

LEGAL FUNDAMENTALS IN AUSTRALIA

A text for students of VCE Legal Studies Units 3 and 4
2nd edition



Megan Blake
Jane Edwards
Matt Richardson



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Commerce Presentations and Publications (CPAP)

206 / 1 Queens Rd

St Kilda Rd Towers

Melbourne Vic 3004

Tel: 03 9866 2289

Fax: 03 9005 2717

Email: cpap@commpap.com

ABN: 19 619 387 012

About the authors

Dr Megan Blake (LLB, BA (Melb) Dip Ed, Postgrad Dip Arts (Research), PhD (Monash)) completed a law degree at the University of Melbourne and worked for a number of years with private law firms and large corporations. Since joining the teaching profession, Megan has been a teacher of VCE Legal Studies and has been actively involved in Legal Studies education. She had positions of responsibility with the VCAA, including as a member of the panel designing the 2011-2017 Legal Studies Study Design, and she has had a number of years experience as a VCE Legal Studies examination assessor. In 2018 and 2019 she acted as Assistant Chief Assessor on the examination assessment panel. Megan is a prolific writer of Legal Studies resources, co-authoring the Legal Fundamentals in Australia textbook, authoring the quarterly CPAP Legal Studies Updates and writing CPAP practice examinations and assessment tasks. Megan has also authored works for Jacaranda and has extensive experience presenting student lectures and workshops.

Jane Edwards (BA, LLB (Hons) Dip Ed (Melb)) completed the Bachelor of Arts and Bachelor of Laws with Honours, at the University of Melbourne. She joined the Australian Competition and Consumer Commission as a graduate and worked for a number of years in the areas of mergers and acquisitions, consumer protection and litigation. Jane trained as a Commonwealth investigator, and participated in a number of the Commission's cases in the Supreme Court of Victoria, the Federal Court, the Full Federal Court and the High Court of Australia. After qualifying as a teacher in 2007, Jane has taught Legal Studies and English at Methodist Ladies College and Scotch College. She has contributed Legal Studies classroom activities to the VCTA's online resource Compak, and has presented to Legal Studies teachers at the VCTA's Comview Conference.

Matt Richardson (BA, Dip Ed (Monash)) is currently a senior Business Management and Legal Studies teacher at Ballarat High School. Matt is the co-author of several textbooks in the areas of Business Management, Legal Studies, Economics and Business and Civics and Citizenship. He has held positions of responsibility with the Victorian Curriculum and Assessment Authority (VCAA) as an examination vetter and examination assessor. He has presented professional development sessions for the Victorian Commerce Teachers Association (VCTA) and has contributed articles to the VCTA journal Compak. Matt presents student revision and exam preparation lectures and is also the writer of CPAP Business Management assessment tasks, practice examinations and Quarterly Updates.

A note to teachers and students

The authors have written this text to closely reflect the requirements of the study as outlined in the VCAA VCE Legal Studies Study Design (2018-2023). The Study Design can be downloaded at http://www.vcaa.vic.edu.au/Documents/vce/legalstudies/LegalSD_2018.pdf and it contains information about the required content for a course of study in VCE Units 3 and 4 Legal Studies. Unit 3 and Unit 4 are both composed of two areas of study (AOS), AOS 1 and 2, making four AOS in total. For each AOS, students are required to demonstrate an understanding of each of the dot points contained under the heading 'key knowledge.' They should also be able to demonstrate the 'key skills' for each AOS.

Importantly, you should not be overawed or discouraged by the size of this textbook. We have included significantly more exercises and activities than students are expected to complete. This is deliberately designed to provide teachers and students with greater choice and to provide extension work for the very keen students of Legal Studies. In particular, there are numerous tables and activities towards the end of each chapter that are intended to develop the key skills listed in the study design. The detailed information contained in these tables is largely designed to address the communicated intention for the current Study Design to focus more heavily on 'higher order skills'. In the current Study Design, higher-order skill words like 'discuss', 'interpret', 'analyse', 'evaluate', 'justify', 'synthesise' and 'apply' make up 70% of the current Study Design, which compares with only 55% in the previous Study Design. The move is away from rote-learning and processes, and towards critical analysis, influences and impacts. Careful and considered use of the information contained in the tables should help students to respond more effectively to examination (or SAC) questions requiring the use of higher-order skills.

