Unit 1
Beyond reasonable doubt

TOPIC 1: LEGAL FOUNDATIONS 7

Chapter 1: Law 8

1.1 The rule of law 9
1.2 Customs, rules and laws 13
1.3 The purpose of law 15
1.4 Characteristics of an effective law 17
1.5 Legal criteria 24

Chapter 2: Law-making 27

2.1 Sources of law: an overview 28
2.2 Customary law 30
2.3 Separation of powers: the legislature, executive, and judiciary 37
2.4 Statute law 44
2.5 Common law 49

Chapter 3: The adversarial system 58

3.1 The adversarial and inquisitorial systems of justice 59
3.2 Overview of the criminal justice process 64

TOPIC 2: CRIMINAL INVESTIGATION PROCESS 70

Chapter 4: Criminal investigation process 71

4.1 Introduction 72
4.2 Different roles in an alleged criminal situation 73
4.3 The role of the police 75
4.4 Types of evidence 76
4.5 Rights and responsibilities of police, suspects, accused persons and victims 95

Chapter 5: Criminal offences 105

5.1 Types of criminal offences 106
5.2 Offences against the person 108
5.3 Offences against property 123
5.4 Traffic offences 127
5.5 Drug offences 129
5.6 Attempts to commit crimes 131
5.7 Accessories and parties to offences 131

TOPIC 3: CRIMINAL TRIAL PROCESS 134

Chapter 6: Pathways to a fair trial, pre-trial processes 135

6.1 Introduction 136
6.2 Bail 138
6.3 Mentions 150
6.4 Callovers 152

Chapter 7: Pathways to a fair trial, the committal process 155

7.1 The purpose of a committal 156
7.2 The committal pathways 157
7.3 Registry committals 158
7.4 Committals by magistrates 158
7.5 The role of the Crown Law Office (Office of the Director of Public Prosecutions) 162
7.6 Ex-officio indictments 163

Chapter 8: The attributes of a fair trial 167

8.1 A common law right 168
8.2 Statutory rights to a fair trial 169
8.3 Trial by a judge and jury 175
8.4 Trial procedures for indictable offences 186
8.5 Rules of evidence 189
8.6 The right to silence 194
8.7 The right to legal representation 196
8.8 Criminal appeals and double jeopardy 198

Chapter 9: Criminal defences and excuses 208

9.1 Criminal responsibility 209
9.2 Ignorance of the law-bona fide claim of right 210
9.3 Independently of the exercise of the will 210
9.4 Accident 213
9.5 Mistake of fact 219
9.6 Insanity 220
9.7 Intoxication 222
9.8 Immature age 223
9.9 Partial excuses for murder 223

Chapter 10: Barriers to justice and equity 230

10.1 A fair and impartial approach 231
10.2 Children 232
10.3 First Nations Peoples 237
10.4 Persons with a disability 247
10.5 Gender equality 251

TOPIC 4: PUNISHMENT AND SENTENCING 259

Chapter 11: Sentencing in Queensland 260

11.1 What is sentencing? 261
11.2 Types of penalties and sentences 262
11.3 Purpose of sentencing 272
11.4 Sentencing principles and factors 280
11.5 Mandatory sentences 284
11.6 Sentencing children 287
11.7 Appealing a sentence 289

Unit 2
Balance of probabilities

TOPIC 1: CIVIL LAW FOUNDATIONS 294

Chapter 12: Introducing the civil law 296

12.1 What is civil law? 297
12.2 Sources of civil law 300
12.3 Distinguishing civil law from criminal law 302
12.4 The branches of the civil law: contract and torts 304
12.5 The doctrine of precedent 304
12.6 How does international law influence Australia's civil law? 309

Chapter 13: Dispute resolution in civil law 310

13.1 What is a civil dispute? 311
13.2 Different methods of resolving civil disputes 311
13.3 Why go to court? 314
13.4 Differences between civil and criminal court actions 315
13.5 Which court or tribunal? 318
13.6 Differences between courts and tribunals 320
13.7 Tribunals involved in civil dispute resolution 320
13.8 Complaints and appeals against government decisions 322
13.9 Commissions of inquiry 327

Chapter 14: Alternative dispute resolution 330

14.1 What is alternative dispute resolution? 331
14.2 Alternative dispute resolution in statute law 332
14.3 Types of alternative dispute resolution 334
14.4 The mediation process 337
14.5 Setting aside a mediation agreement 341

Chapter 15: Resolving issues through the civil justice system 344

15.1 Access to the civil justice system 345
15.2 Making a complaint to the Queensland Ombudsman 348
15.3 Resolving a family issue in the Queensland Civil and Administrative Tribunal 350
15.4 Resolving a contract dispute in the Magistrates Court of Queensland 354
15.5 Court-ordered alternative dispute resolution 362

TOPIC 2: CONTRACTUAL OBLIGATIONS 365

Chapter 16: How a contract is formed 366

16.1 Introduction 367
16.2 Intention to create legal relations 368
16.3 What is an offer? 369
16.4 What is acceptance? 374
16.5 What are consideration and formalities? 376
16.6 Contract law and technological change 381

Chapter 17: The terms of the contract 388

17.1 Identifying the terms of a contract 389
17.2 When is a representation a term of the contract? 392
17.3 When can terms be implied into a contract? 393
17.4 Distinguishing between conditions and warranties 394
17.5 Exclusion clauses 396

