including early intervention programs, legal advice, medical services and meals.

EXTRACT

Hopelessness of the homeless a cause of death

Aisha Dow, *The Age*, 16 February 2014

Homelessness experts are pushing for the condition to be listed as an official cause of death, as murder, chronic illness and festering sores continue to claim the lives of some of Victoria's most vulnerable.

Without intervention, more than half of Melbourne's rough sleepers are likely to die within five years, according to a 2013 survey. Experts are now calling for records to be kept on sudden deaths in the homeless population, warning that the results could be 'grim'.

Since December, at least seven people known to the city's homeless workers have died, including a man in his 50s who developed a foot wound in a Fitzroy rooming house. Salvation Army Major Brendan Nottle said the man had put a sock on the sore when it started to smell. 'He ended up losing his leg and then eventually he died,' he said.

The alleged murder of rough sleeper Wayne 'Mouse' Perry under a railway bridge on 5 January has been followed by another killing. A week ago a 29-year-old man died after a violent stabbing in a Kew rooming house.

On Wednesday, homeless father Greg Anderson killed his son Luke Batty, before being shot by police, leaving a traumatised community to examine the small and gaping system failings that might have led to the 'unspeakable' tragedy.

The homeless death toll would have grown further during Melbourne's heatwave if outreach workers had not helped two young women they suspected had overdosed on heroin. One of the women, aged 19, was about four months pregnant when she was discovered on Elizabeth Street.

Youth Projects chairwoman Melanie Raymond is among those calling for homelessness to be noted by the coroner as a contributing cause of death. 'We think people die of poverty. It's not a medical term, but the combination of exclusion, lack of opportunity and lifetime disadvantage is lethal.' She said years spent homeless made people appear much older than they actually were, 'careworn and weary from life on the streets'. Mouse was originally identified as a man 'in his 50s' after his killing, when in fact he was only 42.

Last year the Melbourne Street to Home program identified 68 homeless people in the city who were expected to die within the next five years if their situation did not improve. Almost three-quarters were 'tri-morbid', which means they were battling substance abuse, chronic illness and mental health issues at the same time.

Brotherhood of St Laurence chief executive Tony Nicholson said the biggest health risk for homeless people 'in terms of numbers of people' was actually found in the suburbs.

In 2011, 31 per cent of Melbourne's homeless (more than 5000 people) were living in severely overcrowded dwellings. Mr Nicholson said it was extremely hard to maintain healthy and hygienic routines for children living in these conditions, leading to ear infections and other health problems.

Each year the Victorian Government spends more than \$220 million to support those who are homeless or at risk of homelessness. But asked whether they should begin recording homelessness deaths, a spokesman said 'appropriate' death data collection was a matter for the Coroners' Court.

On Sunday, Mouse would have celebrated his 43rd birthday. At noon blue balloons will be released in his honour at an Enterprize Park rally that will call for a better deal for those adrift and needy in the world's most liveable city. Major Nottle said: 'We can be saddened by these sorts of deaths, but assume that nothing can be done to prevent them. What we want to do is get the community understanding we must find a way.'

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Rental affordability

- 1 When is housing generally considered affordable? (1 mark)
- 2 What is considered to be overcrowding in rental properties? (1 mark)
- 3 Look back at the article 'More "couch-surf" as homelessness surges' and answer the questions.
 - a What is couch-surfing? (1 mark)
 - b Why is couch-surfing a rental affordability issue? (1 mark)
 - c Which group of people are most at risk of long-term couch-surfing? (1 mark)
- 4 In the case of *Carnovale v. Serevetas* (Residential Tenancies) (2009), VCAT dismissed an appeal by a landlord to evict a tenant because he had sublet the premises. The tenant had been given oral consent by the agent, which VCAT found was binding on the landlord. Explain the responsibilities of the landlord and tenant in relation to subletting. (2 marks)
- 5 In the case of *Director of Housing v. T* (Residential Tenancies) (2009), VCAT found the tenant was using the premises for trafficking heroin. What are the rights of the landlord if the premises are being used for illegal activities? (1 mark)
- 6 Look back at the article 'Hopelessness of the homeless a cause of death' and answer the questions.
 - a Explain why homelessness may be life threatening. What evidence is provided to support this claim? (2 marks)
 - b Why do social workers want the coroner to note homelessness as a cause of death? (1 mark)
- 7 Discuss the reasons for homelessness. (2 marks)
- 8 To what extent do government initiatives help alleviate homelessness and overcrowding? (6 marks)
- 9 Read the case study *Bui v. Residential Tenancies Bond Authority* and answer the questions.
 - a Why was Ms Bui making a claim in this case? (1 mark)
 - b Explain the role of the RTBA. (2 marks)

- c How does the RTBA protect the rights of both tenants and landlords? (2 marks)
- d What did VCAT have to decide in this case? (1 mark)
- e Was Bui successful in this case? Explain. (2 marks)

Bui v. Residential Tenancies Bond Authority (Civil Claims) (2009) VCAT 761 (1 May 2009)

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

This case relates to a dispute between Tuyen Thi Bui and the Residential Tenancies Bond Authority (RTBA). Ms Bui owned a real estate agency which managed residential tenancies. She sold the business. A term of the sale was that the buyer would withhold \$10 000 for three months. It would be paid if after three months 'all transactions were in order', including issues with the RTBA, which were related to Ms Bui's operation of the business.

Ms Bui had lodged a bond for one rental property with the RTBA. Due to a mistake, the RTBA failed to record the lodging of the bond. The mistake was rectified (Ms Bui said after three months), an apology made to Ms Bui and the \$10 000 paid to her by the buyer of her business.

However, Ms Bui had cut short a business trip to Vietnam and delayed a business trip to the USA to deal with the issue. She claims this had delayed the starting of a travel business and seeks \$9950 damages being her estimate of lost income of the new business.

On 24 February 2009, the principal registrar of VCAT rejected the application under section 71(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act). In his opinion, the dispute did not arise from the supply of goods or services in trade or commerce.

Ms Bui sought a review of that rejection under S71(2) of the VCAT Act. In line with its usual practice, VCAT only notified the applicant of the hearing.

On 22 April 2009, I heard her application. Ms Bui attended. The RTBA attended saying they had seen the matter listed in VCAT's published case schedule for the day.

Ms Bui outlined the dispute. Given the lack of notice, the RTBA was not in a position to make substantial submissions, given it had not been notified.

I discussed with Ms Bui that a central issue in deciding the matter was whether the RTBA provided services in trade or commerce.

The RTBA

The RTBA is established under S429 of the *Residential Tenancies Act 1997* (the RT Act), as a body corporate with perpetual succession which may sue and be sued in its corporate name.

Its functions are set out at S431. They are:

- to collect and disburse bond money paid to it under the *Residential Tenancies Act*;
- to establish and administer a Residential Bonds Account and a Residential Bonds Investment Income Account;
- to invest money held in those accounts;
- to collect the information contained in bond lodgement forms given to it and other information kept by it in relation to bonds held by it for use by the Director of Housing in research, compiling statistics and public education; and
- to carry out any other function conferred on it by this Act.

The bonds are paid into the Residential Bonds Account. Interest that accrues must be paid to the Residential Bonds Investment Income Account. The RTBA may pay money from the Residential Bonds Investment Income Account to the Residential Tenancies Fund.

The Residential Tenancies Fund may be used (at the discretion of the Director of Consumer Affairs) for the administration of the RT Act and any money authorised by the RT Act to be paid out (see section 493 of the RT Act). The RTBA does not manage that fund. I should mention that the Residential Tenancies Fund is used to fund the Residential Tenancies List of VCAT. That is not relevant to this decision.

The *Fair Trading Act* (FTA)

Part 9 of the FTA empowers VCAT to hear and determine 'consumer and trader disputes', which in S107 is defined (so far as is relevant to the present case) as a dispute or claim arising between a purchaser of goods or services and a supplier of goods or services in relation to a supply of goods or services. S3 of the FTA defines 'services' to include benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade and commerce ...

Were the services provided in trade or commerce?

In my view, the RTBA did not provide the service to Ms Bui's business (collecting and disbursing the bond) in trade or commerce.

The service it provided was not done in the course of activities or transactions which, of their nature, bear a trading or commercial character.

Rather the service is provided as part of a regulatory framework established under the RT Act to provide for a centralised system for the administration of bonds (see section 1 of the RT Act).

The fact that the RTBA deals with interest generated from the bonds (as described above) does not in my view give the service in question a trading or commercial character.

Therefore, I decided VCAT does not have jurisdiction to hear the application, as the service was not provided in trade or commerce. I confirmed the principal registrar's rejection of the application under section 71(5) of the VCAT Act.

Source: VCAT decision in *Bui v. Residential Tenancies Bond Authority (Civil Claims)* [2009] VCAT 761 (1 May 2009)

10 Read the case study *Palamaras v. Wright* and answer the questions.

- a Why were the tenant and landlord in dispute? (1 mark)
- b What is the purpose of a condition report and how might it have been useful in this case? (2 marks)
- c What was the outcome of this case? Do you think it was fair? Discuss. (2 marks)

Palamaras v. Wright (Residential Tenancies) (2009) VCAT 2614 (4 December 2009)

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES LIST

VCAT Reference: R2009/39288

CATCHWORDS

Residential Tenancies Act 1997 – Sections 417, 418 and 419; Landlord's application for part of the bond as compensation for damage to timber and parquetry floorboards. Fair wear and tear.

APPLICANT: William Palamaras

RESPONDENT: Bernard Wright

WHERE HELD: Melbourne

BEFORE: Member D. O'Halloran

HEARING TYPE: Hearing

DATE OF HEARING: 10 November 2009, onsite 23 November 2009

DATE OF ORDER: 4 December 2009

ORDERS

The Tribunal finds that:

The claims for compensation in the application have been proved in the amounts shown taking into account fair wear and tear and depreciation (all other claims being dismissed): –

Sand and re-polish floorboards allowed at \$2550.00

Clean sandstone pavers allowed at \$220.00

Total claim proved \$2770.00

The Tribunal finds that the tenant has paid a bond of \$7200.00

Direct the Residential Tenancies Bond Authority to pay to the landlord \$2770.00

Direct the Residential Tenancies Bond Authority to pay to the tenant \$4430.00

D. O'HALLORAN, Member

04 December 2009 DO/AD

...

Conclusion and findings

When I first look at the photographs of the floor, I conclude that some of the marks are more than just scratches. Some of the marks are more akin to gouges. It is important therefore, to remember that the photos were at close range. In this regard, the onsite inspection is a great assistance.

Upon arrival at the premises, the view standing up and looking forward reveals very little. The hall timber floor in the ground floor area does not appear to be damaged. However, if one looks down, one can see numerous scratch marks, all along the floor. The extent of the area covered by scratch marks is well beyond the area you would expect arising from normal wear and tear. Some marks are quite deep but it is the area over which the marks cover that is most apparent. The marks are not confined to one spot, they are extensive. In fact, the full length of the hallway appeared to be covered in scratches ...

In addition to the extensive area covered by the scratches, I also noted that they were not scratches arising from the normal use of the floor. Shoes would not cause these scratches. Not even stiletto heels would cause these scratches. In addition, they did not appear to be scratches caused by the movement of furniture. I am not satisfied that the scratches are the result of the various moves between February 2008 and November 2009.

Given the extensive area encompassed by the scratches I am not satisfied that the scratches could in any way be described as arising from the normal wear and tear of a family home.

The bulk of the scratches were short in length, thin and curved in nature. I am satisfied that the tenant's dog caused the scratches. The scratches are certainly consistent with the nails of a dog.

I note again that within the tenancy agreement the landlord has given permission for the tenant to keep a pet at the premises. In my view, this permission does not override the responsibility the tenant has for any damage caused by the tenant's dog.

In addition to the question of fair wear and tear, the issue of the need to regularly sand and repolish timber floorboards is relevant. There is an absence of evidence as to when this should occur. However, it would not be unreasonable to expect that sanding and repolishing would be necessary on a regular basis and I am satisfied that this should occur every five years.

The evidence is that the floors were last sanded in January 2008. The evidence is also that the landlord occupied the premises for approximately eight months after the floors were last

sanded. There is no completed condition report to confirm the precise state of the floor when the tenants commenced their tenancy. The photographs taken at that time do not match the close-up photographs taken when the tenants vacated ...

Source: VCAT decision in *Palamaras v. Wright (Residential Tenancies)* [2009] VCAT 2614 [4 December 2009]

- 11 Describe two avenues of dispute resolution for disputes arising from tenancy issues. (2 marks)
- 12 Use the Internet to investigate a case involving the provision of poor rental accommodation. For example, the deaths of Leigh Sarah Sinclair and Christopher Alan Giorgi. Explain the circumstances in relation to the case and what was decided. (4 marks)
- 13 **Investigation and report**
Investigate either rental affordability or homelessness. Create an infographic or PowerPoint presentation to display your findings. Your report should include:
 - statistics related to the issue under investigation (4 marks)
 - the causes and effects of the issue under investigation (6 marks)
 - at least two possible solutions to the issue under investigation. (2 marks)

(Total 50 marks)

ASSESSMENT TASK REPORT AND INTERVIEW

Tenancy issues

Arrange an interview with someone who has expertise in the area of tenancy issues, such as a person from the Tenants Union or a local real estate agent who manages rental properties. Write a report on your findings. In your report include:

- examples of problems experienced by tenants and landlords
- the role of the law in relation to tenancy issues
- an evaluation of the effectiveness of the law in fulfilling its role and addressing the values of the community.

(Total 10 marks)



CHAPTER 15 ENVIRONMENTAL LAW

OUTCOME

At the completion of this chapter you should be able to explain one or more areas of civil law, and discuss the legal system's capacity to respond to issues and disputes related to the selected area/s of law.

KEY KNOWLEDGE

This chapter is designed to help you understand the key knowledge of:

- legal principles relevant to the selected area/s of law
- a contemporary issue for the selected area/s of law
- the capacity of the legal system to respond to demands for change
- methods and institutions for resolving disputes arising under the selected area/s of law.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

KEY LEGAL TERMINOLOGY

defendant A person against whom a civil legal action is taken.

negligence Doing or not doing something a reasonable person would or would not do in certain circumstances, which causes harm or loss to another person; a common-law principle and a key area in the law of torts or civil wrongs; essential concepts are the 'neighbour principle' and breaches of duty of care.

on the balance of probabilities The standard of proof in a civil case.

plaintiff A person bringing a civil action and who has the burden of proving the case.

private nuisance Unreasonable interference with a neighbour's enjoyment of their property; for example, noise, smells, smoke, water or other matter continually emanating from a neighbouring property.

public nuisance An act or omission that interferes with the comfort or convenience of a number of people to a considerable degree.

sue Start civil proceedings against another person.

THE PURPOSE OF ENVIRONMENTAL LAW

Environmental law aims to provide a safe and sustainable environment for current and future generations. Environmentalists and other interest groups are constantly lobbying governments to ensure that protecting the environment and preserving natural resources are top priorities.

Caring for the environment and looking after it for future generations has become a focus of Commonwealth, state and local governments in recent years. Commonwealth and state governments have developed the **National Strategy for Ecologically Sustainable Development**, which provides broad strategic directions and a framework for governments to direct policy and decision-making. The strategy facilitates a coordinated and cooperative approach to ecologically sustainable development and encourages long-term benefits for Australia over short-term gains.

Governments, keen to encourage ecological sustainability, legislate to protect the natural environment and its flora and fauna, to ensure that both environmental and economic costs are considered in future development. **Ecological sustainability** is the capacity of ecosystems to maintain their essential functions and processes, and retain their biodiversity in full measure, over the long term.

Different Acts of parliament, regulations and local laws passed by the Commonwealth, state and local governments outlaw behaviours that harm the environment and bring the area of environmental protection into criminal law. When a person suffers injury or loss from behaviour that impacts on the environment then they may make a claim for damages under civil law.

Environmental law and the three levels of government

Environmental law aims to protect the natural environment and regulate the effect that humans have on their environment and the living things within it. These laws try to strike a balance between protecting the environment and the needs of business, industry and individuals. Environmental issues

such as global warming, climate change, pollution and the conservation of the world's flora and fauna are not resolved easily. In some cases the damage done cannot be reversed, or the solution requires the agreement of several countries unable or unwilling to effect change because it may impact on their social, political or economic systems.