The 'key knowledge' (and 'key skills') dot points are included below in tables 1 to 6, where each key knowledge point is cross referenced to the relevant section in the text. It will therefore provide a useful guide for teachers when preparing assessment tasks or exercises and a handy guide for students when preparing for assessment tasks, including the end of year exam.

We hope that the breadth and depth of content in this textbook will enhance both student and teacher enjoyment of this stimulating and relevant subject.

Proposed timeline

Unit 3	Area of Study 1:	approximately 8-9 weeks
	Area of Study 2:	approximately 8-9 weeks
Unit 4	Area of Study 1:	approximately 7-8 weeks
	Area of Study 2:	approximately 9-10 weeks
Revision		2 - 4 weeks

Unit 3 Rights and justice		
Area of Study 1: The Victorian criminal justice system		
Key knowledge		Tick when learned
Key concepts		
1	the principles of justice: fairness, equality and access	
2	key concepts in the Victorian criminal justice system, including: <ul style="list-style-type: none"> – the distinction between summary offences and indictable offences – the burden of proof – the standard of proof – the presumption of innocence 	
3	the rights of an accused, including the right to be tried without unreasonable delay, the right to a fair hearing, and the right to trial by jury	
4	the rights of victims, including the right to give evidence as a vulnerable witness, the right to be informed about the proceedings, and the right to be informed of the likely release date of the accused	
Determining a criminal case		
5	the role of institutions available to assist an accused, including Victoria Legal Aid and Victorian community legal centres	
6	the purposes of committal proceedings	

7	the purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases	
8	the reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals	
9	the responsibilities of key personnel in a criminal trial, including the judge, jury, parties and legal practitioners	
10	the purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection	
11	fines, community corrections orders and imprisonment, and their specific purposes	
12	factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements	
Reforms		
13	factors that affect the ability of the criminal justice system to achieve the principles of justice including in relation to costs, time and cultural differences	
14	recent reforms and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice	

Unit 3 Rights and justice		
Area of Study 2: The Victorian civil justice system		
Key knowledge		Tick when learned
Key concepts		
15	the principles of justice: fairness, equality and access	
16	key concepts in the Victorian civil justice system, including: <ul style="list-style-type: none"> – the burden of proof – the standard of proof – representative proceedings 	
Resolving a civil dispute		
17	factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues	
18	the purposes and appropriateness of Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) in resolving civil disputes	
19	the purposes of civil pre-trial procedures	
20	the reasons for a Victorian court hierarchy in determining civil cases, including administrative convenience and appeals	
21	the responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners	
22	the responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners	
23	judicial powers of case management, including the power to order mediation and give directions	
24	the methods used to resolve civil disputes, including mediation, conciliation and arbitration, and their appropriateness	
25	the purposes of remedies	
26	damages and injunctions, and their specific purposes	
Resolving a civil dispute		
27	factors that affect the ability of the civil justice system to achieve the principles of justice, including in relation to costs, time and accessibility	
28	recent and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice	