Chapter 18: Ending a contract 401

18.1 Setting aside a contract 402
18.2 Discharge of a contract 415

Chapter 19: Remedies and other contractual issues 419

19.1 Introduction 420
19.2 Common law remedies 420
19.3 Unjust enrichment 427
19.4 Rental agreements 430
19.5 Sports contracts 431
19.6 Mobile phone contracts 434

Chapter 20: Consumer Law 437

20.1 The modern 'consumer' and the need for protection 438
20.2 Australian Consumer Law (ACL) 438
20.3 Australian Competition and Consumer Commission (ACCC) 447
20.4 Resolving disputes and remedies 452

TOPIC 3: NEGLIGENCE AND THE DUTY OF CARE 456

Chapter 21: The elements of negligence 457

21.1 What elements must the plaintiff prove? 458
21.2 What is the duty of care? 462
21.3 When does a person breach the duty of care? 465
21.4 When is the damage caused by the breach? 471

Chapter 22: Defences and remedies in negligence 480

22.1 Defences in negligence 481
22.2 *Volenti non-fit injuria* (voluntary assumption of risk) 481
22.3 Contributory negligence 484
22.4 Remedies in negligence law 488

Chapter 23: Negligence law in contemporary contexts 491

23.1 The changing landscape of negligence 492
23.2 Defective goods 500
23.3 Drivers of motor vehicles 500
23.4 Teachers 500
23.5 Rescuers 500
23.6 Doctors and healthcare professionals 503
23.7 Negligence in sport 506

Legal foundations

Chapter 1: Law

1.1 The rule of law

1.2 Customs, rules and laws

1.3 The purpose of law

1.4 Characteristics of an effective law

1.5 Forming a legal criteria

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the concept of the rule of law
  - the difference between onus of proof and standard of proof
  - the purpose of laws within society
  - the difference between a rule and a law
  - concepts of just and equitable outcomes as a foundation principle of criminal law in Australia
  - the characteristics of an effective law
  - legal criteria for decisions.
- analyse a range of criminal legal issues by examining different viewpoints.

1.1 The rule of law

Key Terms

Throughout this textbook we will highlight some key terms that are important to each topic. Some of these definitions are drawn from the *Legal Studies General Senior Syllabus* or other sources, such as a legal dictionary. Knowing these key terms will help you understand the larger legal issues you will be asked to analyse and evaluate.

Code: a collection of laws or statutes.

Equitable: even and impartial; finding an acceptable balance between the rule of law and the rights and freedoms of individuals and society.

Just: legally correct, conforming to that which is lawful, fair or reasonable in the circumstances.

Rule of law: the doctrine that all people are equal before the law and that the government is subject to the law.

We cannot build foundations of a state without rule of law.

Palestinian politician Mahmoud Abbas

The doctrine of the **rule of law** is the foundation of our legal system. Although it is made up of many principles, essentially the rule of law asks that every law, process and decision should reflect that everyone, no matter their status or power, **are equal before the law.**

Origins of the rule of law and democracy

We can trace the many principles that underpin the rule of law from our ancient civilisations.

The *Code of Hammurabi,* a collection of legal rules made by Babylonian King Hammurabi, is one of our longest surviving legal texts and illustrates how some ancient societies sought to create systems that supported the concepts of fairness and justice. The *Code* sets out a list of crimes, punishments and guidelines about how to deal with civil disputes. These rules were binding on all members of the community—even people who held privileged positions. This is evidenced in its introduction, which states the *Code* ensures the '*...strong should not harm the weak.*'

The ancient Greeks created a democratic system that included checks and balances against those who held power by giving its citizens individual freedoms and rights, as well as a voice in law-making (although not everyone was considered a citizen).

Today, modern democracies throughout the world, such as those seen operating in the United Kingdom, United States of America, New Zealand, Canada and Australia believe that no-one, not even the president, premier or prime minister, should be above the law. Perhaps the most recent example of this is the impeachment of the 45th President of the United States, Donald Trump. Although he was found 'not guilty' in the Senate (after being impeached by the House of

Code of Hammurabi

Representatives) the fact that he was put on trial at all demonstrates that even those that hold the highest office are still answerable to the people. In their own ways, all these societies, whether it be ancient or modern, have created systems that seek to provide stability, fairness, equality and a clear process for resolving disputes.

Case Study

Democracy can only survive when ordinary men and women have faith in the integrity of those whose responsibility is the preservation of integrity of Parliament in all its workings. It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not, for their personal advantage, abuse their position.

R v Jackson & Hakim (1988) 33 A Crim R 413 at [435]

R v Nuttall (2008) District Court of Queensland

Facts: Gordan Nuttall was a member of the Queensland Legislative Assembly from 1992 to 2006. For most of that time he held a Ministry position.

A Crime and Misconduct Commission (CMC) investigation looked into a number of payments made to Nuttall by Ken Talbot (a Queensland businessman) and Harold Shand (then a director of the Workcover Queensland Board). Shand was appointed a director by Nuttall while he was the Minister for Industrial Relations. He was charged with 36 counts of receiving a secret commission. He pleaded 'not guilty'.

Legal Issue: Did Nuttall corruptly receive anything of valuable consideration (such as real or personal property, money or a loan) from Talbot and Shand while holding a Ministry position? Did this influence Nuttall to show favour or disfavour towards Talbot and Shand or provide the expectation of influence?