Environmental sustainability has become a major issue for the Commonwealth, state and local governments. Governments have enacted laws to mitigate the impact of a variety of environmental issues. For example:

- **maintaining biodiversity** – Biological diversity is about conserving all living things (plants and animals) and maintaining a balance between organisms in an environment.
- **urban and environmental planning** – As rural and urban communities develop, it is necessary to regulate people's use of land in order to minimise their impact on the environment and the rights of others.
- **biosecurity** – This relates to the protection of the environment and its inhabitants from the negative impact of invasive plant or animal pests and diseases.
- **sustainable natural resource management** – Environmental sustainability aims to replenish a country's natural resources, conserve their use or develop safe alternatives. Different strategies and measures ensure that natural resources such as minerals, gas, water, land and forests are available for the use and enjoyment of future generations.
- **climate change** – Global warming has caused climate changes and imbalances in ecosystems. Man-made gases can pollute the earth's atmosphere and cause temperatures to rise, making it difficult for some species to survive.
- **pollution and waste management** – Pollution occurs from a range of human activities, which release gases, chemicals or harmful waste products into the environment that affect the quality of air, land and water.

Table 15.1 Environmental law at federal and state level

	COMMONWEALTH LAW	STATE (VICTORIAN) LAW
Biodiversity	• <i>Great Barrier Reef Marine Park Act 1975</i> • <i>Natural Heritage Trust of Australia Act 1997</i> • <i>National Environment Protection Measures (Implementation) Act 1998</i> • <i>Environment Protection and Biodiversity Conservation Act 1999</i> • <i>Antarctic Treaty (Environment Protection) Amendment Act 2010</i>	• <i>Wildlife Act 1975</i> • <i>Flora and Fauna Guarantee Act 1988*</i>
Biosecurity	• <i>Quarantine Act 1908</i>	• <i>Biological Control Act 1986</i> • <i>Catchment and Land Protection Act 1994*</i> • <i>Livestock Disease Control Act 1994</i> • <i>Control of Genetically Modified Crops Act 2004</i> • <i>Plant Biosecurity Act 2010</i>
Global warming and climate change	• <i>Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</i>	• <i>Climate Change Act 2010</i>

Sustainability and natural resource management	• <i>Water Efficiency Labelling and Standards Act 2005</i> • <i>Water Act 2007</i>	• <i>Forests Act 1958</i> • <i>National Parks Act 1975</i> • <i>Conservation, Forest and Land Act 1987</i> • <i>Water Act 1989</i> • <i>Fisheries Act 1995</i> • <i>Parks Victoria Act 1998</i> • <i>Sustainable Forests (Timber) Act 2004</i> • <i>Sustainability Victoria Act 2005</i> • <i>Water Efficiency Labelling and Standards Act 2005</i> • <i>Game Management Authority Act 2014</i>
Planning	• <i>Australian Heritage Council Act 2003</i>	• <i>Land Act 1958</i> • <i>Planning and Environment Act 1987*</i> • <i>Domestic Animals Act 1994</i> • <i>Heritage Act 1995</i>
Pollution	• <i>Environment Protection (Sea Dumping) Act 1981</i> • <i>Hazardous Waste (Regulation of Exports and Imports) Act 1989</i>	• <i>Environment Protection Act 1970*</i> • <i>Pollution of Waters by Oil and Noxious Substances Act 1986</i>
* These Victorian Acts of parliament delegate aspects of the environmental regulatory framework to local government. Local councils can pass local laws on the management of native vegetation, stormwater, animals and pests, waste and litter, land use, planning and construction, and air pollution.		

THINGS YOU CAN DO TO PROTECT THE ENVIRONMENT

Little choices that are made by everyone every day can add up to make a real difference to the environment. These are some of the things that every household can do:

- Minimise waste – reduce, reuse, recycle.
- Dispose of litter carefully.
- Compost food and garden waste and buy locally grown foods.
- Switch to GreenPower for electricity – this will help reduce greenhouse pollution and support renewable energy industries.
- Only heat or cool rooms you are using.
- Install long-lasting fluorescent light globes.
- Wash clothes in cold water.
- Install a solar hot-water system.
- Cycle or walk for short trips.
- Use public transport where possible.
- Buy a reusable bottle for carrying water around.
- Use environmentally friendly cleaning products.
- Have shorter showers.
- Collect rainwater in tanks.
- Insulate ceilings to avoid losing heat in cold weather or keep out the heat in summer.
- Use the clothes line rather than a dryer for drying clothes.
- Do not buy gas-guzzling cars.



Figure 15.1
Recycling waste

BIODIVERSITY

Maintaining biodiversity is about protecting the different plants, animals and micro-organisms that exist in the environment. The way these plants and animals are connected, live together and depend on one another for survival is referred to as an ecosystem. Different environments have different ecosystems. For example, deserts, rainforests and oceans are all ecosystems.

The *Australia: State of the Environment 2011* report describes Australia's biodiversity as 'megadiverse'. This is because Australia has an array of unique terrestrial and aquatic ecosystems containing between seven and ten per cent of the earth's species.

Urban development, harvesting of natural resources, release of pollutants and introduction of invasive species threaten Australia's biodiversity. World ecosystems are also threatened by climate change and natural disasters.

Biodiversity underpins a healthy environment on which all life forms rely. Changes in ecosystems can lead to the extinction of animal or plant life. Humans depend on fresh air, clean water and uncontaminated food or natural resources for survival and yet the way humans use the environment can have a negative impact on different ecosystems.

Environmental law aims to protect Australian ecosystems and preserve the environment for future generations. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) aims to conserve Australia's biodiversity and protect matters of national environmental significance. Under this Act, any activity (project, development or works) that may have a significant impact on listed matters must be referred to the Commonwealth Department of Environment for assessment and ministerial approval. These nationally significant environmental matters are:

- world heritage properties
- national heritage places
- wetlands listed under the Ramsar Convention
- nationally threatened species and ecological communities
- migratory species

- Commonwealth marine areas and Commonwealth-managed fisheries
- the Great Barrier Reef Marine Park
- nuclear actions and uranium mining
- water resources related to coal seam gas development and large coalmining development.

Minister for the Environment & Heritage v. Greentree (No 3) (2004) FCA 1317

CASE STUDY

A NSW farmer was fined \$450 000 for clearing a declared Ramsar wetland (under the EPBC Act) without ministerial permission. The farmer cleared part of the wetlands on his farm to plant wheat. The Federal Court ordered the farmer to stop farming the area under dispute and to replant it with native trees. The court also stopped the farmer from having domestic or grazing stock on the site for three years.

Tarkine National Coalition Incorporated v. Minister for Sustainability, Environment, Water, Population and Communities [2013] FCA 694

CASE STUDY

The Tarkine National Coalition Incorporated (TNCI), a Tasmanian environmental group, challenged the federal minister's decision under the EPBC Act to allow a new iron ore mine to operate in north-western Tasmania. The minister's approval contained 20 mandatory conditions aimed at reducing the mine's ecological footprint and impact on the local wildlife. The new mine would bring industry and employment to the Tarkine area.

The TNCI claimed the minister had made his decision without proper consideration of Tasmanian Government approved conservation advice relating to the Tasmanian devil. The area is home to a population of Tasmanian devils not affected by the deadly 'devil facial tumour disease'. The TNCI believes that mining in the area would be detrimental to the animal's natural habitat and the long-term survival of the species.

The minister argued that while the documentation used to make his decision did not contain a copy of the approved conservation advice, the advice had been given to him by other means. The court, however, considered this to be irrelevant because the EPBC Act expressly requires the minister to consider the approved conservation advice when making such decisions.

As a consequence of this case, approved conservation advice is now attached to the ministerial briefs used to guide ministerial decisions under the EPBC Act.

The EPBC Act also lists threatened native flora, fauna, marine species and migratory bird species in need of protection from extinction. A permit is required to kill, injure, trade, keep or move a listed species. The Act also makes it illegal to kill or injure cetaceans (whales, dolphins and porpoises) in Australian waters and requires the Australian Government to check that Australian commercial fishing is ecologically sustainable.

In Victoria, biodiversity is protected under the *Flora and Fauna Guarantee Act 1988* (Vic.). This Act requires the Victorian Government to develop a strategy for the conservation of both natural and man-made ecosystems. The strategy aims to protect a range of Victorian ecosystems and environments – namely wetlands, rivers and waterways, alpine and coastal areas, forests, grasslands and the plants and animals living within them. The Act allows for the listing of endangered flora and fauna, which will then require management plans or conservation measures to be put in place to save the animal or plant from extinction.

LEARNING ACTIVITY 15.1

Purpose of environmental law and biodiversity

- 1 What is the purpose of law relating to the environment?
- 2 Explain three environmental issues where governments have enacted laws to minimise the issues' long-term effects and then name an Act of parliament relating to each issue.
- 3 Look back at the list of things that individuals can do to protect the environment and list three things that you could do personally to help to protect the environment. Comment on two things you could do that are not listed.
- 4 What is biodiversity?
- 5 Which Act of parliament aims to protect Australia's biodiversity and how will its provisions protect Australia's ecosystems?
- 6 Look back at the case study *Minister for the Environment & Heritage v. Greentree*. Why was the farmer fined in this case? What other action did the court take?
- 7 Read the case study *Tarkine National Coalition Incorporated v. Minister for Sustainability, Environment, Water Population and Communities*.
 - a Explain the facts and outcomes of this case.
 - b Use this case to explain the federal environment minister's role and responsibility under the EPBC Act.
 - c What long-term effect has occurred as a result of this case?

URBAN AND ENVIRONMENTAL PLANNING

At state level, the *Planning and Environment Act 1987* (Vic.) regulates the use, development and protection of land in Victoria. It provides a 'one-stop shop' for land use and development assessment and approvals in Victoria. The objects of planning established by S4 of this Act include:

- providing for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity
- conserving and enhancing buildings, areas or other places that are of scientific, aesthetic, architectural or historical interest or of other cultural value
- balancing present and future interests of all Victorians
- ensuring that the effects on the environment and the social and economic effects are considered when decisions are made about the use and the development of land.

Other relevant legislation is the *Building Act 1993* (Vic.), which regulates building standards and works, and the *Heritage Act 1995* (Vic.), which may require places of significant cultural value to be preserved.

Planning schemes and permits

In most cases, local government is responsible for developing appropriate **planning schemes** to regulate the use, development and protection of land in their local area. Anyone wanting to use, develop or change how land is used must apply to their local council for a **planning permit**. For large-scale projects and developments, the approval of the Victorian Minister for Planning will be required.

A **planning scheme** restricts how land will be used and development within a local government area. It specifies activities that will require a planning permit. For example, a local council may have areas or zones for residential, business or industrial use. The landowner must not use the land for other purposes without the council's written approval.

The scheme may also contain an **overlay**. The overlay designates that special features within an area are to be protected. For example, an overlay might protect significant trees or heritage buildings. The overlay will require people to gain council permission before they cut down or substantially prune back a significant tree and demolish or renovate a heritage building.

To obtaining a planning permit for a major development or to change how land is used, an applicant may need to obtain specialist advice from building and planning experts, advertise their proposal and consult neighbours or other people affected by their plans. For some proposals, a response from the Environment Protection Authority, Melbourne Water or the federal government (under the EPBC Act) may also be required.

Objections to planning schemes can be made in writing to the responsible authority by people who are affected by the scheme. When a planning permit is granted, affected people are able to appeal against the decision to the Victorian Civil and Administrative Tribunal (VCAT).

Stewart v. Moyne SC [2014] VCAT 360 (2014)

VCAT scaled back a planned residential development in Port Fairy, Victoria. Developers were planning to divide a coastal strip of land at Pea Soup Beach next to the Powling Street wetlands into 32 residential lots.

The Moyne Shire Council had previously referred the project to the federal Minister for the Environment to check that the development's proximity to the wetlands would not require ministerial approval under the EPBC Act. The council then gave approval subject to 32 conditions.

The wetlands are home to a migratory bird, the Latham's snipe. Members of the South Beach Wetland and Landcare Group, with assistance from the Environment Defenders Office, asked VCAT to review the council's planning approval.

VCAT decided to allow the development but reduce its size. Its reasons were twofold: the need to protect the migratory bird's habitat and the need for climate change adaptation. As the site is susceptible to coastal inundation, the developers were told to plan for a possible sea-level rise of 1.2 metres (by the year 2100) instead of the 0.2 metres in their original plans.

CASE STUDY

LEARNING ACTIVITY 15.2

Urban and environmental planning

- 1 What is a planning scheme and what is a planning permit?
- 2 How do planning laws help to protect the environment?
- 3 What would you do if you wanted to object to a planned project or development in your local area?
- 4 Look back at the case study *Stewart v. Moyne SC* and answer the questions.
 - a Why did the members of the South Beach Wetland and Landcare Group object to the proposed development?
 - b What was VCAT's decision in this case?
 - c What two environmental issues influenced VCAT's decision?
 - d What is meant by the term 'climate change adaptation'?

BIOSECURITY SYSTEM

Australia's environmental biosecurity system protects the uniqueness of the Australian environment and Australia's agricultural industry from introduced animals, fungi, parasites, marine pests, insects, weeds and disease. These invasive species can be introduced to the Australian environment accidentally or intentionally; often by human movement and activity. Some introduced species become invasive because the new environment is optimal for reproduction or because they do not have a natural predator. They can infect native species, attack them or compete with them for survival. In the long term, their introduction may destroy ecosystems. Globalisation, with its increase in international travel and trade, makes the introduction of invasive species into Australian ecosystems more likely.

The introduction of marine pests into Australian waters is difficult to control. Marine pests have entered Australian waters attached to hulls of both recreational and commercial vessels. Potential pests may also be in a ship's ballast water. This water is carried to improve the vessel's stability. When the vessel unloads cargo it takes in ballast water and when it is loaded with cargo it discharges this water. Ballast water can therefore contain marine life such as eggs and larvae from across the world.

The northern Pacific starfish is an invasive species from the Asian region. It has no predators in Australian waters and has spread rapidly, consuming large quantities of native shellfish. It can be found in Port Phillip Bay and on the east coast of Tasmania. Australian ports now have ballast management plans to reduce the risk of foreign species being released into Australian waters.

Some animals or plants were introduced at the time of Australia's settlement but have since become pests. Feral animals such as wild rabbits, pigs, camels, cats and horses eat native plants and animals

or degrade natural vegetation through intensive grazing. Ironically, cane toads were released in Queensland to control beetle damage to sugar cane crops but soon grew to pest proportions because they had no natural predators.

Australian quarantine laws reduce the risk of pests and diseases entering Australia, yet there are a number of declared invasive species in Australia that the federal, state and territory governments try to eradicate or control. Invasive species are controlled under the EPBC Act (Cth) and the *Catchment and Land Protection Act 1994* (Vic.). The proposed *Invasive Species Bill 2014* (Vic.) aims to update Victoria's invasive species management legislation.



Figure 15.2

The northern Pacific starfish is an invasive species in Australian waters.

Genetically modified crops

Genetically modified (GM) plants have had their genetic material (DNA) changed to introduce new characteristics or alter existing characteristics. This process is a form of gene technology, also known as genetic engineering. It sometimes involves inserting genetic material into the desired plant from other plants or bacteria.

Some consumers around the world are concerned about the unknown environmental effects of growing GM crops and consuming GM foods. For this reason, the use of GM organisms in Australia is either banned or regulated under strict licence.

Some people are concerned that GM plants (pest and insecticide resistant) may escape the confines of farming properties to the wild environment and become a 'noxious weed' or invasive species in the wild either in their own right or as a new hybrid species. There is also concern that GM crops narrow the world's genetic stock, affecting crop biodiversity.

Despite these concerns, GM crops are used in various parts of the world to produce food for animal or human consumption. **The genetic modification may make crops more resistant to pests, increase crop yields or make fruit last longer, taste better or contain more vitamins.** Examples of GM crops include:

- clover plants that resist plant viruses estimated to cost Australian farmers more than \$100 million a year
- ryegrass plants that provide better feed for livestock as well as reducing hay fever and asthma problems associated with ryegrass pollen
- canola plants that resist certain pesticides; this means producers can use weedkiller sprays without damaging their canola crop
- frost-resistant potato plants
- rice plants with rice grains that contain beta-carotene, which the body then converts into vitamin A
- soybeans containing a herbicide-resistant gene taken from bacteria
- sweet peppers resistant to viruses.

The *Gene Technology Act 2000* (Cth) regulates the use of GM organisms in Australia and establishes the **Office of the Gene Technology Regulator** to oversee developments in this area. It prohibits the use of GM organisms (for research, manufacture, production or import) unless the regulator deems the use low risk or allows the use under strict licence. The gene technology regulator must keep a register of GM organisms approved for use or distribution in Australia.