Unit 3 Key skills			
The key skills across Unit 3 AOS 1 and 2		Area of Study	Tick when learned
	Define		
1	- legal terminology	1 and 2	
	Explain		
2	- the rights of an accused in the criminal justice system	1	
3	- the rights of victims in the criminal justice system	1	
4	- the purposes of committal proceedings	1	
5	- the roles of institutions available to assist an accused	1	
6	- the purposes of pre-trial procedures	2	
7	- the reasons for the Victorian court hierarchy	1 and 2	
	Use		
8	- legal terminology	1 and 2	
9	- examples to illustrate the purposes of pre-trial procedures	2	
	Interpret		
10	- legal principles and information	1 and 2	
	Apply		
11	- legal principles and information to actual and/or hypothetical scenarios	1 and 2	
	Justify		
12	- the appropriateness of the means to determine a criminal case	1	
13	- the appropriateness of institutions and methods used to resolve a civil dispute	2	
	Discuss		
14	- legal principles and information	1 and 2	
15	- the means used to determine a criminal case	1	
16	- institutions and methods used to resolve a civil dispute	2	
17	- the responsibilities of key personnel	1 and 2	
18	- the ability of sanctions to achieve their purposes	1	
19	- the ability of remedies to achieve their purposes	2	
20	- recent reforms	1 and 2	
21	- recommended reforms	1 and 2	
	Analyse		
22	- factors to consider when initiating a civil claim	2	
	Evaluate		
23	- the ability of the justice system to achieve the principles of justice	1 and 2	
	Synthesise		
24	- legal principles and information with actual and/or hypothetical scenarios	1 and 2	

Unit 4 The people and the law
Area of Study 1: The people and the Australian Constitution

Key knowledge		Tick when learned
1	the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making	
2	the division of constitutional law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers	
3	the significance of section 109 of the Australian Constitution	
4	the means by which the Australian Constitution acts as a check on parliament in law-making, including: <ul style="list-style-type: none"> – the bicameral structure of the Commonwealth parliament – the separation of the legislative, executive and judicial powers – the express protection of rights – the role of the High Court in interpreting the Australian Constitution – the requirement for a double majority in a referendum 	
5	the significance of one High Court case interpreting sections 7 and 24 of the Australian Constitution	
6	the significance of one referendum in which the Australian people have protected or changed the Australian Constitution	
7	the significance of one High Court case which has had an impact on the division of constitutional law-making powers	
8	the impact of international declarations and treaties on the interpretation of the external affairs power	

Table 5
Unit 4 The people and the law
Area of Study 2: The people, the parliament and the courts

Key knowledge		Tick when learned
<i>Parliament and courts</i>		
9	factors that affect the ability of parliament to make law, including: <ul style="list-style-type: none"> – the roles of the houses of parliament – the representative nature of parliament – political pressures – restrictions on the law-making powers of parliament 	
10	the roles of the Victorian courts and the High Court in law-making	
11	the reasons for, and effects of, statutory interpretation	
12	factors that affect the ability of courts to make law, including: <ul style="list-style-type: none"> – the doctrine of precedent – judicial conservatism – judicial activism – costs and time in bringing a case to court – the requirement for standing 	
13	features of the relationship between courts and parliament in law-making, including: <ul style="list-style-type: none"> – the supremacy of parliament – the ability of courts to influence parliament – the interpretation of statutes by courts – the codification of common law – the abrogation of common law 	
<i>Law reform</i>		
14	reasons for law reform	
15	the ability and means by which individuals can influence law reform including through petitions, demonstrations	
16	and the use of the courts	
17	the role of the media, including social media, in law reform	
18	the role of the Victorian Law Reform Commission and its ability to influence law reform	
19	one recent example of the Victorian Law Reform Commission recommending law reform	

20	the role of one parliamentary committee or one Royal Commission, and its ability to influence law reform	
21	one recent example of a recommendation for law reform by one parliamentary committee or one Royal Commission	
22	the ability of parliament and the courts to respond to the need for law reform	