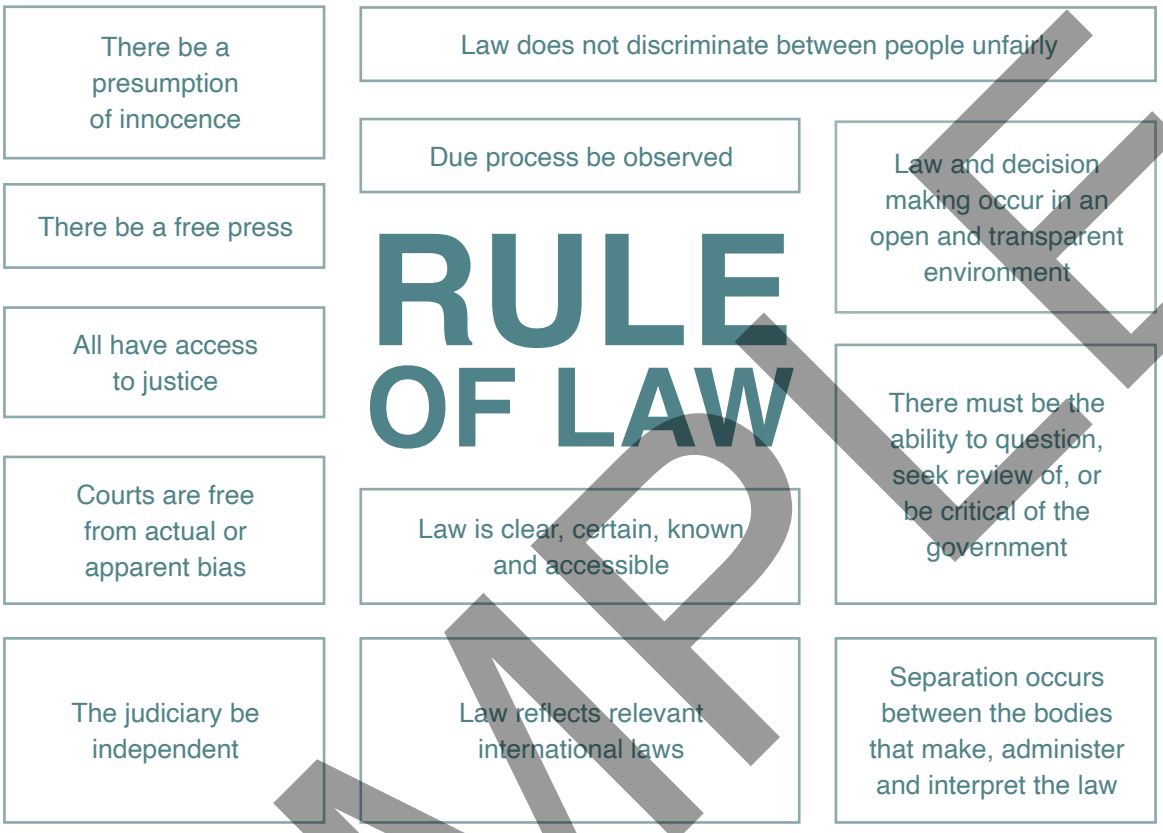
Decision: When summing up the case to the jury, Chief Judge Patsy Wolfe told the jury Nuttall's guilt or innocence hinged on what he believed Talbot and Shand wanted when they gave him the money.

A jury found Nuttall guilty of all charges. He received a sentence of seven years imprisonment. He was eligible to apply for parole at 2 January 2012. He appealed his conviction and sentence, but this was dismissed by the Queensland Court of Appeal.

1. With what criminal offence was Nuttall charged? [C]
2. What was the outcome of the trial. [C]
3. Explain how this case shows Nuttall, a person who held a powerful position as a member of parliament, was subject to the law. [A]
4. Justify whether or not the outcome of this case demonstrates the rule of law operated effectively. Explain your reasons. [E]

Rule of law principles

There are many principles that underpin the rule of law in Australia that work together to help make everyone **equal before the law**. You will see these principles mentioned at various points throughout your Legal Studies course. Some key principles are set out in the infographic below.



Some of you might argue that these principles don't exist in the real world—and that's ok. **As Legal Studies students, it's important to be critical and question whether the law and our legal processes are just, fair and equitable.**

The rule of law is important as it protects all of us from the misuse of power by restricting what governments, businesses and individuals can do to each other by ensuring everyone must obey and follow the law. This helps our community to function effectively and efficiently.

Tip

Each time you are asked to analyse or evaluate a legal issue or the law, you may like to think about whether the principles of the rule of law are being applied and to what degree. For example, prior to 2017, the *Marriage Act 1961* (Cth) defined marriage as being, 'between a man and a woman.' Although the law was clear, certain and known; the law also discriminated between same-sex and heterosexual couples. This unequal treatment was a key factor behind the reform of Australia's definition of marriage, which now defines marriage as, 'the union of 2 people to the exclusion of all others, voluntarily entered into for life.' You will notice this definition does not reference a person's sex or gender.

Practical Application

1. Match the relevant rule of law principle (A-F) being referred to in each source (1-6). [C]

A. Law and decisions are made in an open environment

1. The doctrine is reflected in the structure of the *Australian Constitution*: Chapter I is entitled 'The Parliament'; Chapter II, 'The Executive Government; and Chapter III, 'The Judicature'. But these powers are not as separate and the distinctions not as clear as some might imagine.

Source: Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Interim Report 127, July 2015).

B. The independence of the judiciary

2. …because there is a considerable imbalance of resources between the State and the defendant…[it] requires that proper measures are taken to ensure that such censure does not fall on the innocent.

Source: Andrew Ashworth 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 251.