The *Gene Technology Amendment Act 2007* (Cth) established the Gene Technology Ethics and Community Consultative Committee to provide advice on ethical issues relating to gene technology. This committee is also responsible for community consultation and matters of general concern relating to GM organisms.

In November 2007, Victoria lifted its ban on growing GM canola. Former premier John Brumby decided not to extend the moratorium on growing GM canola and said lifting the ban would make Victorian farmers more internationally competitive. It would also be better for the environment because GM canola requires far less pesticide than traditionally grown canola. Anti-GM activists condemned the decision, saying consumers would face a growing array of food made from GM material and they would be unaware of the fact when they purchased the food.

The Network of Concerned Farmers expressed outrage at the Victorian Government's decision to lift the ban on GM crops. Their main concern was the cost of separating non-GM crops in order to supply markets that are GM sensitive.

All GM foods intended for sale in Australia and New Zealand must undergo a safety evaluation by Food Standards Australia New Zealand (FSANZ). FSANZ will not approve a GM food unless it is safe to eat. Since 2002, food labels must indicate if a product contains GM food or ingredients.

Advantages of GM foods

Genetically modified foods have many potential benefits:

- Pest-resistant crops can be produced more cheaply.
- GM crops may be better for the environment because fewer harmful pesticides are being used, which will reduce soil contamination and toxic water run-off.
- Drought-resistant crops would allow farmers to grow crops in low-rainfall areas.



Figure 15.3
Fruit of the future – genetically modified to be a combination of an apple and an orange

- More-nutritious crops could provide better nutrition in countries that are reliant on single crops such as rice.
- Crops could produce edible vaccines, making it easier to deliver the vaccine to reduce disease in developing countries.
- Crops can be developed to clean up soil pollution.
- Genetically modified crops or foods may last longer or have improved nutritional value.
- Crops can be modified to make food better for consumption; for example, through improved vitamin content or the removal of allergens to reduce allergic reactions to certain foods.

Figure 15.4

Some bananas have been genetically engineered to contain genes that are expected to increase the content of vitamin A, vitamin E or iron in the fruit.



- Governments rigorously test GM food, so it may be safer for consumption than non-GM food that may not be tested.
- Pest- and disease-resistant crops will increase world food production using less land resources.
- Increased food production through GM crops could eliminate world hunger.
- Crops could make their own pesticides within the plant.

Disadvantages of GM foods

Genetically modified foods may cause some problems:

- Insects could become resistant to crops that have been genetically modified to manufacture a pesticide.
- Herbicide-resistant genes could transfer from GM crops to weeds, making weeds resistant to herbicides.
- GM crops could cause allergies.
- Developing and growing GM crops is very costly and could lead to higher prices for consumers.
- The technology is new and the long-term environmental or health effects of growing or eating GM foods are unknown.
- Some GM plants could transfer their altered genes to other plants, which could create environmental problems; for example, when pollen is blown onto other crops.
- If companies that genetically modify plants are able to take out patents over the new plants they create, this gives them considerable power over world food production.
- Companies generally create GM crops to improve company profits rather than solve world hunger problems. For example, some companies develop plants that produce sterile crops, which prevents seed-saving and thus forces farmers to buy new seed every year.

YOU MAY ALREADY BE EATING GM PRODUCTS!

Some food items that contain GM products have been on the supermarket shelves since 2000, when the Food Standards Australia and New Zealand organisation approved the first GM products for sale in Australia. Mostly these items are imported from the United States. Any GM ingredients must be identified on the packet, but foods that are highly processed to the extent that all GM protein and DNA should have been removed do not require GM labelling. Meat products from animals that have been fed GM food also do not need to be labelled.

Some foods may be GM free but may use products derived from animals that were fed GM soy or corn. Some restaurants or fast-food outlets may use oil from GM crops in the cooking process, such as cottonseed oil.

**Figure 15.5**

Perhaps we could have genetically modified apples that are blue.

GM crops and negligence

A farmer who grows GM crops could be sued for negligence if his or her GM seeds spread to a non-GM farmer's crops. For a case of negligence to exist it must be shown that:

- the GM farmer failed to observe a duty of care to manage his or her GM farming activities to reasonably avoid damage to the non-GM farmer
- there has been a breach of duty by the GM farmer
- the breach of duty led to damage to another party.

Farmers growing GM crops have a duty of care to manage their crops to minimise impact on others. A breach of duty could result from failing to adhere to good practice in GM crop cultivation (such as keeping buffer zones between GM crops and plantings of non-GM neighbours).

EXTRACT

WA organic farmer sues childhood friend over GM contamination

WA Today, 10 February 2014

An organic farmer is suing a neighbour for allegedly contaminating his farm with genetically modified canola. Advocates of Steve Marsh claim the case, which began in the WA Supreme Court on Monday, is the first legal matter of its kind in the world.

Mr Marsh is suing his former childhood friend Michael Baxter, claiming that he lost organic certification for more than half his farm after GM canola found its way onto his land from Mr Baxter's adjacent property.

In 2010, Mr Marsh's property Eagle Rest – which was used to farm oats, rye and sheep – was certified organic by the National Association for Sustainable Agriculture Australia (NASAA). The organisation has a zero tolerance for GM material.

Mr Marsh, whose legal costs are being partly funded from a 'crowd-sourced' Internet appeal, claims that swathed GM canola blew 1.5 kilometres inside his boundary fence. He says this prompted NASAA to withdraw its certification for his organic farm, near Kojonup, 250 km south-east of Perth. Mr Marsh's barrister, Richard Niall, told the court this had a devastating effect on Mr Marsh's livelihood.

'[Mr Baxter] failed to contain the genetically modified seeds, and they escaped on the wind onto the Marsh property – thousands of seeds were deposited on Eagle Rest,' Mr Niall said. 'At the time he planted the canola, he knew ... that GM seed would escape. It was plainly foreseeable.' Mr Niall also said Mr Baxter was told in 2008 that any GM seeds escaping next door could cause his neighbour to lose his organic certification.

Mr Baxter says that when he planted the GM canola, just months after it had been approved by the WA government, he observed all regulations regarding buffer zones and notifying neighbours.

He is defending the case with the backing of biotechnology company Monsanto. The legal battle has divided the small farming community, and set the former childhood friends against each other. Supporters of Mr Marsh rallied outside the court before the hearing.

Scott Kinnear, director of the Safe Food Foundation, said Mr Marsh was making a stand for all Australians. 'Steve Marsh's right to grow what he chooses is the same as our right to choose what we eat,' Mr Kinnear said.

The hearing before Justice Kenneth Martin continues.

LEARNING ACTIVITY 15.3

Biosecurity system

- 1 What are invasive species and how can they harm the Australian environment?
- 2 List three ways invasive species have been introduced into the Australian environment.
- 3 Use the Internet to investigate one invasive species in Australia. Note the harm it does to the environment and what action is being taken to control or eradicate it.
- 4 Why are some crops modified genetically? Give an example.
- 5 Why do some people think that GM organisms could become harmful to the environment or people?
- 6 Identify one group that has expressed concerns about GM crops. Give a reason for their concern.
- 7 Identify the Act of parliament that regulates GM crops.
- 8 Look back at the article 'WA organic farmer sues childhood friend over GM contamination' and answer the questions.
 - a Why is Steve Marsh suing Michael Baxter? What has occurred to prompt this case?
 - b If you were Steve Marsh's lawyer what arguments would you put forward?
 - c How might GM contamination affect other Australian farmers?
 - d In May 2014, Justice Kenneth Martin decided in favour of Michael Baxter. Investigate the outcome of this case and explain the reasons for the decision. Was an appeal lodged?

SUSTAINABILITY AND NATURAL RESOURCE MANAGEMENT

Water, land, forests, animals, fish, minerals and gas are all natural resources that humans depend on for survival. These resources provide food, shelter and energy. The depletion or scarcity of such resources has caused people to rethink how they use these resources and to search for possible alternatives.

Over time, people have begun to realise that they need to minimise their impact on the environment and live within the limits of what the environment can provide. Many people do this by using energy-efficient products, conserving water, recycling materials and using renewable resources.

Environmental organisations try to educate people about how human activity uses natural resources and produces waste that is harmful to the environment. The measure of human impact on natural resources is called an ecological footprint. It calculates the amount of land, forest, food, fibre and timber consumed or required to dispose of waste products. According to the World Wide Fund

for Nature's *Living Planet Report 2012*, Australia's ecological footprint is 6.68 global hectares (gha) per person. This is 2.4 times the average global footprint of 2.7 gha per person.

A report by Professor Corey Bradshaw of the University of Adelaide, in 2010, ranked Australia ninth among the world's worst countries for environmental impact. Countries were measured on a range of indicators, including fertiliser use, natural forest loss, habitat conservation, fisheries and other marine captures, water pollution, carbon emissions and threat to species. The 10 countries with the worst global footprint were Brazil, the United States, China, Indonesia, Japan, Mexico, India, Russia, Australia and Peru.

Governments will often encourage sustainable practices through the imposition of water restrictions or waste management limits and through special grants, schemes or education programs, which encourage people to adopt a sustainable approach to living.

Local governments, in particular, encourage people within their municipalities to reduce the amount of waste going to landfills and to recycle materials such as glass, cardboard, paper, plastic, steel and aluminium to reduce the demand for natural resources.

Governments also restrict people's ability to harvest timber in forests and to hunt or fish so that these resources are harvested in a sustainable way and are available for future generations.

HUNTING AND FISHING

Hunting in Victoria is a restricted activity. While people can hunt for deer, duck and quail they can only do so with a licence during open seasons or in specific areas of the state. They are restricted to harvesting specific species and may need to comply with set bag limits. From 2014, the Game Management Authority will be responsible for the administration, licensing, compliance and enforcement of game-hunting activities in Victoria.

Commercial and recreational marine or freshwater fishing is also regulated in Victoria. Anglers between the ages of 18 and 70 require a recreational fishing licence. The Victorian Recreational Fishing Guide specifies the type of fish or crustaceans to be harvested, size and bag limits, the places to fish and the type of equipment and bait allowed.

Sustainable water supply

Water is a necessity of life. Without it animals and plants cannot survive. Humans not only depend on water for drinking, cooking and washing but also for agriculture and manufacture.

Compared to other places on earth, Australia is a dry continent. Australians have begun to acknowledge the importance of water conservation both in terms of its quality and the amount available for consumption. Variable rainfall, drought and an increase in population can dramatically reduce the amount of water available for consumption. Australia's water quality can also be affected by the overuse of water from rivers and the pollutants that drain into them.

The **water footprint** of an individual, business or nation is defined as the total volume of fresh water that is used to produce the goods and services consumed. Australians are among the highest water users in the world. The latest water account from the Australian Bureau of Statistics reports that in 2011–12, Australia used 74 925 gigalitres of water with most water being used for hydroelectricity generation. Industry used 14 303 gigalitres with the agricultural industry being its highest user at 9 418 gigalitres or 20 times the volume of water in Sydney Harbour. Households consumed 1 715 gigalitres. Overall, Australia's water consumption was four per cent higher than the previous year.

The state and territory governments impose water restrictions on individuals, and to a lesser extent, businesses, when water storage levels are low. The scarcity of water in Australia has led to the use of recycled, grey and desalinated water.

Recycled water

Recycled water comes from waste water that has been used in bathrooms, laundries, kitchens and businesses. It has been treated to a high standard so that it is safe to use for **non-drinking** purposes such as fire-fighting, irrigation, gardening and car washing. The Environment Protection Authority and the Victorian Department of Heath regulate the quality of recycled water in Victoria.

Grey water

Water from sinks, showers and laundry constitutes 50–80 per cent of residential waste water. This grey water may be reused for other purposes, especially watering the garden.

To deal with the water shortage problem, some households have installed grey-water diversion systems to redirect non-toilet water away from the sewage system and into the garden. This is legal where a licensed plumber completes the work in consultation with local water authorities and local councils. However, excessive use of grey water, which contains pollutants such as lint, human waste and detergents, can be a health hazard and needs to be managed properly.

Desalinated water

Desalinated water is sea water that has had the salt and minerals removed from it and then been treated to meet Australian drinking water quality standards. The most common desalination process is known as 'reverse osmosis desalination', which is energy intense. It uses high energy to force the sea water through fine membranes that filter out the salt and minerals. Some environmentalists are concerned that desalination plants are harmful to the environment because of increased greenhouse gas emissions and the possible inappropriate disposal of salty waste products.

DID YOU KNOW?

Victoria's desalination plant was built to offset times of drought. It cost \$3.5 billion to build. The Victorian Government entered into partnership with AcquaSure who built and now operates the plant near the town of Wonthaggi. The plant can supply 150 billion litres of drinking water each year. However, it has been in standby mode since it was built due to high rainfall in Victoria's water catchment areas.

Sustainable timber harvesting

Humans depend on wood as a resource. It has long been used as a fuel source and for shelter and transportation, and is often harvested from forests. Ideally, the rate at which forest trees are logged should not exceed the rate at which they grow. Much of the felled timber is used for furniture, building materials, flooring and paper products. Forest sustainability needs to be managed so that felled trees are replaced with younger trees. This will maintain the forest ecosystem and create a useable resource for the future.

To achieve this level of sustainability the Victorian Government established VicForests in 2004. This government-run company is responsible for cutting and selling native timber from state forests. It operates under a Sustainable Forest Management System, which requires compliance with Victoria's forest management plans and the *Code of Practice for Timber Production 2007*.

However, environment groups believe that forests are more than just a source of timber; they are home to native animals and plants in need of protection and clean waterways that may be polluted by the timber production process.



Figure 15.6
A large old-growth tree

LEARNING ACTIVITY 15.4

Sustainability and natural resource management

- 1 What does sustainability mean in environmental terms?
- 2 What sustainable practices have people begun to adopt to conserve Australia's freshwater supply?
- 3 Explain the environmental advantages and disadvantages of a desalination plant.
- 4 Explain the advantages and disadvantages of timber harvesting in forest areas.
- 5 To what extent do Victorian hunting and fishing laws strike a balance between people's desire for recreation or food and the sustainability of harvested species?

ENVIRONMENTAL ISSUE – LEADBEATER'S POSSUM

In 2011, the Victorian Supreme Court stopped logging of old-growth forests at Sylvia Creek in Victoria's Central Highlands because it threatened the habitat of the endangered Leadbeater's possum. This possum is only found in Victoria, was thought to be extinct until rediscovered in a forest area near Marysville in 1961, and is now listed as an endangered species under the EPBC Act and the *Flora and Fauna Guarantee Act 1988* (Vic.). It is also one of Victoria's faunal emblems.

Conservationists believe that much of the possum's habitat in the Central Highlands was burnt out by the Black Saturday bushfires in 2009 and that current logging activity in the area threatens the possum's survival. VicForests agrees the bushfires did burn out parts of the possum's natural habitat, but argues its logging activity has minimal impact on Leadbeater's possum habitats.

VicForests says it either excludes these habitats from the areas selected for logging (coupes) or creates a buffer zone around areas where the possum has been sighted. According to VicForests, 30 000 hectares of forest in the Victorian Central Highlands have been set aside to protect this possum's habitat and, before any logging activity, staff survey the area to identify the possible impact on native species such as the Leadbeater's possum.

Conservationists argue that VicForests' surveys are incomplete because the Leadbeater's possum is a nocturnal animal and VicForests conducts its surveys during the day when the possum is inactive. They also argue that buffer zones around known possum habitats should be at least one kilometre rather than the current 100 metres.



Figure 15.7
Protesters occupying
the Little Red Toolangi
Treehouse

Environmentalists engaged in a number of peaceful protests to highlight the possum's plight. Protests included the occupation of the 'Little Red Toolangi Treehouse', built 25 metres off the ground in an old tree in the Toolangi State Forest. The occupation of the treehouse ceased when the Department of Environment and Primary Industries (DEPI) gained an order from the Magistrates' Court for its removal.

At Mount St Leonard, the 'Knitting Nannas of Toolangi' stopped logging works by peacefully sitting in the forest and knitting. Police later escorted the protesters from the forest. DEPI took the protesters to court. They were placed on a diversion order and required to pay a \$50 donation to Landcare.

MyEnvironment v. VicForests [2013] VSCA 356

Conservationists asked the Supreme Court to issue an injunction stopping VicForests from logging in three coupes in the Toolangi State Forest in the Victorian Central Highlands. The conservationists believe the forest's mix of large living and dead hollow trees with dense undergrowth is an ideal habitat for the Leadbeater's possum and should not be logged.