Unit 4 Key skills			
The key skills across Unit 4 AOS 1 and 2		Area of Study	Tick when learned
	Define		
1	- legal terminology	1 and 2	
	Explain		
2	- the reasons for law reform	2	
	Use		
3	- legal terminology	1 and 2	
4	- examples of the constitutional law-making powers of the state and Commonwealth parliaments	1	
5	- examples of the reasons for law reform	2	
6	- examples of the influence of the media, including social media, in law reform	2	
7	- examples of the means by which individuals can influence law reform	2	
8	- recent examples of the ability of law reform bodies to influence a change in the law	2	
	Interpret		
9	- legal principles and information	1 and 2	
	Apply		
10	- legal principles to actual scenarios	1 and 2	
	Compare		
11	- the constitutional law-making powers of the state and Commonwealth parliaments	1	
	Discuss		
12	- legal principles and information	1 and 2	
13	- the significance of s109 of the Australian Constitution	1	
14	- the significance of High Court cases involving the interpretation of the Australian Constitution	1	
15	- the impact of international declarations and treaties on the interpretation of the external affairs power	1	
16	- the factors that affect the ability of parliament and courts to make laws	2	
17	- the means by which individuals can influence law reform	2	
	Analyse		
18	- legal principles and information	1 and 2	
19	- the ability of the Australian people to protect or change the Australian Constitution	1	
20	- the features of the relationship between parliament and courts	2	
21	- the influence of the media, including social media, in law reform	2	
	Evaluate		
22	- the ways in which the Australian Constitution acts as a check on parliament in law-making	1	
23	- the ability of law reform bodies to influence a change in the law	1	
24	- the ability of parliament and the courts to respond to the need for law reform	1	
	Synthesise		
25	- legal principles with actual scenarios	1 and 2	

Assessment

Teachers are required to provide a score for each outcome in each of Units 3 and 4, which represents an assessment of the student's achievement. The score must be based on the teacher's assessment of the level of performance of each student on the outcomes for the unit specified in the Study Design. These outcomes for each unit are linked to the key knowledge and skills as specified in the Study Design and re-produced on the previous pages.

Teachers must select assessment tasks from the designated list for each outcome published in the Study Design. School-assessed Coursework for the outcomes in Unit 3 will contribute 25 per cent to the student's study score. School-assessed Coursework for the outcomes in Unit 4 will contribute a further 25 per cent to the student's study score. The external examination will contribute the final 50 per cent to the student's study score.

Unit 3 Assessment		
Outcome statement	Marks allocated*	Assessment tasks
<p>Outcome 1 Explain the rights of the accused and of victims in the criminal justice system, discuss the means used to determine criminal cases and evaluate the ability of the criminal justice system to achieve the principles of justice.</p>	50	<p>The student's performance on each outcome is assessed using one or more of the following:</p> <ul style="list-style-type: none"> • a case study • structured questions • an essay • a report in written format • a report in multimedia format • a folio of exercises.
<p>Outcome 2 Analyse the factors to consider when initiating a civil claim, discuss the institutions and methods used to resolve civil disputes and evaluate the ability of the civil justice system to achieve the principles of justice.</p>	50	
Total marks	100	
*School-assessed Coursework for Unit 3 contributes 25 per cent to the study score.		

Unit 4 Assessment		
Outcome statement	Marks allocated*	Assessment tasks
<p>Outcome 1 Discuss the significance of High Court cases involving the interpretation of the Australian Constitution and evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making.</p>	40	<p>The student's performance on each outcome is assessed using one or more of the following:</p> <ul style="list-style-type: none"> • a case study • structured questions • an essay • a report in written format • a report in multimedia format • a folio of exercises.
<p>Outcome 2 Discuss the factors that affect the ability of parliament and courts to make law, evaluate the ability of these law-makers to respond to the need for law reform, and analyse how individuals, the media and law reform bodies can influence a change in the law.</p>	60	
Total marks	100	
*School-assessed Coursework for Unit 3 contributes 25 per cent to the study score.		

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Introduction to VCE Legal Studies

Units 3 and 4

Before we get into Unit 3 AOS1, we should overview the difference between criminal law and civil law, because that's the foundation for the division of Unit 3 into AOS1 and AOS2.

All law regulates human behaviour in some way: it can make certain behaviours compulsory; it can prohibit other types of behaviour; it can try to motivate a shift in public expectations or standards of behaviour. Sometimes the purpose is to regulate behaviour between private individuals, in terms of how they relate to each other in their private relationship and affect each other's rights; other times the purpose is to regulate the behaviour of individuals as it affects society as a whole.