C. A free press

3. …the prosecution brings the charge against the accused, and for that reason the prosecution has the burden of proving that charge. The standard of proof required is proof beyond reasonable doubt…

Source: Mark Tedeschi QC and The Rule of Law Education Centre, 'The role of a prosecutor', *Presumption of Innocence* (You Tube, 15 October 2012).

D. Separation between the bodies that make, administer and interpret the law

4. Queensland has an open judicial system. As a member of the Queensland public, you're encouraged to see how it works (by going to court).

Source: Queensland Courts, *Courtroom etiquette* (Web Page, 2022)

E. Presumption of innocence

5. …judges need to be able to decide the cases on the evidence before them in accordance with the common law and statute, without influence or pressure from any external source.

Source: The Hon Chief Justice Catherine Holmes AC, 'The fight for independence' (14 June 2019) *The Australian Legal Review.*

F. Due process is observed

6. Whether it's starving the public broadcaster of funding while forking out millions to Foxtel, the further concentration of media ownership in Australia, or the frequency with which journalists, media organisations and whistle-blowers are being raided and arrested by police – these are not the features of a healthy democracy.

Source: Ebony Bennett, 'Why freedom of the press matters', *The Australia Institute* (Web Page, 6 June 2021).

1.2 Customs, rules and laws

Our lives are governed by many customs (which can be influenced by our families, friends and the communities in which we live), rules and laws.

Social customs and rules are important, but they do not have the same status or force that the law does. To help you understand this further here is an example using a mobile phone:

Customs, rules and laws

Custom

When you watch a movie at the cinema, you turn your mobile phone on silent.

MOBILE PHONE

Rule

Your school has a rule that your mobile phone is switched off and put away during class. You receive a detention if you break this rule.

Law

The *Transport Operations (Road Use Management-Road Rules) Regulation 2009* (Qld) s300 states that a driver must not use a mobile phone while the vehicle is moving or is stationary but not parked. You can be fined and lose points if you do so.

What do you think?

1. Form a group of 3 and together identify one custom or school rule that you think might benefit from becoming a law. Think of reasons that support that choice. Present your choice to the class. [A]

Legal foundations

Chapter 2: Law-making

2.1 Sources of law: an overview

2.2 Customary law

2.3 Separation of powers: the legislative, executive and judiciary

2.4 Statute law

2.5 Common law

Learning objectives

At the conclusion of this chapter students will be able to:

- comprehend
  - the sources of law in the Australian legal system
  - the separation of powers doctrine in the Australian legal system
  - the court hierarchy
  - the process of statutory law-making
  - the process of statutory interpretation and the role of the courts.
- analyse
  - a range of criminal legal issues
  - the role of customary law in Australia's legal system.

2.1 Sources of law: an overview

Key Terms

Common law *(also known as judge-made law, case law or precedent):* a body of law based on judicial decisions that has been developed over time.

Customary law: the practices and systems developed by First Nations peoples, which regulated their behaviour towards each other and towards the land in which they lived, and which also included penalties for non-compliance.

Court hierarchy: the arrangement of the courts into a specific order guided by jurisdiction. Decisions made in courts located at the top of the court hierarchy have greater authority than courts located at the middle or bottom of the hierarchy.

Statute law *(also known as parliament-made law or legislation):* law created and passed by a legislative body.

Law in Australia after 1788

When Captain Arthur Phillip declared our continent was part of the British Commonwealth in 1788, our legal system began to change dramatically. In that moment, English law applied to all people living on this continent, sweeping away one of the oldest legal systems in the world developed by our First Nations peoples (which we will discuss in a moment). Throughout the mid to late 1800s, England granted each British colony more latitude to develop their own laws and legal processes. Consequently, England had less say in the day-to-day decisions made by our governments, culminating in the creation of the Commonwealth of Australia through a process of federation, which heralded the beginning of an independent system of government in Australia. However, complete legislative independence was not finally established until the passing of the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK).

Although we make, administer and apply our own distinct laws and legal processes, you will continue to see connections to our legal past—as many features of our legal system are similar to those found in England. It also means you will find similarities between our legal system and that of other Commonwealth countries such as New Zealand and Canada.

Tip

When researching possible recommendations for an inquiry task you may wish to see how other Commonwealth countries respond to a legal issue.

Like in England, there are two main sources of law we follow, these being:

- **statute law, and**
- **common law.**

Main sources of law in Australia

Statute law

Law created and passed by a legislative body.

Common law

A body of law based on judicial decisions that has been developed over time.

Statute law is law made in Australia by parliament or by those to whom parliament has delegated authority. It is also known as **parliament-made law** or **legislation**. It is where we get most of our laws today. It is considered the leading source of law, as it can override law made by the courts. For example, when the Queensland Parliament passed an amendment to the *Summary Offences Act 2005* (Qld), unlawfully entering or remaining on particular land (such as a food production facility) became a summary offence (s13). Most criminal law, the focus of your first unit of study, is made by State and Territory Parliaments (although the Commonwealth Parliament also makes criminal law).

Common law is law made by the courts. It is also called **judge-made law, case law** or **precedent**. Decisions made by superior courts, such as the Queensland Court of Appeal or the High Court of Australia, are followed by courts located lower in a **court hierarchy** in matters that are similar in a factual or legal sense. For example, in *Kozarov v Victoria* [2022] HCA 12, the High Court of Australia decided that an employer owes an employee a 'duty of care' (a term you will learn more about in Unit 2) to take reasonable steps to avoid excessive stress and mental trauma. This decision will be applied in courts located lower in the court hierarchy, such as the Supreme Court of Queensland.