VicForests stopped its logging activity in the coupe until the case was determined. It argued its management plans complied with all legislative requirements including the Leadbeater's Possum Action Statement.

The Leadbeater's Possum Action Statement provides a zoning system for the protection of the possum's habitat. Zone 1A areas were to be conserved for the Leadbeater's possum and other wildlife. Zone 1A areas comprise 'living old trees (over 120 years old) containing hollows and regrowth forests with at least 12 live hollow-bearing trees per three hectares'.

The court concluded that Victorian legislative provisions aim to strike a balance between the need to protect the Leadbeater's possum and the need to harvest timber from state forests. It ruled that the logging coupes under dispute did not contain Zone 1A habitat and ordered MyEnvironment to pay costs.

CASE STUDY

To protect the Leadbeater's possum, conservationists and the Royal Society of Victoria, a prominent science organisation, want logging practices stopped in old-growth forests and for the Central Highland forest to be declared a national park.

In 2013, the Victorian Government established the Leadbeater's Possum Advisory Group to help find a solution to the issue. The advisory group was co-convened by Zoos Victoria and the Victorian Association of Forest Industries and included representatives from Parks Victoria, the Leadbeater's Possum Recovery Team and VicForests. The group has been criticised because its representatives are closely linked to either the timber industry or the government.

In 2014, the advisory group presented 13 recommendations, which the Victorian government agreed to implement. Some of the recommendations are:

- the creation of a 200-metre timber harvest exclusion zone around known possum colonies
- the installation of nest boxes
- the use of retention harvesting rather than clear-felling in mountain ash forests in the possum's forest range
- an amendment to the definition of the Leadbeater's possum habitat Zone 1A to '10 live, mature, hollow-bearing trees per three hectares'
- a two-year delay in harvesting from areas likely to be possum habitats so that proper surveys can be undertaken
- the development of an active fire management plan in known possum habitats.

PERMIT WHALING CATCHES										
NATION	AREA	FIN	SPERM	HUMPBAC	SEI	BRYDE'S	MINKE	GRAY	BOWHEAD	TOTAL
Japan	Coastal	0	0	0	0	0	110	0	0	110
Japan	NW Pacific	0	3	0	100	34	74	0	0	211
Japan	Antarctic	0	0	0	0	0	103	0	0	103
TOTAL										424
COMMERCIAL WHALING CATCHES UNDER OBJECTION TO THE IWC BAN										
NATION	AREA	FIN	SPERM	HUMPBAC	SEI	BRYDE'S	MINKE	GRAY	BOWHEAD	TOTAL
Norway	NE Atlantic	0	0	0	0	0	464	0	0	464
Iceland	Iceland	0	0	0	0	0	52	0	0	52
TOTAL										516

Source: International Whaling Commission

Humane Society International Inc v. Kyodo Senpaku Kaisha Ltd [2008] FCA 3

The Federal Court of Australia issued an injunction against a Japanese company involved in the Japanese Whaling Research Program in Antarctic waters. The court ruled that the whaling activity was illegal because it occurred in Australian waters. The EPBC Act declares Australian waters a whale sanctuary.

Australia claims exclusive rights over waters extending 200 nautical miles from its coastline including waters around the Australian Antarctic Territory. As Japan does not recognise Australia's claim over Antarctic waters, the company argued that its whaling vessels had not entered Australian waters but were on the high seas.

**CASE
STUDY**

Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) 2014 International Court of Justice

In 2010, Australia (supported by New Zealand) began legal proceedings in the International Court of Justice against Japan. Australia argued that the large-scale whaling program under the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) was excessive for its stated scientific purpose.

The court ruled the special permits issued by Japan in connection with JARPA II did not comply with Article VIII of the International Convention for the Regulation of Whaling and ordered Japan to revoke existing permits and refrain from granting further permits for the JARPA II program. Both nations agreed to abide by the court's decision, which cannot be appealed. This judgment does not stop Japanese whaling activities in its own waters or in the North Pacific Ocean.

**CASE
STUDY**

ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this task.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Leadbeater's possum

- 1 Briefly explain why the protection of the Leadbeater's possum is an issue. (2 marks)
- 2 Look back at the case study *MyEnvironment v. VicForest* and answer the questions.
 - a What is an injunction? (1 mark)
 - b What is a coupe? (1 mark)
 - c What was this dispute about? (2 marks)
 - d What reasons did the court give for its decision? (1 mark)
 - e What are costs? What impact might these costs have on MyEnvironment? (2 marks)
- 3 Explain the actions conservationists have taken to bring the issue of the Leadbeater's possum to the government's attention. (2 marks)
- 4 What was the government's reaction to the conservationists' actions? (2 marks)
- 5 Why did conservationists criticise the work of the Leadbeater's possum advisory group? (1 mark)
- 6 To what extent will the advisory group's recommendations protect the Leadbeater's possum? Do you think conservationists will support these recommendations? (3 marks)

Whale conservation

- 7 Explain the function of the International Convention for the Regulation of Whaling. (2 marks)
- 8 Which countries engage in whale harvesting and for what purpose? (3 marks)
- 9 Why do conservation groups criticise Japan's scientific whaling program? (2 marks)
- 10 Look back at the 2012 whale catch statistics in table 15.2. To what extent do the statistics support the conservationists' criticism of Japan's whaling program? (2 marks)
- 11 What action did the Sea Shepherd Conservation Society take to make their objection to the Japanese whaling program known? (2 marks)
- 12 Use the Internet to research other anti-whaling tactics and campaigns by the Sea Shepherd Conservation Society. To what extent do you think the Sea Shepherd's actions are fair or justified? (3 marks)
- 13 Read the case study *Humane Society International Inc v. Kyodo Senpaku kaisha Ltd.* What was the outcome of this case? (2 marks)
- 14 Which Act of parliament created the Australian whale sanctuary? Where is the sanctuary located? (2 marks)
- 15 Read the case study *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*. Why did Australia commence legal proceedings in the International Court of Justice against Japan and what was the outcome of this case? (3 marks)
- 16 To what extent will this judgment stop Japan's whaling program? (2 marks)

(Total 40 marks)

CLIMATE CHANGE

The earth's troposphere (lower atmosphere) has a blanket of natural greenhouse gases, which warms the earth. This layer of gas traps some of the heat from the sun's rays radiating off the earth's surface and prevents much of the heat escaping into space. This phenomenon is known as the **greenhouse effect**. Without it, the earth's temperature would be much colder and would not sustain life as we know it.

Over time, human activity has increased the amount of carbon dioxide, a major greenhouse gas, in the lower atmosphere. This increase in greenhouse gases absorbs and traps more heat and results in global warming and climate change because weather patterns are affected. Significantly changed weather patterns can potentially threaten natural ecosystems and hence the way we live on this planet.

Carbon emissions and greenhouse gases can be released by human activity such as burning fossil fuels (coal, wood, oil, gas), the use of aerosols or chlorofluorocarbons (now almost phased out) and the rotting of animal and vegetable material. The clearing of forests also has an effect on the amount of carbon in the atmosphere. Plants and trees remove and store carbon dioxide from the air and release oxygen through photosynthesis as they grow, offsetting the effect of carbon emissions.

To educate the public, environmentalists ask people to examine their lifestyle and reduce their **carbon footprint**; that is, the amount of greenhouse gases that a person produces through their daily activity. Using energy-efficient products, green energy, fuel-efficient cars and public transport can help to reduce a household's carbon footprint because less fossil fuel is used.

Research by the world's scientists, including the international Intergovernmental Panel on Climate Change (IPCC), suggests that:

- over the past 100 years, the earth's surface temperature has risen by about 0.7 °C on average
- polar ice caps are melting and sea levels are rising – by the year 2100, sea levels could have risen by 18–59 centimetres as oceans expand and glaciers and ice sheets melt
- weather patterns are changing, with more extreme variations resulting in severe droughts, heatwaves, bushfires, floods and storms
- plant distribution, animal habitats and human health are being affected as climate patterns shift
- the warmest year on record in Australia was 2013 – mean temperatures for that year were 1.2 degrees above the 1961–90 average. The hottest month on record was May 2014.

Government response to climate change

As a signatory to the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, Australia agreed to monitor and report on its greenhouse gas emissions, contribute to research into the problem of climate change and educate the public about the probable effects of climate change.

The **Kyoto Protocol** was negotiated in Kyoto, Japan, in 1997. The protocol asked developed nations to reduce their individual greenhouse gas emissions by five per cent or more (from 1990 levels) by 2012. While some nations agreed to reduce their emissions under the protocol, it did not stop developing countries from increasing their greenhouse gas emissions, and some of the world's biggest creators of emissions, such as the United States, did not sign the protocol.

In April 2010, the then prime minister Kevin Rudd announced that there would be a delay in the introduction of the **carbon pollution reduction scheme** or emissions trading scheme until the end of 2012, when the Kyoto agreement expired.

The next UNFCCC conference will be held in November 2015. The conference objective is to achieve a legally binding and universal agreement on climate from all the nations of the world.

In 2012, under the Gillard (Labor) Government, a carbon price mechanism was established. This required Australia's biggest emitters of carbon pollution to pay a set fee (carbon tax) for each tonne of carbon pollution their operations created, in preparation for the introduction of an emissions trading scheme. The emissions trading scheme would see the government cap carbon emissions and release permits into the market. These permits would allow liable companies (the big emitters) to release amounts of carbon pollution into the atmosphere equal to the permits held. Companies without sufficient permits would either reduce their emissions, purchase permits from other companies or purchase carbon credits earned from sustainable farming practices.



Figure 15.8
Carbon emissions

In 2013, the Abbott (Coalition) Government announced it would repeal the carbon tax and emissions trading scheme and replace it with its Direct Action Plan. Under the plan, the government aimed to reduce Australia's greenhouse gas emissions by five per cent (from 2000 levels) by 2020. A core component of the plan was an emissions reduction fund providing low-cost emission abatement projects to promote the use of clean energy, renewable energy and solar energy. Funds will also be provided to establish a National Climate Change Adaptation Centre to help communities understand and develop practical solutions to the long-term impact of climate change.

After July 2014, when the new senators took their seats in the Senate, the Palmer United Party held the balance of power in the Senate. Following a discussion with Al Gore, a leading international environmentalist, Clive Palmer, the leader of the Palmer United Party, decided to ensure the emissions trading scheme would remain in place (at zero cost until other countries joined the scheme) and to retain the 20 per cent target to reduce greenhouse gas emissions. He would also support the renewable energy target and the continuation of the Clean Energy Finance Corporation and the Climate Change Authority. Palmer agreed he would support the scrapping of the carbon tax but did not intend to support the Direct Action Plan. The carbon tax was repealed in 2014.

The Victorian Parliament passed the *Climate Change Act 2010* (Vic.). This Act aims to reduce greenhouse gas emissions, particularly emissions from brown coal-fired electricity generators and empowers the Environment Protection Authority (EPA) to regulate greenhouse gas emissions in Victoria. The Act also requires the development of statewide adaptation plans to manage future risks related to climate change, such as floods, drought, bushfires and the threat of rising sea levels.

WHAT IS RENEWABLE ENERGY?

Renewable energy or 'green energy' comes from easily replaceable natural resources. It was developed as an alternative to gas, oil and coal, which are finite or not easily replenished. The generation of electricity using renewable resources is often referred to as 'clean' energy as it produces little or no carbon emissions. There are three main sources of renewable energies in Australia:

- **solar energy** – The heat from the sun's rays is captured through photovoltaic (solar) cells, which convert the sun's heat into electricity. Small solar cells are embedded in household items such as calculators or garden lights. Much more powerful solar cells are installed on rooftops so the electricity they generate can be used for household or business purposes, or exported to the main electricity grid.
- **wind energy** – The force of the wind is harnessed and converted into energy using large fan-like structures called wind turbines. Wind farms, consisting of many wind turbines, generate enough electricity to sell to electricity companies.
- **bioenergy** – Organic materials are used to generate alternative sources of heat, gas and fuel. For example, the biofuel additive ethanol is produced from sugar cane, wheat and corn crops, while biodiesel is produced from waste animal fat and oil-bearing crops. Biogases, such as methane, can be extracted from waste landfills and sewerage plants.

Dual Gas project

In 2011, the Environment Protection Authority (EPA) gave its approval for Dual Gas Pty Ltd to construct a 300-megawatt electricity plant that would generate electricity through a combination of 'syngas' (derived from brown coal) and natural gas.

The new plant would have produced electricity with about 30 per cent improvement on current greenhouse gas emissions from coal-fired power stations. Supporters of the new technology see the proposal as 'part of the solution' in responding to climate change, and as part of the transition to a cleaner energy future.

Both the company and environmental groups challenged the decision in the Victorian Civil and Administrative Tribunal (VCAT). The company, with the support of the local council, had wanted to build a 600-megawatt plant in the Latrobe Valley. Environmental groups wanted the project stopped because it did not reflect best practice in sustainable energy production as it continues to contribute to greenhouse gas emissions through the use of coal.

In 2012, VCAT dismissed the environmentalists' objections about inappropriate greenhouse gas emission levels and gave permission for Dual Gas to construct its 600-megawatt facility but only after the closure of another coal-fired power plant in Victoria. This would lead to a net reduction in greenhouse gas emissions.

The company was forced to put the project on hold because the closure of a power plant in Victoria could not happen without government approval and funding.

CASE STUDY

DID YOU KNOW?

Nuclear power stations

- Over 400 nuclear power plants operate in more than 30 countries.
- The USA, France, Japan and Russia rely heavily on nuclear power for the generation of electricity.
- Nuclear power plants do not create carbon emissions and are considered by some to be a clean energy source.

- The use of nuclear power plants creates other environmental issues related to uranium mining, the storage of radioactive waste and the decommissioning of old power plants.
- Three major incidents at Three Mile Island (USA) in 1979, Chernobyl (Russia) in 1986 and Fukushima (Japan) in 2011, released radioactive material into the environment, which saw townships declared unsafe and their populations evacuated. In the case of Chernobyl and Fukushima, the areas are still considered unsafe.

Greenhouse gases and ozone depletion

Some gases, such as chlorofluorocarbons (containing chlorine, fluorine and carbon) and halons (containing bromine and iodine), are harmful to the environment, particularly if they enter a part of the upper atmosphere known as the stratosphere.

These chemical compounds, also known as ozone-depleting substances (ODSs), do not break down easily. Once released, they can slowly make their way into the stratosphere where they cause a chemical reaction that depletes the ozone layer. The ozone layer filters the sun's ultraviolet rays. Overexposure to ultraviolet radiation is injurious to animals and plants and is linked to skin cancer and eye damage in humans. Ozone depletion is greatest in the Antarctic region because the polar area's colder temperatures and special weather conditions intensify the chemical reaction caused when ODSs enter the stratosphere.

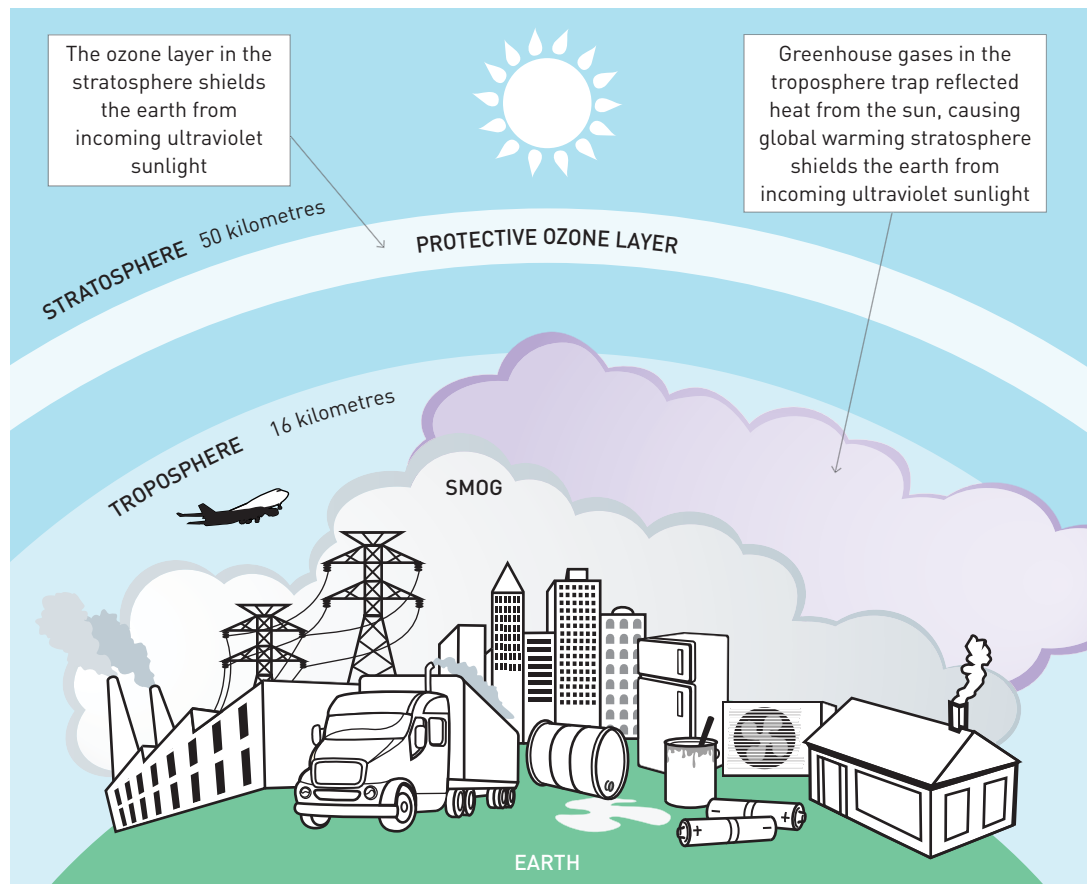


Figure 15.9
Man-made greenhouse gases and carbon emissions are harmful to the earth's atmosphere.