This is the basic difference between **criminal law** and **civil law**. Criminal law regulates human behaviour insofar as it affects society as a whole, whereas civil law regulates human behaviour insofar as it relates to the private relationships between individuals.

The difference between criminal and civil law is required knowledge for understanding the Unit 3 split between AOS 1, 'The Victorian criminal justice system', and AOS 2, 'The Victorian civil justice system'.

Criminal law

Criminal law regulates the relationship between individuals and the state. The state sets out standards of behaviour that everyone is expected to follow for the protection and benefit of the whole community, and anyone who breaks these rules can be **prosecuted** by the police or the Office of Public Prosecutions, on behalf of the whole community.

Study tip: Note that there is a difference between a human individual and a legal individual. A human individual is a person; a legal individual, on the other hand, can be a person, but can also be a different kind of legal entity such as a corporation or government agency. Most of the time the law talks about individuals and 'parties' to a case in terms of legal individuals.

The charges will be brought by the police for **summary offences**; in other words, for minor offences that are heard in the **Magistrates' Court**, the lowest court.

The case will be prosecuted by the Office of Public Prosecutions for **indictable offences**; in other words, the more serious matters that are tried in the higher **courts**, the **County Court** or the **Supreme Court**.

In both cases the person accused of the crime is called the **'defendant'**, but they can also be referred to as the **'accused'**. The person bringing the action is called the **'prosecution'**.

Criminal cases begin with the commission of a crime. Once a crime has been reported to the police the police will begin an investigation, and once a suspect has been found and charged she or he will appear in court.

Civil law

Civil law regulates the relationship between individuals and other individuals - remember that, legally, companies count as individuals, as does the government when it is being sued or launching a private action itself.

Study tip: It is important to always use the correct terminology when talking about criminal cases. Words such as 'crime', 'charged', 'guilty', 'accused' and 'prosecution' all denote criminal law and criminal disputes.

The state sets out expectations of conduct for the way in which individuals treat each other, with the aim of protecting each individual from another individual unlawfully infringing her, his or its rights. Anyone who feels their rights have been unlawfully infringed can take a **civil action** against the individual who did it: they can **sue** them. The legal matter will be one individual against the other individual.

All civil lawsuits will be brought by an individual on her, his or its own behalf: the state does not represent the individual.

Civil cases begin with the infringement of an individual's rights. Once an individual believes their rights have been unlawfully infringed they may send a letter of demand to the other party, informing them of the complaint and giving them a chance to resolve the issue without going to court. This is the unofficial commencement of civil proceedings.

The individual bringing the action is called the **'plaintiff'**, and the individual who is being taken to court is called the **'defendant'**, the same as in criminal cases. The word **'accused'** cannot be used for civil cases, though.

The power of courts and **tribunals** to hear civil matters is determined by how complex the case is: how much money is being asked for, or how complicated the law or evidence is. More complex matters are heard in higher courts.

Resolution of disputes

The most common means of resolving disputes has traditionally been through the court system. Courts operate on a federal level as well as in each state. Federal courts hear cases relating to federal law, while state courts hear cases relating to state law.