Although the bodies that make these laws are independent of each other (more on that later) they interact directly and indirectly. For example, when a judge or magistrate sentences a defendant, they will:

- apply and interpret statute law, such as the *Criminal Code 1899* (Qld) and the *Penalties and Sentences Act 1992* (Qld), and
- use common law by applying decisions made by other judicial officers when deciding an appropriate sentence.

Practical Application

The Supreme Court Library Queensland (SCLQ) publishes decisions made by Queensland courts and tribunals.

1. Locate the case *R v Renata; Ex parte Attorney-General* [2018] QCA 356 on the Supreme Court Library Queensland CaseLaw database (sclqld.org.au). [S]
2. Identify and state the statute law and common law referred to by the Queensland Court of Appeal when they made their decision in the table below. [C] [S]

Statute law	Common law

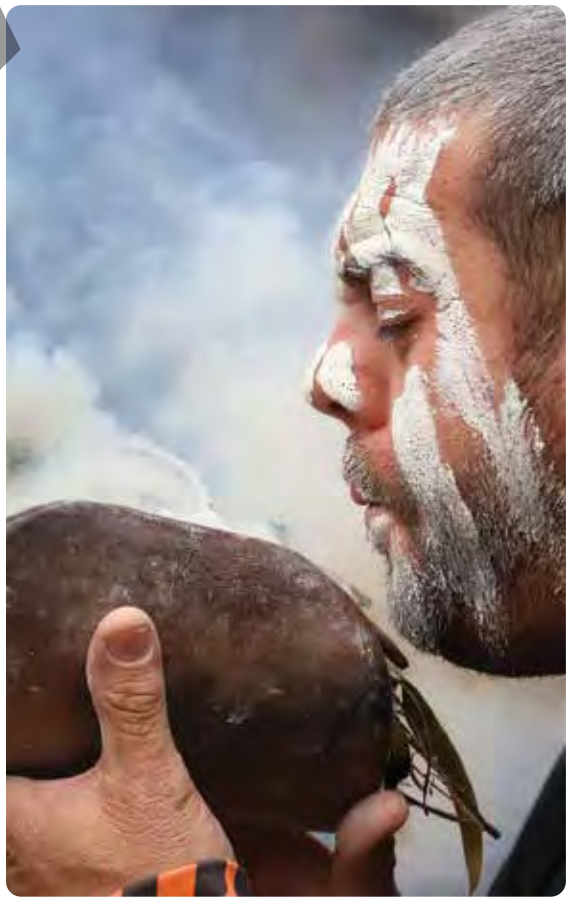
It is important to re-state that statute and common law are not the oldest sources of law in Australia, nor the only sources of law you will study. **First Nations peoples, the traditional custodians of country throughout Australia, also developed a system of law.**

2.2 Customary law

WARNING: First Nations students are advised that this section of the text contains images and words of deceased persons.

Law in Australia prior to 1788

According to the National Museum of Australia, First Nations peoples lived on mainland Australia for at least 65,000 years prior to European arrival. This means that Australia's first source of law was **customary law**.



Like all types of law, customary law sought to:

- regulate people's behaviour
- create rights and responsibilities
- set down penalties or reparations
- connect people with the land
- govern relationships.

It was communicated to the community by word of mouth or through cultural practices such as art, dance and song. We will now consider the modern application of customary law in three different areas:

- land (native title)
- hunting and fishing rights
- family law (customary adoption).

Native title

The fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.

The Hon Justice Brennan, 1992

Customary law was not accepted or respected by England. When the English colonised Australia, they ignored any customary laws developed by First Nations peoples'. In particular, they did not recognise First Nations peoples ownership and connection to their land, which we term 'native title'. Instead, the English declared that Australia was *terra nullius* (land belonging to no-one), a legal fiction that was only overturned by the landmark case *Mabo v Queensland (No. 2)* [1992] HCA 23, (1992) 175 CLR 1. One of the outcomes of this decision was that it brought customary law into the common law. This decision also influenced the creation of statute law (as shown below).

The *Mabo* decision and sources of law

CUSTOMARY LAW	COMMON LAW	STATUTE LAW
		
The Meriam people had a traditional system of law and land tenure, a long and continuous history of occupying and using the land and a deep spiritual connection to the Murray Islands.	The High Court of Australia recognised that Indigenous peoples had lived in Australia for thousands of years and exercised native title according to their own laws and customs. This recognised native title in common law.	The Commonwealth Government enacted the *Native Title Act 1993* (Cth), which determines the nature and extent of native title; as well as provides a process for Indigenous communities to have their traditional rights to land recognised and protected by Australian law.

Before we examine the *Mabo* decision, it is important to understand the factual basis of *Mabo's* claim, as it demonstrates the connection between customary law and land ownership. First Nations peoples organised themselves into clans, who each occupied clearly defined territory. A clan's customs and laws underpinned their traditional rights and obligations with respect to the land. Before *Mabo* could be decided, the High Court of Australia asked the Supreme Court of Queensland to hear and determine the facts of the claim. The case was heard by the Hon Justice Moynihan AO in Brisbane and the Torres Strait. Justice Moynihan heard evidence from many witnesses that showed that the Meriam people had a traditional system of law and land tenure, a long and continuous history of occupying and using the land and a deep spiritual connection to the Murray Islands. This led him to conclude that the Meriam people had a strong system of customary land rights which had existed before the arrival of the English. After Justice Moynihan's determination was made, the High Court of Australia could hear the legal issues in the case.