The universally ratified Montreal Protocol on Substances that Deplete the Ozone Layer (1987) is an international agreement that phases out the use of ODSs across the world. These ODSs are used in the manufacture of refrigerators, air-conditioning systems, aerosol cans, fire extinguishers and foam. The protocol aims to phase out the use of most ODSs.

The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) bans the manufacture and import of ODSs and phases out their use in Australia. The Act also regulates the use of synthetic gases used as replacements. While these alternatives may not harm the ozone layer, their release into the atmosphere may add to the greenhouse effect, so their use needs to be controlled.

LEARNING ACTIVITY 15.5

Climate change

- 1 What is the greenhouse effect?
- 2 What types of human activity create man-made greenhouse gases?
- 3 How do man-made greenhouse gases contribute to global warming?
- 4 What types of climate change are attributed to global warming?
- 5 What is a carbon footprint?
- 6 How did the Kyoto Protocol try to minimise global warming?
- 7 To what extent do you think the Kyoto Protocol was a success?
- 8 What is Australia doing to reduce the impact of global warming?
- 9 Explain two types of renewable energy.
- 10 Why is renewable energy called 'clean' energy?
- 11 Look back at the case study 'Dual Gas project' and answer the questions.
 - a What was the Dual Gas project?
 - b Why did proponents of the project think it would help the environment?
 - c Why did some people oppose the project?
- 12 What are ozone-depleting gases?
- 13 What is the purpose of the earth's ozone layer and why is its depletion hazardous to the environment and people's health?
- 14 What is the function of the earth's natural greenhouse gases in the troposphere?
- 15 What has been the response of Australian governments to the issue of ozone depletion?

POLLUTION

The Victorian Environment Protection Authority (EPA) investigates cases involving land, air, water or noise pollution and is empowered under the *Environment Protection Act 1970* (Vic.) to prosecute any person or company responsible for polluting the environment. The EPA monitors pollution levels in Victoria, assists the government to formulate environment policy and educates the public about environmental issues.

Types of pollution

Air pollution

Air pollution occurs when the air contains odours, fumes or gases in sufficient quantities to be harmful to the health of humans or animals, or harmful to plants and materials. It can be caused by a build-up of smoke and other emissions from fires, cars, trucks and factories and so on. Long-term exposure can cause respiratory and other health issues. The EPA has air quality monitoring stations across the state, which allows it to issue periodic air quality bulletins.

Land pollution

Land can be polluted by discarded waste (litter or rubbish) and chemical compounds from industrial activity or an accidental spill that saturates the soil with contaminants such as pesticides, petroleum and lead compounds.

Hazardous waste is strictly regulated in Australia and comes in both solid and liquid forms. Hazardous waste is any material that is poisonous, toxic, radioactive, flammable, explosive or infectious. The EPA regulates the disposal of industrial waste. This waste can contain chemicals (acids, oils or paints), metals (arsenic, lead or mercury) or airborne dust (asbestos and ceramic-based fibres). This hazardous material can come from a range of industries including the agricultural, manufacturing, construction, automotive, medical and pharmaceutical industries.

Some common household items can be classified as hazardous waste and should not be discharged into household drains or stormwater systems. Most local councils will assist residents with proper disposal of materials such as:

- household paint
- garden chemicals and pesticides
- motor oil and coolants
- pesticides
- car batteries
- fluorescent light fittings
- pool chemicals.

CASE STUDY

Ecuador v. Chevron Corp

This case began in 2001 when the people of the El Oriente region in Ecuador sued the Chevron–Texaco oil company because it allegedly discharged toxic waste into waterways and did not clean up major oil spills from its Ecuadorian oil operations. The residents believe the pollution has caused crop failures, birth defects and an increase in cancer-related deaths.

US Environment group Amazon Watch has dubbed the issue ‘Chevron’s Chernobyl’. Amazon Watch says Chevron is using vast financial and legal resources to avoid responsibility for the harm its subsidiary company caused to the tribal communities living in Ecuador’s Amazon rainforest. The issue has also drawn the attention of human rights organisations.

The Chevron energy company denies liability, arguing it acquired its Texaco subsidiary in 2001, nine years after Texaco stopped its Ecuadorian operations. Chevron maintains that Texaco spent US\$40 million on a remedial action plan when it sold its operations to Petroecuador – Ecuador’s state-run oil company. The remediation plan was ratified by representatives of the Ecuadorian government and Petroecuador. Chevron believes it has fully remedied its share of environmental impacts arising from oil production in Ecuador and claims any environmental damage in the area is due to the mismanagement of current owners.

The company has used the Ecuadorian, US and international courts to fight this case. In 2011, an Ecuadorian court ordered the company to pay US\$19 billion for the environmental damage done in Ecuador’s Amazon rainforest. In 2013, the amount was reduced to US\$9.3 billion on appeal. Chevron refused to pay the compensation, claiming the judgment was influenced by bribery and unethical behaviour on the part of lawyers, judges and the Ecuadorian government.

The plaintiffs have found it difficult to enforce the decision because Chevron has no assets in Ecuador. They have asked courts in the United States, Canada, Argentina and Brazil (where Chevron has subsidiary companies or assets) to enforce the decision.

In 2014, a US District Court judge agreed that the plaintiff's legal team, headed by US lawyer Steven Donziger, used unethical means to win the case, effectively stopping the judgment from being enforced in the United States. The judge said his decision was mostly about whether the Ecuadorian court's decision was procured by corrupt means and not about whether the initial cause was just. Chevron asked the court to order Donziger to pay US\$32 million in legal costs. The legal team denies any wrongdoing and will appeal this decision. The US court's decision does not stop courts in other countries from enforcing the decision.

This environmental dispute has spanned over a decade and indications are that further legal proceedings will follow.

EXTRACT

Contaminated sites under scrutiny

Jason Dowling, *The Age*, 13 June 2011

Solving Melbourne's housing shortage by building in old industrial areas is under threat with two separate high-level investigations into the dangers caused by contaminated waste.

The Ombudsman has ordered the Environment Protection Authority to conduct soil tests at 20 locations in the Cairnlea housing estate in Melbourne's west – a former munitions factory site that now hosts thousands of homes. Victoria's Auditor-General will also investigate 'how effectively the Environment Protection Authority and planning authorities regulate contaminated sites to mitigate the potential health impacts on the community'.

'Contaminated sites are increasingly being rezoned and redeveloped for use by the community, particularly residential developments,' the Auditor-General's office said in its yearly report. 'As the extent of the contamination of these sites and their location is often unknown ... there are potential health impacts to those exposed to the sites, or water or soil affected by leaked or escaping chemicals.'

The EPA is analysing the completed soil tests at Cairnlea and will report to the Ombudsman by July.

In recent years a string of developments on or near former waste or industrial sites have been affected by contamination, including leaking methane gas from a former landfill site in Cranbourne and soil contamination from a Spotless dry-cleaning operation in Barkly Street, Brunswick, that led to the demolition of a new apartment block.

The Brimbank Council has begun testing the extent of contamination in groundwater and methane gas emissions at two former landfill sites at Sunshine Energy Park in Albion and Carrington Drive Reserve in St Albans. The council said preliminary tests at the two sites had revealed no imminent risk, despite groundwater pollution.

Greens Western Metropolitan MP Colleen Hartland said there had to be stricter rules for the clean-up of former industrial and landfill sites. She said sites should not only be safe to live on today, but in 20 years' time.

Master Builders Association executive director Brian Welch says 'contaminated soil is a huge problem for builders, particularly trying to build on sites formerly used for industrial purposes'.

'The cost of taking the soil to an appropriate containment site is becoming extremely expensive – so much so that it is bringing some projects' viability into question,' he said.

Planning Minister Matthew Guy said 'development will not take place on sites like Fishermans Bend until the appropriate remediation works have taken place'.

Water pollution

The release of chemicals or waste into rivers, streams or the sea can have a detrimental impact on human, plant and animal life. Pollutants can enter these waterways as run-off from agricultural land or from drainage systems in cities. Accidental oil spills at sea can spoil beaches and kill marine life. During the summer months, the EPA will provide regular updates about the water quality of the Yarra River and Victorian beaches. At other times, alerts about water pollution, dead fish and algae levels in these waters are published on the EPA website.

CASE STUDY

Contamination of fish

A drain at the bottom of a farmyard collected all the washings and muck from the yard. It was then supposed to drain into a slurry store. There was a break in the drain, and the yard water and washings were able to seep into a canal that was approximately 100 metres from the farm, causing the death of fish and damage to insects and plants.

The contaminated water from the canal then washed into the breeding ponds of a local fish farm. Extensive damage was done to the fish stock. The fish breeder sued the farmer for compensation for the death of his fish, claiming that the farmer had a duty to check the drain for possible leaks. It was reasonable to assume that any break in the drain could lead to damage on neighbouring properties.

Noise pollution

It is illegal to continue to emit unreasonable or excessive noise in Victoria. What is considered unreasonable will depend on the circumstances. The police deal with complaints about residential noise, noisy private parties or entertainment venues. Industrial noise and noisy vehicles can be reported to the EPA. Local councils can also deal with some noise complaints; for example, noisy animals or use of noisy equipment in small business and residential premises.

DID YOU KNOW?

Light pollution is caused by excessive illumination at night. Night lighting is increasingly being used to deter crime, improve public safety and highlight special features on public buildings or residential premises. However, the glare from these lights can be annoying and a private nuisance if it reduces another person's enjoyment of their land or causes physical or mental harm such as sleep deprivation. Environmentalists consider excessive use of night lights harmful to nocturnal wildlife and a waste of energy, while astrologers are unhappy because it obscures the night sky.



Figure 15.10 Street light trespassing into windows

Pollution and the torts of nuisance and negligence

Pollution that impacts significantly on an individual or a group of people may be actionable in civil law. A person or a group of people affected by a nuisance or negligence may seek compensation for their hurt or loss and/or a court order (an injunction) to stop the annoying or harmful behaviour from continuing.

Public nuisance

A person or group of people affected by a public nuisance can use the civil law to sue the person or people who created the nuisance. A **public nuisance** was defined by British judge Lord Denning as ‘a nuisance so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large’. To be considered a public nuisance, an act or omission must, therefore, interfere with the comfort or convenience of a number of people.

When deciding a case of nuisance, a court will consider:

- the frequency and extent of the interference
- the defendant’s reasons for using the land the way they are
- the ordinary use of land in the area
- the difficulty the defendant would face in taking precautions to prevent the nuisance.

Private nuisance

People whose enjoyment of their private property is interfered with by another can also sue for damages. A **private nuisance** refers to the violation of the right of a person to ‘reasonable convenience and comfort in life’. To succeed in a private nuisance claim it is necessary to establish that the act or omission:

- created an inconvenience
- was unreasonable
- resulted in actual loss or harm.

NOISE AND SMELLS

Neighbours may create a private nuisance when noise, smells, smoke, water or other matter emanating from their property unreasonably interferes with their neighbours’ enjoyment of their land. For example, a person may keep noisy geese in their backyard. Their neighbours may seek a court order to have the geese removed or they may seek compensation for any loss or injury sustained.

Whether noise levels are considered excessive or unreasonable will often depend on the location of the property, and the tolerance of people living in the vicinity. Complaints about neighbourhood noise often relate to the use of lawnmowers, air conditioners, alarms or pools. Noise from parties, children and animals can also irritate neighbours and escalate into a dispute.

Working from home

Joan starts a small clothing business from home. She converts her three-car garage into a small clothing factory. As her business expands, she employs other people to run her cutting and sewing machines during the day. Neighbours complain about the noise from the machines and the increase in employee and delivery traffic, which often blocks neighbour’s driveways. As Joan’s

CASE STUDY

business grows, her husband buys three guard dogs to protect the stock stored in the garage, they bark constantly at night. Neighbours complain about the large quantities of manufacturing waste (material offcuts, cardboard, old machinery) that Joan piles up outside the property on a monthly basis, creating an environmental eyesore.

The law of nuisance broadly concerns the protection of a person's land from damage or from activities that interfere with the enjoyment of that land. Nuisance can involve, for example, fumes emitted from an industrial process or noxious weeds spreading from one property to another.

It is not necessary to show that the interference with the land was direct or intentional, as long as the interference is a reasonably foreseeable consequence of the defendant's actions. For example, if it is foreseeable that the defendant's use of pesticides could interfere with the reasonable use or enjoyment of the plaintiff's land, the defendant will be liable for the tort of nuisance if they do not take action to prevent wind or water transporting pesticides off their land and onto the plaintiff's land.

CASE STUDY

Friesen et al. v. Forest Protection Limited

In the case of *Friesen et al. v. Forest Protection Limited* (1978), 22 N.B.R. (2d) 146 (Q.B.), it was found that spraying insecticides on a person's land without consent constituted a nuisance. Dr Abram Friesen and his wife were awarded \$1328 plus costs.

In May 1976, Dr and Mrs Friesen were picking plants near a creek on their farm when planes flew directly overhead, emitting a cloud of spray that descended on them, burning their cheeks, causing their eyes to water, and making them cough. The Friesens, organic farmers who shunned pesticides, were furious. They knew that as part of their insect control program, Forest Protection Limited was spraying a pesticide formulation containing fenitrothion, a highly toxic organophosphate insecticide. Just one week earlier, Dr Friesen had asked the company not to spray his property.

Following the incident, the Friesens suffered a variety of physical ailments, which they attributed to fenitrothion poisoning. Their 12-year-old son suffered asthma attacks. The Friesens also found several hundred dead bees near their hives.

The Friesens sued Forest Protection Limited for damages under trespass and nuisance. Mr Justice Dickson determined that Forest Protection Limited had trespassed by throwing a foreign substance on the property of another. They also found that this action had disturbed the Friesens' enjoyment of their property.

Justice Dickson also found Forest Protection Limited had created a nuisance.

The law of nuisance is of limited use in protecting the environment because it only protects an individual's interest in land, and many of the situations are now dealt with more comprehensively by legislation dealing with pollution and other environmental harms.

The law of negligence, rather than the tort of nuisance, is better suited to situations where a person's carelessness created an unreasonable risk that has caused injury, harm or loss to another person.

Negligence

The law of negligence could apply in some situations where there has been environmental damage. For example, an accidental chemical spill or the deliberate disposal of chemical waste into water or onto land can cause contamination, health issues and financial loss for people who depend on the land or water as a natural resource.

According to insurance companies, in the future people may sue towns for negligence because they have not done enough to prepare for floods and storms.

Negligence has been defined as a **failure to take reasonable care**. Individuals and companies are obliged to take reasonable care, where it is reasonably **foreseeable** that other people could be harmed by their actions or omissions. Companies are vicariously liable for the actions of their workers.

When bringing an action for negligence, it must be proved that:

- the plaintiff was owed a **duty of care**
- the duty of care was **breached** – the defendant did not act as a reasonable person would have done in similar circumstances and therefore placed others at risk of loss or injury
- the breach of the duty of care caused loss or harm (**causation**)
- **harm or loss** was the result of the breach of duty of care.