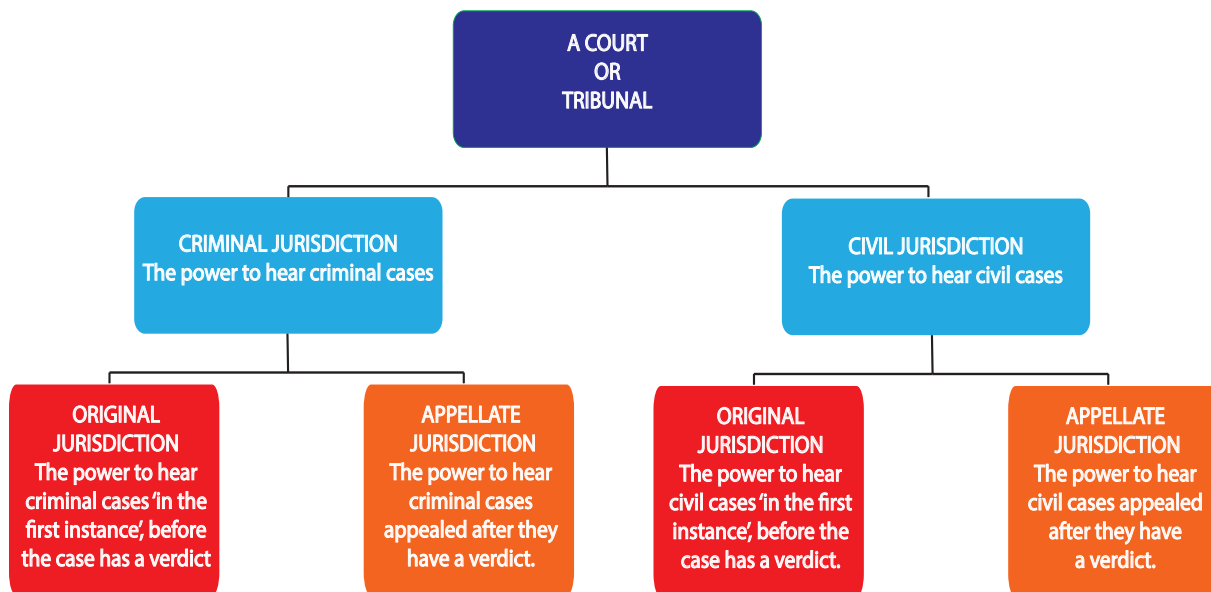
Study tip: It is equally important to use the correct terminology when talking about civil cases. Words such as 'tort', 'civil wrong', 'sued', 'liable', 'remedy' and 'plaintiff' all denote civil law and civil disputes. Some language, such as 'rights' or 'defendant', apply to both civil and criminal law.

Courts resolve disputes according to their **jurisdiction**. The 'jurisdiction' of an official body is the authority it has to use the power of government: for a body like parliament, this will be the authority to make laws; for a body like a court or tribunal, this will be the authority to hear cases and give out criminal **sanctions** (such as prison terms) or civil **remedies** (such as monetary **damages**). Which court or tribunal a party goes to will depend on the type of law covering the area, and how serious their case is.

Each court or tribunal therefore has four possible categories of jurisdiction:

- i. **Criminal jurisdiction.** This is the authority to resolve criminal disputes.
- ii. **Civil jurisdiction.** This is the authority to resolve civil disputes.
- iii. **Original jurisdiction.** This is the authority to hear a criminal or civil case that currently has no resolution.
- iv. **Appellate jurisdiction.** This is the authority to hear a criminal or civil case that has a resolution, but where one or both of the parties is querying something about the resolution of the case in an **appeal**. The authority to hear that appeal is called 'appellate jurisdiction'.

Combining these four jurisdictions, a court or tribunal may have original criminal jurisdiction; original civil jurisdiction; appellate criminal jurisdiction; and/or appellate civil jurisdiction.



AOS 1 in Unit 3 will focus on the left branch: the ability of dispute resolution bodies to exercise criminal jurisdiction. Here, we focus on courts, because tribunals do not generally hear criminal disputes. AOS 2 in Unit 3 will focus on the right branch: the ability of dispute resolution bodies to exercise civil jurisdiction. Here, we look at both courts and tribunals.

Study tip: Remember that sometimes legal individuals will be organisations, corporations or the government. This is why the pronoun 'its' is sometimes used. It is not necessary to do this in your own writing, but it is important to remember that non-humans can also be legal individuals under the law. When they are, it will often have a significant impact on the case and the equal footing of the parties.

Where relevant, the ability of the individual to take her, his or its own action outside the official dispute resolution bodies will also be studied. For instance, individuals may try to resolve civil disputes without going to court.