Case Study

Mabo v Queensland (No. 2) [1992] HCA 23, (1992) 175 CLR 1

Facts: Eddie Mabo (the lead plaintiff) and four others, who lived on the island of Mer in the Torres Strait between Australia and Papua New Guinea, went to the High Court of Australia to seek a declaration (a legal ruling) on whether they had native title (ownership) of their land.

Legal Issue: Was there a form of ownership (native title) held by First Nations peoples of their land? If so, does Australia recognise this form of native title and did the Meriam people have native title of their land?

Decision: On 3 June 1992 (a date now acknowledged as Mabo Day) the High Court of Australia, by a six to one majority, upheld the Meriam people's claim to native title over their traditional land.

> *…The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land…The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists.*
>
> The Hon Justice Brennan [63]

> *The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not terra nullius or 'practically unoccupied' in 1788. The Crown's property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.*
>
> The Hon Justice Deane and Justice Gaudron [56]

The High Court of Australia ruling recognised that First Nations peoples had lived in Australia for thousands of years and exercised native title according to their own laws and customs. The Court acknowledged that the Meriam people had continued their ownership of the lands of Mer to the present time and held native title over the land. However, the ruling clearly stated that native title claims may only apply to particular types of land (not all land), such as vacant Crown land, national parks and some leased land.

1. Identify the lead plaintiff in this case. [C]

2. Explain the ruling the court made on the application of the doctrine of terra nullius. [C]

Case Study ...

3. Explain why Justice Brennan felt that the doctrine of terra nullius would perpetuate an injustice if it were to continue. [A]
4. Explain why Justice Deane and Justice Gaudron describe the act of dispossession as, 'the darkest aspect of the history of this nation'. [A]
5. Locate, select and reference at least 2 to 3 secondary sources that assist you to answer this question: Why was the Mabo decision legally significant? [S] [E]

Native Title Act 1993 (Cth)

The Native Title Act 1993 is a defining piece of legislation in terms of customary law. As a statute that had its evolution through common law, it is the ultimate recognition that Indigenous Australian societies possessed, and continue to possess, well-developed systems of law.

Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2006

As a result of *Mabo*, the Commonwealth Government enacted the *Native Title Act 1993* (Cth), which statutorily affirms the recognition at common law of the pre-existing system of customary law. This Act determines the nature and extent of native title over land in Australia; as well as provides a process for Indigenous communities to have their traditional rights to land recognised and protected by Australian law. The Act sought to give certainty, stability and enforceability to both First Nations and non-Indigenous peoples' rights to land. One important objective is outlined in the Act's Preamble:

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests.

A native title holder's rights and interests might include using the land to hunt and fish, practice ceremonies, camp or teach, but it falls short of providing First Nations peoples with the same rights as one might possess when they purchase freehold title (the most complete form of land ownership).

Criminal investigation process

Chapter 5: Criminal offences

5.1 Types of criminal offences

5.2 Offences against the person

5.3 Offences against property

5.4 Traffic offences

5.5 Drug offences

5.6 Attempts to commit crimes

5.7 Accessories and parties to offences

Learning objectives

At the conclusion of this chapter students will be able to:

- comprehend the difference between summary and indictable offences.
- analyse and apply
    - data to ascertain relationships, patterns and trends in crime
    - the elements of offences to a range of criminal scenarios.
- select legal information and data about crime rates and criminal offences.

5.1 Types of criminal offences

Key Terms

Crime: an act or omission that is in breach of the criminal law.

Indictable offence: A serious criminal offence. It includes offences such as manslaughter, rape and armed robbery.

Summary (simple) offence: A less serious offence. It includes offences such as public nuisance, intoxication in a public place and some minor traffic offences

There are two types of offences in Queensland, criminal offences and regulatory offences. The *Criminal Code 1899* (Qld) s3 classifies offences into the categories shown in the diagram below.

Types of criminal offences.

Adapted from: Caxton Legal Centre Inc., 'Types of Criminal Offences', *The Queensland Law Handbook,* (Web Page, Last Updated 14 January 2019), <queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/introduction-to-criminal-law/types-of-criminal-offences/>.

The distinction between the different types of offences is important because it determines the:

- court an offence will be heard in
- legal processes or procedures that will apply
- time limits for bringing an offence to court
- penalties available.

Summary (simple) offences

A **summary (simple) offence** is a less serious offence. Examples of summary (simple) offences include:

- public nuisance,
- urinating in a public place,
- wilful exposure, and
- fare evasion.

Summary (simple) offences are usually heard in the Magistrates Court of Queensland without a jury. If a defendant has pleaded 'not guilty', they will face a summary trial (i.e. a trial before a magistrate only and not a jury). Witnesses give evidence and are cross-examined before a magistrate decides whether the offence has been proven 'beyond a reasonable doubt.'

Indictable offences

An **indictable offence** is a serious criminal offence. Examples of indictable offences include:

- homicide,
- burglary,
- torture,
- sexual assault, and
- stalking.

You will know whether an offence is indictable or not, because each offence contained in the *Criminal Code 1899* (Qld) will state whether it is a:

- crime,
- misdemeanour, or
- simple offence.

Indictable offences must be prosecuted on an indictment (a document written and presented by a person authorised to prosecute a criminal offence that sets out the charge) before a judge alone or judge and jury in the Supreme or District Court of Queensland. **Some indictable offences can be heard summarily when the law allows.** For example, in some cases a defendant charged with possessing a dangerous drug (*Drugs Misuse Act 1989* (Qld) s9) may have the offence heard summarily if no commercial purpose is alleged by the Crown. If convicted this allows the defendant to receive no more than three years imprisonment - see *Drugs Misuse Act 1989* (Qld) s13(3)(b).