If all of the above can be proved, the wronged person can claim compensation (damages).

LEARNING ACTIVITY 15.6

Pollution

- 1 Explain the different types of pollution.
- 2 Who is responsible for controlling pollution levels in Victoria?
- 3 Give two arguments for and two arguments against the regulation of light pollution.
- 4 What is hazardous industrial waste and why is its disposal strictly controlled?
- 5 Give two examples of hazardous household waste.
- 6 Look back at the case study *Ecuador v. Chevron Corp* and answer the questions.
 - a Why did the Ecuadorian court order the Chevron Corporation to pay \$9.3 billion in compensation?
 - b What are Chevron's reasons for relentlessly fighting this case?
 - c Do you think Chevron's refusal to pay the compensation as ordered appropriate in the circumstances? Give reasons.
 - d What have the Ecuadorian plaintiffs tried to do to enforce the compensation order?
- 7 Look back at the article 'Contaminated sites under scrutiny' and answer the questions.
 - a What are contaminated sites and why are they becoming more prevalent?
 - b What was the role of the Ombudsman in relation to new housing sites mentioned in the article?
 - c What is the impact of land contamination for people who live on or near these sites?
 - d Explain the action taken to try to solve the problem.
- 8 Briefly explain the tort of nuisance and the difference between public nuisance and private nuisance.
- 9 How might the tort of nuisance provide a remedy in cases involving significant pollution issues?
- 10 Look back at the case study 'Working from home' and answer the questions.
 - a What is occurring in this situation that constitutes a public nuisance and a private nuisance?
 - b How are the following laws applicable in this case?
 - i local planning scheme and/or other local laws
 - ii the *Environment Protection Act 1970* (Vic.).
- 11 Look back at the case study *Friesen et al. v. Forest Protection Limited* and answer the questions.
 - a What occurred in this case? What injury was suffered?
 - b Explain how the tort of nuisance applies in this case.
- 12 In what circumstances may someone sue for negligence in relation to pollution?

Methods and institutions for resolving disputes

The Environment Protection Authority

In Victoria, the Environment Protection Authority (EPA) has been established to protect, care for and improve our environment. The EPA is responsible for preventing or controlling pollution (including noise) and improving the quality of the environment. One of the tools available to the EPA is the licensing of premises that might present a risk to the environment. Section 20 of the *Environment Protection Act 1970* requires occupiers of some specific premises to be licensed, such as premises where industrial waste is handled.

The EPA is responsible for preventing land and groundwater contamination from waste disposal and industrial activities. The *Environment Protection (Industrial Waste Resource) Regulations 2009* provide for the disposal of industrial wastes.

The air quality in Victoria is also protected by the EPA. Melbourne's air quality has improved since the 1980s. In an international context (compared to similar urban centres), Melbourne's air quality is relatively good. Particles of contaminating matter carried in the air are of major concern for the environment. These air particles come from motor vehicles, domestic fuel burning, volcanoes, bushfires and industrial processes.

Excessive noise is prohibited at certain times by the *Environment Protection (Residential Noise) Regulations 2008*. Noise complaints can be made to the EPA, the police and local councils.

Anyone can report littering or pollution to the EPA. There is a 24-hour EPA Pollution Hotline, which will take calls on environmental incidents, such as smoke or odours from an industry or business, spills or slicks in waterways, illegal dumping of wastes, or noise from a factory or industrial complex. People can also use an online facility to report motorists who throw litter from their car or whose vehicles emit excessive exhaust emissions.

When pollution incidents are reported to the EPA, it is possible for the EPA or other government agencies to take action to limit the damage or potential damage to the environment. Rapid notification can help the EPA to identify the cause and source of the problem and to take legal action against those responsible. If an individual or group is found to be responsible for pollution, a person who has suffered loss or harm as a result of the pollution may also sue the polluters for compensation.

Courts

Many environmental cases are taken to the Supreme Court of Victoria or the Federal Court of Australia for a binding resolution. In this way precedents can be set, which can be followed in the future. This is particularly important for cases where environmental groups want to stop behaviour that endangers the environment or where environmental contamination has caused harm or illness requiring those affected to be compensated. Environmental issues that affect a group of people can instigate a class action.

In Australia, **class actions** (or **group proceedings** as they are formally known) can be commenced by one person making a claim in circumstances where seven or more people have claims that arise out of the same or related circumstances.

If a group of people have been similarly injured by the same individual or group, they can join together to bring a civil action. In this way they can support each other and share the costs. It is also a more efficient way of dealing with a number of claims, saving court time and the time of court personnel. Class actions enable people to pursue civil actions that they may not have been able to afford to pursue as individual cases.

CASE STUDY

More than 50 000 Texas City residents sue BP

More than 50 000 Texas City residents have joined a class-action suit against British oil and gas company BP, alleging they became ill in 2010 from a 41-day emissions release caused by malfunctioning equipment at a BP refinery. More than 250 tonnes of chemical emissions were sent into the atmosphere. People complained of respiratory infections and severe rashes. A US federal lawsuit was claiming that dangerous levels of carcinogens were released during the incident.

BP contends air monitors near and surrounding the refinery registered no elevated readings during April and May 2010, and that no-one was harmed by flaring (burning off unwanted gases that build up in the process of refining oil) at its Texas City refinery.

VCAT

Issues that arise relating to health and the environment can involve planning decisions by the local council; for example, land that has been incorrectly zoned for houses.

The Victorian Civil and Administrative Tribunal's (VCAT) Planning and Environment List deals with applications by people seeking a planning or building permit and objections to the granting of building permits. If a person has been denied or granted a planning or building permit from a local council, either the applicant or an objector can take the matter to VCAT to review the decision to grant or deny the permit. VCAT takes into consideration a wide range of environmental issues when making the decision, such as protection of the environment, heritage issues and the impact on the environment and surrounding residents.

The courts may also become involved if a decision in VCAT is made and appealed. The Supreme Court or the Court of Appeal has the power to hear the appeal.

Environmental Defenders Offices

The Australian Network of Environmental Defenders Offices Inc. (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each state and territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. They provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer education programs designed to facilitate public participation in environmental decision-making.

Lawyers

People who have a legal problem can ask for assistance from lawyers; for example, if they have been injured or suffered a loss as a result of an environmental incident. Some lawyers will act on a 'no win, no fee' basis in environmental disputes. This means that the party employing the lawyer only pays the lawyer's fees if the case is won. The fees are deducted from the compensation payment. If the case is lost, no legal fees are charged, although the costs of running the case will have to be paid.

The Victorian Ombudsman

The Victorian Ombudsman is an independent officer of the Victorian Parliament. The office was established under the *Ombudsman Act 1973* (Vic.).

The ombudsman seeks to ensure that the public sector maintains the highest possible standards in delivering services to all Victorians. The ombudsman will investigate the actions of government departments or other government bodies such as local councils on behalf of individuals who feel that they have been unfairly treated by these actions.

The office also carries out other important functions to help ensure that state entities, such as local councils, comply with key pieces of Victorian legislation such as the *Whistleblowers Protection Act 2001*, *Freedom of Information Act 1982* and the *Charter of Human Rights and Responsibilities Act 2006*.

The Commissioner for Environmental Sustainability

Victoria's first Commissioner for Environmental Sustainability was appointed in 2003. The commissioner reviews and reports on the state and use of Victoria's natural environment every five years. The purpose of these reports to government is to engage in community consultation and to collect data about the health of Victoria's natural environment. Based on the information collected, the commissioner recommends regulatory or policy changes to encourage and promote environmentally sustainable practices.

Alternative dispute resolution

Minor environmental disputes involving civil law, for example a neighbourhood dispute about noise, can be settled through alternative dispute resolution including conciliation, mediation and arbitration.

Neighbours can resolve disputes through negotiation or mediation at the **Dispute Settlement Centre of Victoria**.

Mediation is an informal method of dispute resolution used as an alternative to going to court. It is cheaper, quicker and less intimidating than taking a matter to court. Decisions made during mediation are not binding, but the parties will usually enter into a binding deed of settlement.

LEARNING ACTIVITY 15.7

Methods and institutions for resolving disputes

- 1 Explain the role of the EPA.
- 2 What is a group proceeding?
- 3 Look back at the case study 'More than 50 000 Texas City residents sue BP'. Explain the issues raised in this case.
- 4 How can VCAT be involved in environmental issues?
- 5 What is the role of the Victorian Ombudsman?
- 6 Explain the role of the Commissioner for Environmental Sustainability.

ENVIRONMENTAL ISSUE – MAJOR OIL SPILLS

When an oil spill occurs, it is generally due to human activity and is a form of pollution. Oil spills often occur in the ocean or coastal waters and can be crude oil, refined petroleum products (such as petrol or diesel fuel), oil by-products or oil refuse from ships.

Spills can take months or years to clean up. Marine birds or mammals such as seals can be seriously affected by oil spills. The oil penetrates their feathers, reducing their insulating capabilities and making the birds vulnerable to temperature and less buoyant. It has similar effects on the fur of

animals. Unless they are helped, affected animals and birds are likely to die. Beaches become covered in oil and impossible to use for recreation. Fish and fishing industries can be grossly affected.

Montara oil spill

A massive oil spill from a blowout on the Montara wellhead platform in the Timor Sea, off Western Australia's northern coastline, began in August 2009 and was eventually plugged in November. The operators, PTTEP Australasia (a subsidiary of Thai company PTT), estimated that for 10 weeks the equivalent of 400 barrels of crude oil poured into the sea every day. Others estimate up to 2000 barrels per day were released.

The *West Atlas* drilling rig, which was ruined after it caught fire, was estimated to be worth \$250 million and the topside (platform) about \$16 million.

The Australian Maritime Safety Authority coordinated a joint response to the incident. Ships operated containment booms and recovered approximately 500 000 litres of oil. The residual oil was sprayed with 160 000 litres of dispersant to minimise the oil's impact on reefs and shorelines and to assist with biodegradation.

Biologists said that the effects of the Montara oil spill could be catastrophic for marine ecosystems. The oil would have toxic effects on birds, marine invertebrates, coral and marine algae. Whales and flatback turtles were often seen in the water around the well. Fishermen observed sick and dying marine life and the absence of birds in the area.

Fishing communities in East Timor and Indonesia have complained that the oil spill has ruined local seaweed farms and fishing catchments, causing residents significant financial losses. However, the company denies the oil slick reached these coastlines.

The Australian Government launched a commission of inquiry into the spill. The report concluded the disaster was caused by negligence and poor management practices on the part of the operator and a lack of proper supervision by Northern Territory regulatory authority. PTTEP Australasia retained its licence to operate in Australia; however, it had to comply with special conditions and a strict monitoring system.

The company admitted responsibility and estimates its environmental impact costs to be \$40–50 million. In addition to payments for clean-up operations, the Thai company was prosecuted under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) and fined \$510 000. Some people consider this fine too lenient.



Figure 15.11
The West Atlas
drilling rig and oil
spill in the Timor
Sea

CASE STUDY

CASE STUDY

Chinese coal carrier stuck on the Great Barrier Reef

On 3 April 2010, a Chinese coal carrier, *Shen Neng 1*, ran aground on Douglas Shoal in the Great Barrier Reef. It was loaded with 68 000 tonnes of coal. The reef damaged the ship's hull and 2.5 tonnes (approximately 2800 litres) of fuel discharged into the water. Dispersants were used to break up the oil. The vessel was stranded on the reef for nine days causing scarring to the reef and long-term damage to marine life.

The Great Barrier Reef is a marine park and World Heritage Area. Shipping near the reef is highly regulated. The *Shen Neng 1* was estimated to be more than 10 kilometres outside the shipping lane. At one point, it was reported that the vessel was in danger of breaking apart but the vessel was refloated and towed into Hervey Bay for repairs, which averted a major oil spill and environmental disaster.

An investigation by the Australian Transport Safety Bureau found that the accident happened because the chief mate, who was bridge watchkeeper at the time, did not alter the ship's course at the designated point as instructed by the shipmaster. His failure to adequately monitor the ship's position was attributed to fatigue caused by a long day supervising deballasting operations and the loading of coal in Gladstone. Investigations revealed he had no more than three hours sleep in the preceding 38 hours.

The chief mate pleaded guilty to being in control of a vessel causing damage in a marine park and was jailed for three months, while the shipmaster was fined \$25 000 after pleading guilty to causing damage to a marine park. The magistrate took into account that the master was not steering the vessel at the time.

Conservationists have expressed outrage that bulk carriers can travel from Gladstone to Cairns without a marine pilot to guide them through the Great Barrier Reef. At the time of the incident, only a few areas in the reef required compulsory piloting. Australian Maritime Safety Authority chairman Leo Zussino called for increased surveillance to ensure that thousands of vessels passing through the World Heritage site stayed in designated shipping lanes.

In 2011, the Queensland and Commonwealth governments issued a joint media statement announcing that all large vessels travelling through the Great Barrier Reef between the Torres Strait and Bundaberg will be tracked by Australian authorities using radio and satellite. The vessels will also be given information about the proximity of other ships, weather conditions and any other information necessary to avoid ships from getting into trouble on the reef.



Figure 15.12

Chinese coal carrier *Shen Neng 1* stuck on the Great Barrier Reef and leaking oil

Massive oil spill in Gulf of Mexico

The *Deepwater Horizon* drilling rig in the Gulf of Mexico caught fire in April 2010 and burned for two days. It then sank in 1500 metres of water, causing a massive oil spill. It is believed that 11 men lost their lives.

CASE STUDY



Figure 15.13

Fire-boat response crews battle the blazing remnants of the BP-operated offshore oil rig *Deepwater Horizon* in the Gulf of Mexico, in April 2010.

The rig belonged to Transocean, the world's biggest offshore drilling contractor. It cost \$350 million to build and up to \$1 million per day to lease. The rig was drilling BP's *Macondo* exploration well when a gas explosion set the rig on fire. The well was being drilled to a water depth of 5000 feet and 13000 feet into the sea floor. Drilling to such depths does not come without risk.

The fire was extinguished when the rig sank, but oil from the well continued to flow into the water and collected on the surface. BP estimates that approximately 3.26 million barrels of oil escaped into the environment, while an independent study suggests the spill was more like 4.1 million barrels (1 barrel = 158 litres). The spill fouled beaches, killed wildlife and disrupted the economies of Gulf Coast states. The well was capped in July and officially declared safe by the end of September 2010.

The incident was the subject of a number of investigations and legal proceedings – both criminal and civil. Over 110000 local businesses and individuals from the US Gulf Coast sued BP over this oil spill. Investigations in the ensuing months found a series of errors by BP, the owner of the well, as well as by Transocean, the owner of the rig, and by Halliburton, which performed cementing work on the well.

BP agreed to provide compensation for legitimate claims. According to BP, its payments for the *Deepwater Horizon* incident as of December 2013 are as follows: more than \$14 billion in response and clean-up costs, \$12.4 billion in compensation payments to individuals, businesses and governments, and \$900 million on restoration projects and support for Gulf Coast tourism and seafood industries.

DID YOU KNOW?

Hydraulic drills and fracking

Following the *Deepwater Horizon* incident, people began to question the safety, expense and risks associated with the use of hydraulic drills to penetrate deep into the world's seabeds to extract oil.

Similar concerns are associated with **hydraulic and horizontal fracturing** (fracking) for gas deposits. The process requires a well to be drilled deep into sedimentary rock below the earth's surface. Fracking fluid, made up of chemicals, sand and millions of litres of water, is then pumped into the rock at high pressure to create cracks in the rock, which release the embedded gas. Proponents say the process has dramatically increased the world's supply of gas. Opponents believe the process is environmentally unsound because the process can create minor earthquakes and requires the disposal and treatment of toxic waste water, which has the potential to contaminate underground water tables.

Despite a report recommending the lifting of a ban on fracking, the Victorian Government extended the moratorium on the use of hydraulic fracturing in the state's coal seam gas industry until 2015.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Major oil spills

- 1 List the type of damage that can occur from an uncontained oil spill. (2 marks)
- 2 Look back at the case study 'Montara oil spill' and answer the questions.
 - a What occurred in this situation? (1 mark)
 - b What was the Australian Maritime Safety Authority's role in this case? (1 mark)
 - c What methods were used to contain the oil spill's impact on the environment? (2 marks)
 - d Describe two different legal responses to the incident. (2 marks)
- 3 Look back at the case study 'Chinese coal carrier stuck on the Great Barrier Reef' and answer the questions.
 - a What was the cause of this accident? (1 mark)
 - b What environmental damage did the accident cause? (1 mark)
 - c Explain the outcome of the criminal proceedings that resulted from this accident. Do you think these outcomes were fair in the circumstances? (3 marks)
- 4 Look back at the case study 'Massive oil spill in Gulf of Mexico' and answer the questions.
 - a What were the personal, environmental and economic impacts of this incident? (4 marks)
 - b What is a class action and why is it relevant in this case? (3 marks)

(Total 20 marks)

ASSESSMENT TASK STRUCTURED ASSIGNMENT

Environmental issues and case studies

- 1 Read the case study 'Cranbourne gas emission class action' and answer the questions.
 - a Why are the residents of Brookland Greens Estate suing the City of Casey? (2 marks)
 - b What is a class action? Explain why a class action is relevant in this case. (2 marks)
 - c What is mediation? Why do you think it is being used in this case? (2 marks)
 - d What role did the EPA play in this case? (2 marks)
 - e This action is being launched on a 'no win, no fee' basis. What does this mean for the law firm Slater & Gordon and for the plaintiffs they represent? (2 marks)
 - f Why did the Victorian Ombudsman report on this case? (2 marks)
 - g Explain the outcome of this case. (2 marks)

Cranbourne gas emission class action

A firm of Melbourne lawyers conducted a class action on behalf of hundreds of property owners whose properties had been affected by a methane gas leak from the disused Stevensons Road landfill in Cranbourne. The statement of claim lodged with the Supreme Court of Victoria sought unspecified damages from the defendant, the City of Casey. Over 500 households signed up to be part of the class action against the City of Casey. In September 2008, 29 households were evacuated from the Brookland Greens Estate after the Country Fire Authority warned that methane gas levels had reached explosive levels in at least one home.



Figure 15.14
Cranbourne landfill
near the Brookland
Greens Estate

The residents of Brookland Greens Estate claimed that the value of their properties had dramatically dropped since they were first built. It was estimated that the value of more than 800 properties was \$320 million (based on an average of \$400 000 each).

The property owners alleged that the City of Casey, the sole occupier and EPA licence holder of the Stevensons Road landfill since 2005, had failed in its management of the site. They claimed that the Council had ignored repeated warnings from the EPA since 2001. The backyard of the lead plaintiffs in the action, Matthew and Theresa Wheelahan, was only 30 metres from the landfill. Their home was valued at \$424 000 in September 2008, just before the methane leak scare. The Wheelahans chose the best house they could afford as an investment for the future.

The EPA concluded in April 2009 that the emissions were down to a safe level but regular monitoring by the households was essential. The Victorian Ombudsman reported on the issue in October 2009. The City of Casey has worked to improve gas emissions from the landfill site.

The statement of claim in this case was lodged with the Supreme Court of Victoria in November 2008. Since that time, the EPA and 10 other defendants joined the proceeding. The mediation of the case began in May 2009 and continued over many days. Due to the number of parties involved and the difficulty locating appropriately sized mediation facilities, the mediation had to be conducted at the County Court and the Federal Court. The trial of the case was listed for July 2011 and was expected to run for at least three months. During the course of the proceeding, legal firm Slater & Gordon obtained over 100 000 documents for review. Numerous expert witnesses were expected to give evidence at the trial on a range of topics including highly technical issues relating to landfill design and construction and landfill gas migration.

On 25 March 2011, Slater & Gordon announced that a settlement of the class action had been reached, subject to approval by the Court. The City of Casey and EPA will pay \$23.5 million in compensation including the costs of conducting the claim. All group members will receive compensation under the settlement with a minimum compensation amount of \$6000 with payments rising to approximately \$130 000 for those worst affected.

- 2 Read the case study *Burnie Port Authority v. General Jones Pty Ltd* and answer the questions.
 - a What occurred in this case? (1 mark)
 - b Apply the law of negligence to this case. (2 marks)

***Burnie Port Authority v. General Jones Pty Ltd* (1994) 68 ALJR 331**

Burnie Port Authority owned a building used to store a large quantity of frozen vegetables. The building was undergoing renovations. The building contained 30 boxes of expanded polystyrene, which was insulating material. The trial judge found that the employees of a welding company, W and S, were negligent in their welding practices. During the welding, sparks of molten metal fell on one or more of the boxes of insulating material causing a fierce fire.

The law of negligence applies in this case. The High Court on appeal held that, applying principles of negligence, a person who takes advantage of the control of premises to introduce a dangerous substance, to carry on a dangerous activity or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another.

- 3 Read the case study *Andrea Bowles v. Tien Tien Cafe Bar* and answer the questions.
 - a What is environmental tobacco smoke? (1 mark)
 - b What harm did the plaintiff suffer? (1 mark)
 - c Give two legal reasons why the Tien Tien Cafe Bar was held liable in this case. (2 marks)
 - d What was the outcome in this case? (1 mark)

Andrea Bowles v. Tien Tien Cafe Bar (Melbourne Magistrates' Court, 13 September 2000)

This was a precedent-setting case involving a Melbourne restaurant diner who had suffered a debilitating asthma attack as a result of exposure to environmental tobacco smoke (ETS). The complainant alleged that the restaurant had failed to enforce the no-smoking rule in the non-smoking area, failed to adequately separate the smoking and non-smoking areas, and not adequately ventilated the premises.

This was the first case in Australia in which judgment was passed on the rights of restaurant customers affected by ETS and the obligations of restaurants that offer non-smoking sections.

The court found that the bar had breached its contract to offer a non-smoking area and had been negligent in its duty of care towards Andrea Bowles, who was awarded \$7000 in compensation.

- 4 Read the case study 'Maralinga' and answer the questions.
 - a What type of tests occurred at Maralinga in the 1950s and 1960s and who conducted these tests? (2 marks)
 - b Name two groups of people who may have suffered injury as a result of these tests. (2 marks)
 - c What has been the Australian Government's response to the issues raised by these people? (2 marks)
 - d What has been the response of the British Government and courts to the issues raised by these people (2 marks)

(Total 30 marks)

Maralinga

British nuclear tests occurred between 1955 and 1963 at the Maralinga site, part of the Woomera Prohibited Area in South Australia. Seven major nuclear tests were performed with the agreement of the Australian Government. The site was contaminated with radioactive materials. A clean-up was attempted in 1967, but the 1985 Royal Commission into British Nuclear Tests in Australia found that more could have been done to protect the local Aboriginal people from exposure to the radiation and to clean up the site. Further efforts to decontaminate the site occurred in 1996 and 2000.

In the 1980s, some Australian servicemen who served at Maralinga and some traditional Indigenous owners of the land at Maralinga were suffering blindness, sores and illnesses such as cancer.



Figure 15.15
Nuclear testing at Maralinga occurred between 1955 and 1963.

In the 1990s, the British Government paid Australia £20 million to help clean up the site and the Commonwealth Government reached a \$13.5 million compensation settlement with the Maralinga Tjarutja people for the damage to their land. To date very few people exposed to the radioactive fallout at Maralinga have been paid compensation for personal injuries.

In March 2012, the British Supreme Court ruled that 1000 British veterans involved with the tests are unable to sue the UK Ministry of Defence for compensation because too much time has passed to show a causal link between the tests and people's illnesses.

In 2013, the Australian Human Rights Commission decided it lacked the jurisdiction to deal with a complaint from Australian Maralinga veterans. The veterans wanted the commission to support their claim that the government of the day had breached their human rights, under the Universal Declaration for Human Rights, by exposing them to radiation at Maralinga. Following this decision, independent Senator Nick Xenophon vowed to introduce legislation to guarantee Maralinga veterans free medical care for health issues associated with the radiation exposure.

ASSESSMENT TASK REPORT

Environmental issues

- 1 Choose at least five of the issues listed below and discuss them with a classmate. Then provide either two arguments for or two arguments against each of your chosen issues. The issues for research are:

- logging in state forests
- genetically modified crops grown in Australia
- greater use of recycled water for drinking purposes
- deepsea drilling for oil and hydraulic fracturing for gas deposits
- uranium as a fuel source to generate electricity
- freeways versus public transport
- very fast trains versus air travel.

(10 marks)

- 2 Gather at least three newspaper articles, magazine articles or information from the Internet that relates to an environmental issue. Make sure you:

- source the material
- provide the date of publication

(5 marks)

- 3 Using the information you have gathered as your focus, write a report that gives a description of the issue and explains:

- conflicting attitudes relating to the issue
- action taken by individuals or groups to bring the issue to the government or public's attention
- the current laws related to the issue or suggested changes to the law.

Alternatively, you can display your findings in an annotated visual display such as:

- a poster, brochure or booklet
- presentation slides
- a multimedia presentation
- a webpage.

(10 marks)

(Total 25 marks)

GLOSSARY

abrogate

Abolish; law made through the courts can be cancelled by an Act of parliament if the Act specifically states that it abolishes the law made by the courts.

acceptable quality

Goods fit for their purpose or intended use.

acceptance

A written or oral statement or act that indicates that the person is willing to accept the offer made.

accessory

An accessory to a crime is a person who is involved with a crime, other than someone who directly commits the crime. An accessory can be a person who knowingly conceals information about a crime, or who obstructs the apprehension, prosecution, conviction or punishment of a person who has committed a serious indictable offence.

accused

A person defending a criminal case.

acquittal

A finding of not guilty of an indictable offence prosecuted in a criminal trial; the opposite of conviction.

Act of parliament

A law passed by parliament, which must be followed by everyone it affects.

actus reus

A guilty act.

adjournment with or without a conviction

This is a sanction, but the sentencing is delayed for a specified period of time on the condition that the person found guilty of the offence does not reoffend within that time.

administrator

A person appointed by the court to administer the estate in cases of total or partial intestacy (dying without a will).

adversary system

The system of trial used in Australia in which two opposing sides try to win the case. Set rules of evidence and procedure must be followed; the judge/jury are impartial arbitrators.

amendment

An alteration to an existing Act of parliament.

appeal

A hearing that reconsiders a decision in a lower court. A party to a dispute who has gone through a trial or hearing and is not satisfied with the decision can, in certain circumstances, take the matter to a higher court to challenge the lower court's decision.

appellant

The party making an appeal.

appellate jurisdiction

The authority to hear a case on appeal.

arbitration

When a third party (the arbitrator) decides a case, but only after he or she has tried to persuade the parties to come to an agreement. The parties usually agree to be bound by the decision of the arbitrator.

assault

Assault is defined in section 31 of the *Crimes Act 1958* (Vic.) as the direct or indirect application of force by a person to the body, clothing or equipment of another person, where the application of force is without lawful excuse and intentional or reckless and results in bodily injury, pain, discomfort, damage, insult or deprivation of liberty. Under civil law, a person can also be sued for trespass to the person, which includes assault.

attachment of earnings

An enforcement procedure against a person who has not paid a debt. An order can be made that the debt is paid directly out of the debtor's pay to the person the debt is owed to.

attestation

The witnessing of a will.

attestation clause

A clause at the foot of the will for the signature of the willmaker and the witnesses to the will.

attorney-general

Principal legal officer of the Crown, at both state and federal levels.

Australian Human Rights Commission

An independent statutory organisation that works to protect and promote the human rights of people, including within the workplace.

awards

The minimum wages and conditions set by the government. Also called a modern awards.

BAC

Blood-alcohol concentration (the amount of alcohol in the blood) measured to ascertain if the driver of a motor vehicle is driving under the influence of alcohol.

bail

The procedure that enables accused people to be released from custody after being charged awaiting their hearing or trial.

balance of probabilities

The standard of proof required in a civil case.

barrister

A person who is briefed (given all the information about a case) by a solicitor and who will appear in court on behalf of the client.

battery

A direct act of contact by one person to another person without their consent.

beneficiary

A person who receives benefits under a will.

bequest

A gift of personal property by means of a will; usually not money.

beyond reasonable doubt

The standard of proof required in a criminal case.

bicameral

Two houses of parliament – at a federal level, the House of Representatives and the Senate; in Victoria, the Legislative Assembly and the Legislative Council.

Bill

A proposed law.

binding precedent

A decision of a higher court that must be followed by lower courts in the same hierarchy.

bond

Money paid to a landlord by a tenant at the start of a tenancy as security to cover any future damage to the premises by the tenant.

burden of proof

The responsibility of proving an action usually lies with the person who initiates the action.

burglary

Entering any building as a trespasser with the intent to steal or commit an offence involving assault in a building entered as a trespasser, or damaging a building entered as a trespasser.

cabinet

The Commonwealth Government policy-making body that decides what changes in the law should occur. It is made up of senior ministers and the prime minister.

causation

In the case of murder or manslaughter, an unbroken link (causal chain) between the act of the accused and the death of the victim.

caveat emptor

Literally, 'let the buyer beware'.

challenge for cause

A request that the judge dismiss a potential juror from serving on a jury by providing a valid legal reason why he or she should not serve.

charge

When the police formally allege that a person has committed a crime.

committal proceedings

A term given for the hearings that take place in the Magistrates' Court for indictable offences. One of the hearings is a committal hearing.

common law/case law/judge-made law

Decisions made by judges that form part of the law.

conciliation

When a third party (the conciliator) helps the parties to a dispute to come to an agreement. The conciliator may give suggestions about how to resolve the dispute.

concurrent powers

Law-making powers that are shared by the Commonwealth Parliament and the state parliaments. Under S109 of the Constitution, if there is a conflict then Commonwealth law prevails.

concurrent sentences

When terms of imprisonment imposed for two or more separate offences are to be served at the same time (as opposed to cumulative sentences).

condition report

A report giving a list of rooms in premises with a description of the condition of each room.

conditions

Certain terms that form part of a contract that must exist for the contract to be binding.

consideration

Something of value that passes from one party to the other at which time a contract is complete; can also be a promise to pay.

consumer

A consumer is generally a person who purchases goods or services for less than \$40 000; or any person who buys goods or services for personal, domestic or household use regardless of cost; or a person who buys any car or trailer designed for use on public roads.

consumer guarantee

Specific consumer rights that form part of a consumer sales contract and are implied by law.

contract

A legally binding agreement where a person has offered to buy or sell something, and another person has accepted the offer.

contributory negligence

A defence to a claim of negligence, asserting that the damage or loss was partly due to the plaintiff's own negligence.

conviction

A criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty.

coroner

A person who investigates sudden or suspicious deaths, deaths as a result of an anaesthetic, deaths in custody or psychiatric institutions and deaths where a doctor has been unable to pinpoint the cause of death; also investigates fires that involve death.

counter-offer

A person may decide to reject an offer and make a counter-offer, which is a new offer, and the person making the original offer is at liberty to accept or reject the counter-offer.

court hierarchy

The ranking of courts according to the seriousness of the matters they deal with.

crime

An act or omission that offends against an existing law, is harmful to an individual or society as a whole and is punishable by law.

criminal negligence

Acts of negligence that are so gross that they become a criminal matter.

cross-examination

When a witness has been intentionally called by either party, the opposite party has a right to cross-examine him or her (ask questions). The purpose of the cross-examination is to find flaws in the evidence of the witnesses and show up any inconsistencies or indications that the witness may be unreliable. The cross-examination is not confined to matters proved in examination-in-chief, and leading questions may be put.

crown prosecutor

The legal representative of the Crown who initiates legal proceedings against those accused of criminal offences.

culpable driving

A person can be found guilty of culpable driving if that person was responsible for the death of another road user while driving a motor vehicle recklessly, negligently or under the influence of alcohol or a drug.

cumulative sentences

Terms of imprisonment that are to be served one after the other (as opposed to concurrent sentences), thereby increasing the amount of time to be spent in jail.

custodial sentence

A sentence where the offender is detained in custody (in prison).

damages

A civil remedy (an order of a court) that aims to compensate the person who has been wronged for the injury or loss suffered.

defamation

Written or verbal statements that lower a person's reputation in the eyes of the community.

defendant

A person against whom a civil action is taken in a civil case.

defensive homicide

Where a person believes they were acting in self-defence but a court finds the accused's belief or actions unreasonable. In June 2014, the Liberal Government introduced a Bill to the Victorian Parliament to abolish the law of defensive homicide.

delegated legislation

Laws made by subordinate authorities.

denunciate

When a court shows disapproval.

devise

A gift of real property (house or land).

die without issue

Die without children.

directions hearing

A hearing conducted by a judge for a case that is to be heard in the County Court or Supreme Court, aimed at speeding up the process of getting to trial and resolving some issues before the trial gets under way.

disapprove

When a court expresses disapproval of a precedent but is still bound by it.

discrimination

When someone is treated less favourably than another person or group because of an irrelevant attribute such as gender or ethnic origin.

distinguish

When a court decides that the material facts of a case are sufficiently different to a precedent and that the precedent is therefore not binding.

doctrine of precedent

The common-law principle by which the decisions of higher courts in a hierarchy are binding on lower courts in the same hierarchy where the material facts are similar.

domestic agreement

An agreement made between family members or friends that is not intended to be legally binding unless the circumstances indicate otherwise.

domestic tribunal

A tribunal set up by a private company or group rather than by parliament.

duress

Unlawful pressure put on a person to persuade that person to perform an act that he or she would not ordinarily perform.

duty of care

A legal obligation to avoid causing harm to a person or group when harm is 'reasonably foreseeable' if care is not taken. There must be a sufficiently close relationship (sometimes referred to as 'proximity') between the two people in order for a duty of care to exist.

enabling Act

An Act giving subordinate authorities the power to make laws.

enterprise agreement

An agreement about wages and other matters between two or more employees and their employer.

estate

All assets and all liabilities; that is, everything the willmaker owns and all their debts.

eviction order

An order by the Residential Tenancies List of VCAT ordering a tenant to leave rented premises.

evidence

Material used in legal proceedings to prove or disprove matters of fact presented in court.

examination-in-chief

The stage in a court case when a party questions a witness under oath to draw out all the evidence favourable to that party's case.

exclusive powers

Law-making powers of the Commonwealth Parliament that can only be exercised by the Commonwealth Parliament.

executive council

A body made up of the governor-general (governor at a state level) and senior ministers. Its task is to pass delegated legislation in areas where an enabling Act has given power to the executive council to make regulations.

executor

A person appointed to carry out the directions regarding property contained in a will.

exemplary damages

A sum of money the court orders to be paid in a civil case if the court feels that the conduct of the defendant is so bad that he or she should be punished by a higher award of damages.

exemption clauses

Clauses in a contract that set out when a person is exempted from being liable.

fair comment

Fair comment may be used as a defence to an action for defamation if the defendant expressed his or her opinion in a matter of public interest. For this defence to be successful, defendants must honestly believe that what they said was true.