Practical Application

1. Locate the *Criminal Code 1899* (Qld). [S]
2. For each offence listed below determine if the offence is:
   a. an indictable offence or a non-indictable offence
   b. a crime, misdemeanour or simple offence
   c. an offence against a person, property, morality or the public interest. [A]

Section 59 Member of Parliament receiving bribes

Section 80 Piracy

Section 207 Disturbing religious worship

Section 229G Procuring engagement in prostitution

Section 321A Bomb hoaxes

Section 335 Common assault

Section 475 Traveling with infected animals

As you discovered in the practical application, criminal offences can be further categorised in different ways. For the remainder of this chapter, you will study a selection of:

- offences against the person
- offences against property
- motor vehicle or traffic offences
- drug offences.

5.2 Offences against the person

Homicide

Key Terms

Actus reus: a Latin term that describes the act or omission that reflects the physical element of a criminal offence. The act or omission must be voluntary and conscious.

Mens rea: Latin for a 'guilty mind'. The term describes the mental element of some criminal offences. To be found guilty it must be proven that the person has demonstrated intent to engage in that conduct.

Some definitions drawn from Australian Government Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, (Web Page, 2002), <ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners>.

It is unlawful to kill another person, although in some circumstances it can be authorised, excused or justified by law, which we will explore in later chapters. **This crime seeks to protect one of the most fundamental human rights, that being, the right to life.** All homicide matters are decided in the Supreme Court of Queensland.

Practical Application

How common is homicide?

Before you read the statistics below, answer the following questions about your knowledge and impressions about the occurrence of homicide in Australia:

- Do you think the homicide rate in Australia is increasing or decreasing?
- What weapon(s) do you think is most often used in homicide incidents?
- Are males or females more likely to be a homicide victim?

The Australian Institute of Criminology (AIC) reported that between 1 July 2020 and 30 June 2021 in Australia:

Practical Application ...

- there was a decrease of 51 homicide incidents (a 20 per cent decrease in the incident rate per 100,000) when compared to the previous year,
- three-quarters of victims knew the offender and a fifth were killed by a stranger,
- 59 per cent of homicide incidents occurred in a residential setting,
- knifes or other sharp instruments were the most used weapon in homicide incidents (35 per cent), with firearms being used in 17 per cent of incidents.

Table 1: Homicide incidents, victims and offenders, 1 July 2020 to 30 June 2021

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	TOTAL
Incidents									
Number	61	28	42	29	11	6	6	7	201
Rate	0.75	0.73	0.80	1.05	0.61	1.06	1.32	2.81	0.82
Victims									
Male	43	32	33	21	8	4	6	5	152
Female	20	20	12	9	4	2	0	2	69
Offenders									
Male	53	48	57	31	12	6	7	8	222
Females	10	12	12	4	0	0	0	3	41

Adapted from: Samantha Bricknell, *Homicide in Australia 2020-21* (Australian Institute of Criminology Statistical Report 42, 28 March 2023) 4 <aic.gov.au/publications/sr/sr42>.

Referring to the statistics and information above, answer the questions below. Ensure you reference any data that you use correctly (i.e. Table 1 or Bricknell, 2023, 4).

1. Is the homicide rate in Australia going up or down? [C]
2. Which state or territory has the highest number of homicide incidents? [C]
3. What weapon is most likely to cause someone's death in a homicide incident? [C]
4. What reasons could you give for the fact that two thirds of homicide victims were male? [A] [E]
5. In 2022 the homicide rate in England and Wales was 1.2 per 100,000 people and in 2021 the homicide rate in the United States was 7.8 per 100,000 people. Why do you think Australia's rate is much lower? [A]
6. Did any of the statistics or information provided in the *Homicide in Australia* report surprise you? Explain. [R]

Tip

The Australian Institute of Criminology (AIC) (aic.gov.au) is a good primary source for statistics related to crime. Some other statistical sources you may wish to bookmark include:

- Australian Bureau of Statistics (ABS) (abs.gov.au/statistics/people/crime-and-justice)

Tip

- Australian Institute of Health and Welfare (AIHW) (aihw.gov.au/reports-data)
- Queensland Courts' domestic and family violence statistics (courts.qld.gov.au/court-users/researchers-and-public/stats)
- Queensland Government Statisticians Office (QGSO) (qgso.qld.gov.au/about-qgso/our-services/crime-statistics-research)
- Queensland Police Service (QPS) (mypolice.qld.gov.au/queensland-crime-statistics/)
- Queensland Sentencing Advisory Council (QSAC) (sentencingcouncil.qld.gov.au/statistics)

Murder

Murder is defined in *Criminal Code 1899* (Qld), s302. It has a mandatory sentence of life imprisonment (s305), as stated by the Hon Justice Applegarth in *R v Markovski* [2021] QSCSR 567:

> *There is only one sentence that can be imposed for the offence of murder. Damian Markovski, you are sentenced to life imprisonment.*

Elements of murder

All criminal offences require proof of one or more elements. These elements can be a physical element (such as an act or an omission to act) or a fault element (such as intention, knowledge, negligence or recklessness).

To be found guilty of murder, the Crown must prove the following elements beyond a reasonable doubt, that:

- a person (the accused)
- unlawfully
- kills
- another person (the victim)
- with intention to kill (or to cause grievous bodily harm).