Fair Work Commission

An independent national workplace relations tribunal with power to carry out a range of functions relating to enterprise bargaining, industrial action, dispute resolution, termination of employment, safety net of minimum wages and employment conditions and other workplace matters.

Fair Work Ombudsman

A statutory body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints and enforces compliance with Australia's workplace laws.

false imprisonment

The wrongful removal of the liberty of a person, directly brought about by another person.

fine

A monetary penalty expressed in levels of penalty units that can be imposed with or without a conviction.

garnishee

An enforcement procedure against a person who has not paid a debt. If A owes money to B and B owes money to C, A can be ordered to pay the debt direct to C. An attachment of debt can be paid by garnishee.

general damages

An unspecified amount of money to compensate for pain and suffering, loss of quality of life, loss of earning capacity, inconvenience and so on.

government

The members of parliament belonging to the political party or parties with the majority of members in the lower house of parliament.

governor-general

The Queen's representative in Australia and the executive head of the Commonwealth Government.

governor-general-in-council

See executive council.

grant of probate

The giving of approval to the executor to deal with the estate after the registrar of probates or the Supreme Court has accepted the will as valid.

guideline judgment

Advice given by the Court of Appeal that directs what other courts should do when passing sentence in certain types of cases.

hand-up brief

A process in a committal proceeding where written statements are used instead of having witnesses attend in person to give evidence.

harassment

When someone is unreasonably made to feel intimidated, insulted or humiliated, particularly if this happens on a regular basis.

hearing

A judicial examination of a case reaching a decision in a court of summary jurisdiction (Magistrates' Court) presided over by a magistrate.

hearsay evidence

Evidence that is given about something said by another person who is not called as a witness.

homicide

The killing of a person. Murder, manslaughter, defensive homicide, infanticide and child homicide are unlawful homicides. (The Victorian Government is planning on abolishing the offence of defensive homicide.)

House of Representatives

The lower house of the Commonwealth Parliament.

hung jury

A jury that cannot reach a verdict.

implied conditions

Conditions that are not listed but still form part of a contract and are implied by law.

indictable offence

More serious offences which can be heard before a judge and jury.

indictable offences heard summarily

An indictable offence heard in the Magistrates' Court as if it was a summary offence.

informant

A person laying charges against a suspect, usually a police officer.

injunction

A civil remedy, a court order that stops someone from doing something or compels someone to do something.

intention to create legal relations

A principle of contract law, requiring the parties to intend to create obligations which are legally binding and enforceable.

interested witness

A person who is a beneficiary under a will, or whose spouse is a beneficiary.

interrogatories

Written questions sent by one party in a civil case to the other party before the trial.

intestate

Dying without a will.

invitation to treat

Not an offer, but an indication of a person's willingness to negotiate a contract (usually the seller will make an offer to sell the goods at an agreed price).

joint proprietors

When two or more people own a property as joint proprietors (sometimes called joint tenants*), and one dies, the remaining joint owner automatically owns the whole property. One person's share of the property cannot be left to someone else in a will. (* not to be confused with rental tenancies or leases)

judicial determination

When parties take a legal dispute to court or VCAT when it is presided over by the president or vice president (who are court judges) for a judicial ruling. An independent arbiter uses formal processes to consider the evidence presented by both parties before making a binding decision.

jurisdiction

The lawful authority or power of a particular court to decide a particular case.

landlord

An owner of property who leases (rents) that property to a tenant under a lease agreement in exchange for the payment of rent.

law

A legal rule.

lease

A legal agreement under which a property owner allows a tenant to use the property for a specified period of time and rent.

legacy

A gift of money or property left to someone in a will.

legislation

Acts of parliament.

Legislative Assembly

The lower house of the Victorian Parliament.

Legislative Council

The upper house of the Victorian Parliament.

letters of administration

The giving of approval to an appointed administrator to deal with the estate of a person who has died without a will. The registrar of probates or the Supreme Court must be satisfied that there was no valid will.

litigant

A party to a civil proceeding.

litigation

A civil proceeding; a lawsuit.

malice aforethought

Malice aforethought is the intention to commit the crime (a guilty mind or 'mens rea'). For malice aforethought to exist, the accused must have acted voluntarily and have one of the following states of mind: an intention to kill, an intention to inflict serious injury, reckless indifference, an intention to assault a person who was trying to make a lawful arrest, which resulted in that person's death.

mandatory injunction

An order compelling someone to do a particular act; for example, removing something from their land.

manslaughter

A person can be charged with manslaughter (or found guilty of manslaughter) if he or she was criminally negligent, or killed someone while conducting a dangerous and unlawful activity.

marriage

The union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

mediation

When a third party (the mediator) helps the parties to a dispute to come to an agreement. Mediators help the parties maintain open communication. Mediators do not take sides and will not make suggestions to the parties about how to resolve the dispute.

mens rea

Guilty mind; the intention to commit the crime.

minister

A member of parliament who is responsible for a particular portfolio or area of government.

monogamy

Being married to one person.

murder

The unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (10 years old and over) and of sound mind.

natural justice

A common-law principle that states people must be treated fairly; for example, an unbiased decision-maker must hear any disputes.

negligence

Doing or not doing something a reasonable person would or would not do in certain circumstances, which causes harm or loss to another person.

negotiation

The parties to a dispute negotiate an agreement on their own; they may seek advice from lawyers who could represent each party in the process.

neighbour principle

Used in negligence cases to determine whether a duty of care was owed to the person injured. A person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their 'neighbours'; that is, the people who would be closely and directly affected by their acts or omissions.

next friend

A person who brings a civil case on behalf of a minor.

no-fault divorce

A dissolution of marriage where there is no need to prove fault by either party. All that has to be proved is that the marriage has irretrievably broken down and the parties to the marriage have been separated for 12 months.

nuisance

A civil tort imposing a duty not to interfere with the enjoyment of a public or private right.

obiter dictum

Remarks made by a judge in passing, which are not binding.

offer

Written or oral statement or act that indicates the person is willing to buy or sell goods or services.

offeree

The person to whom an offer is made.

offeror

The person making an offer.

ombudsman

A person who investigates complaints made by individuals about decisions made by government departments or statutory authorities.

order of specific performance

A civil remedy (an order of a court) that requires someone to perform a specific act; normally used in contract law to order someone to complete a contract.

original jurisdiction

The authority to hear a case for the first time (in the first instance).

overrule

A new case in a higher court creates a new precedent, which means the earlier precedent in a different case is no longer applicable.

parenting plan

A written agreement that is made between the parents of a child and deals with who the child should live with, times of contact, maintenance and any other aspects of parental responsibility.

parliament

The supreme law-making body (within its jurisdiction) consisting of the Queen's representative (the governor-general), the Senate and the House of Representatives at a federal level, and the Queen's representative (the governor) and the Legislative Council and Legislative Assembly at a state level in Victoria.

penalty unit

The monetary unit in which a fine is expressed. One penalty unit is \$147.61 (1 July 2014 to 30 June 2015).

peremptory challenge

The right of the plaintiff and the defendant to have a juror dismissed before trial without giving a reason.

persuasive precedent

A decision of another court, which is influential but not binding.

plaintiff

A person bringing a civil action. This person has the burden of proving the case.

pleadings

Documents exchanged between the solicitor for the plaintiff and the solicitor for the defendant in a civil case, before taking the matter to court, to establish the reason for the claim and which facts are disputed. Documents include writ, notice of appearance, statement of claim and statement of defence.

precedent

A court decision that is followed by another court lower in the hierarchy.

prima facie case

On the face of it; there is sufficient evidence to suggest that the accused has committed a crime.

private nuisance

Unreasonable interference with a neighbour's enjoyment of their property; for example, noise, smells, smoke, water or other matter continually emanating from a neighbouring property.

probate parchment

A document certifying that the will has been proved (declared valid).

propensity evidence

Evidence about a person's propensity to commit a crime; may include prior convictions.

prosecutor

A person who brings the case for the Crown against the accused.

public nuisance

An act or omission that interferes with the comfort or convenience of a number of people to a considerable degree.

qualified privilege

It is a defence to defamation. Qualified privilege is available providing the statement is made without malice and for a particular purpose, such as media reports of parliamentary proceedings or court cases, or because a person is under a moral or legal duty to advise others of a situation.

question of law

A dispute about the law that applies to a particular situation.

rape

Intentional sexual penetration of another person without that person's consent, while being aware that the person was not consenting or might not have been consenting; or not withdrawing from sexual penetration after becoming aware that the person is not consenting.

ratio decidendi

The reason for a decision (the binding part of a decision).

real property

Land (as opposed to goods) including vacant land, the family home, other real estate, business properties and farms.

reasonable foreseeability

See neighbour principle.

recidivist

A person who continues to commit crimes despite being punished for them.

reckless indifference

When the accused knows it is probable (highly likely) that the accused's actions will either cause death or a really serious injury to another person and he or she is indifferent to this fact.

redundancy

When an employer decides they no longer want an employee's job to be done by anyone and terminates their employment.

re-examination

The party that has called the witness in a court case is able to re-examine that witness after cross-examination, to explain or contradict any adverse impression produced by the cross-examination.

rehabilitate

Restore to a life without crime; restore reputation.

remand

When a suspect is refused bail and is held in custody until the trial.

remedy

A way in which a court in a civil case will enforce a right, impose a penalty or make another court order for the benefit of the plaintiff. It is aimed at restoring the plaintiff back to the position he or she was in before the wrongful act occurred. The most common remedy is damages.

rent

A stated return or payment for the temporary possession or use of a house, land or other property, made by the tenant or user to the owner, usually at fixed intervals.

residual powers

Law-making powers left with the states at the time of federation.

restrictive injunction

An order stopping someone from doing something; for example, stopping someone from destroying a building if it is in the interests of the nation to preserve it.

reverse

A higher court makes a different decision than a lower court in the same case on appeal.

right

An entitlement or permission, usually of a legal or moral nature.

right to silence

A person can remain silent during police questioning, except in circumstances when they may be required to give their name and address; a person can also elect to not give evidence in court.

robbery

The use of force on any person, or putting any person in fear of force being used immediately before or during the act of stealing.

royal assent

A formal signing of a Bill by the governor at a state level, or governor-general at a federal level, after which time the Bill becomes an Act of parliament.

sanction

A legal punishment given to a person who has been found guilty of an offence.

scam

A dishonest and deceptive attempt to defraud someone.

Senate

The upper house of the Commonwealth Parliament.

serial monogamy

Entering into a monogamous marriage more than once in a lifetime (but not at the same time).

solicitor

A legal professional who can offer assistance to people with legal problems.

special damages

A monetary compensation of a specified amount to cover the cost to the plaintiff of items such as medical expenses, loss of earnings and cost of artificial limbs.

spousal maintenance

A party to a marriage is liable to maintain the other party, to the extent that they are reasonably able, if, and only if, the other party is unable to support him or herself adequately.

standard-form contract

A pre-written agreement used by suppliers who regularly sign contracts with their clients. Most terms and conditions are set with little scope for negotiation; for example, mobile phone plans and insurance agreements.

statute

An Act of parliament; a piece of legislation.

strict liability crime

A crime where there is no need to prove intention to commit the crime.

subordinate authorities

Authorities that have been given the power by an Act of parliament (an enabling Act) to make rules and regulations.

sue

Start civil proceedings against another person.

summary offence

A minor offence heard in the Magistrates' Court.

summons

A document telling the accused which court will deal with their criminal case and the mention date (date of first hearing).

surety

A person who guarantees the appearance of an accused person at their trial if they have been released on bail.

telemarketing

A form of selling via telephone.

tenancy agreement

A legal document outlining the terms and conditions of the tenancy; it protects the rights of both the tenant and the landlord (also referred to as a lease or rental agreement).

tenant

Someone who pays rent to use land or a building or a car that is owned by someone else.

tenants* in common

When two or more people own a property as tenants in common (in equal or unequal shares), each owner can separately dispose of their portion of the property. Their share forms part of their estate and is an asset to be disposed of by a will. (* not to be confused with rental tenancies or leases)

terra nullius

Empty land.

test case

A case that establishes new legal rights or principles.

testator

A person who makes a will.

tort

A civil wrong; an act that injures someone in some way, and for which the injured person may sue the wrongdoer for damages.

trademark

A logo or emblem used to identify a product or organisation.

trader

A person or group that sells goods or services.

trespass to goods

Direct interference by one person with another person's possession of goods.

trespass to land

Unauthorised access to another person's land.

trespass to person

Assault, battery or false imprisonment of another person.

trial

An examination and determination of a legal dispute in a higher court (not a court of summary jurisdiction).

trust

The holding of property for the benefit of another person.

ultra vires

Beyond the power or authority. An Act of parliament or piece of delegated legislation may be deemed ultra vires by a court because it is outside the power of the body making the law.

unfair dismissal

When someone's employment has been terminated and the termination was harsh, unjust or unreasonable.

union

An organisation that represents and protects the rights of employees.

unlawful termination

When someone's employment has been terminated for a reason that is not lawful.

vicarious liability

A club, association or business can be held liable for the actions of an employee or voluntary worker as long as the worker does not act beyond their given duty or outside normal behaviour.

Victims of Crime Assistance Tribunal (VOCAT)

A tribunal set up to compensate victims of crimes.

Victorian Civil and Administrative Tribunal (VCAT)

A tribunal that deals with disputes relating to a range of civil issues heard by various Lists (sections), such as the Human Rights List, the Civil Claims List and the Residential Tenancy List.

Victorian Human Rights and Equal Opportunity Commission

Independent Victorian statutory body that helps people resolve complaints of discrimination, sexual harassment and religious vilification.

void contract

The contract no longer exists (also referred to as an invalid contract).

voidable contract

A contract that can be rejected by one party because of some error in the contract or the making of the contract.

volenti non fit injuria

A situation (often in sport) where the parties involved accept the dangers of a known and appreciated risk, either expressly or by implication.

warrant

A court document used to arrest a suspect and bring him or her before a court of law.

warranties

Terms of a contract that are not the main elements of the contract.

will

A statement (usually written) by which the person making it (the testator) provides for the distribution or administration of property after his or her death.

WorkCover

A government authority that offers compensation to workers who are injured at work or in work-related activities.

workplace bullying

Aggressive or unreasonable behaviour against someone who works in the same workplace as the bully, particularly if this happens on a regular basis.

writ of attachment

A court order instructing the defendant's employer to pay a certain amount of money to the complainant regularly, the money to be deducted from the defendant's wages.

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