We will now look at the element of 'kills', 'another person' and 'intention', as well as explore some of the different circumstances that constitute murder.

'Kills'

'Kills' means to cause a death either directly or indirectly. The issue of causation (the relationship between an act and its result or consequences) is a very important one in homicide, as sometimes there can be more than one event that contributes to someone's death and **a court may need to decide what event was the substantial cause of a victim's death.** It is also important to mention that a person can be held to have caused a person's death if a victim:

- takes evasive action such as jumping out of a window due to a threat or intimidation (s295)
- asks for a person's assistance to accelerate their death, as you cannot consent to your own death (s296), the exception being a death under the *Voluntary Assisted Dying Act 2021* (Qld)
- has a physical defect, weakness or abnormality or the victim makes a decision to refuse medical treatment that contributes to their death (for example, a person with a thin skull

may die because of a single punch, but another person would be merely injured and recover) (s297)

- dies as a result of medical treatment that is reasonably proper in the circumstance provided by medical professionals in good faith (s298).

The cases of *Levy v R* (1948) 51 WALR 29 and *Royall v R* (1991) 172 CLR 378 demonstrate how causation is applied in the real world.

Case Study

Levy v R (1948) 51 WALR 29

Facts: The victim, who was in a critical condition, was admitted to hospital with stab wounds that were intentionally inflicted by Levy. The hospital treated the victim in line with the best course of treatment available in these circumstances. Unbeknownst to the doctors at the time of treatment was that the victim had a diseased liver. The victim's liver broke down because of the drugs used to treat the stab wounds and died.

Legal Issue: Had Levy caused the victim's death?

Decision: The treatment provided by the doctors was reasonable and proper given the circumstances. The stab wounds caused by Levy was the key cause of the victim's death ('but for' the stab wound, the victim would be alive).

Royall v R (1991) 172 CLR 378; 100 ALR 669; 65 ALJR 451; 54 A Crim R 53

Facts: The victim was found in the street below an apartment that she shared with Royall. There was a great deal of blood throughout the apartment and the bathroom door had been forcibly opened. Royall admitted he and the victim had a violent argument during which he punched her in the face and pulled her hair. Royall said the victim went to take a shower to calm down, but, as she was an epileptic, he was concerned for her safety, so he forced open the door. He gave evidence that he saw her voluntarily jump out of the window. The Crown argued that Royall either pushed her out of the window, or that in fear of his continuing violence she either fell while trying to get away from his attacks or believed that jumping was her only means of escape.

Legal Issue: Had Royall caused the victim's death?

Decision: The jury found Royall guilty of murder. This was upheld by the High Court of Australia.

1. What were the possible causes of the victim's death in both cases? [C]
2. What did the Court hold was the substantial cause of death in each case? Do you believe that it was just and fair to convict Levy and Royall of murder in these circumstances? Ensure you consider the implications of your decision. [A] [E]
3. In 2014, New Zealander Warriena Wright fell 14 stories to her death after trying to lower herself onto the apartment balcony below. Wright was at the apartment of Gable Tostee, whom she met on Tinder. He was charged with her murder but was found 'not guilty' by a jury.
   a. Locate at least two news articles on this case. [S]
   b. Compare and contrast the facts of Tostee that you were able to locate with Royall. [A]
   c. Do you believe the outcome of *R v Tostee* was just and fair, taking into account the circumstances and facts you were able to locate? Why do you believe the outcome in this case was different? [E]

Criminal trial process

Chapter 8: The attributes of a fair trial

8.1 A common law right

8.2 Statutory rights to a fair trial

8.3 Trial by judge and jury

8.4 Trial procedures for indictable offences

8.5 Rules of evidence

8.6 The right to silence

8.7 The right to legal representation

8.8 Criminal appeals and double jeopardy

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - in Australia, the right to a fair trial originated in the common law, and has been influenced by parliamentary reform
  - the attributes of a fair trial are set out in the *International Covenant on Civil and Political Rights 1976*, Article 14
  - the *Australian Constitution* protects the right to a fair trial only where Commonwealth law applies
  - the principles of a fair trial are set out in Acts of Parliament in Queensland, Victoria, and the ACT
  - the role of the courts is to ensure that the right to a fair trial is not eroded by statute
  - the elements of a fair trial in the court process include the reality and appearance of independence and impartiality, the application of procedural fairness, operating as an open court, and giving reasons for decisions
  - all accused persons are entitled to the presumption of innocence (presumed innocent until proven guilty)
  - the standard of proof in criminal proceedings is proof 'beyond reasonable doubt'
  - the jury system is the cornerstone of our justice system.
- analyse and evaluate the procedures and processes that Australian courts use to conduct fair trials.

8.1 A common law right

Key Terms

Beyond reasonable doubt: the criminal standard of proof applied by the jury in criminal trials. A jury must find a defendant 'guilty' of the offence charged beyond reasonable doubt.

Circumstantial evidence: proof of circumstances from which, according to the ordinary course of human affairs, the existence of some fact may reasonably be presumed. It is therefore opposed to direct evidence of the fact itself.

Direct evidence: evidence directly bearing upon the point at issue, and which, if believed, is conclusive in favour of the party adducing it. It is the making of a statement, orally or in writing, that a particular fact is true because the maker of the statement saw, felt, or heard it.

Onus of proof: the duty of proving one's case. It is a rule of evidence that the point in issue is to be proved by the party who asserts the affirmative proposition.

Presumption of innocence: in criminal matters, the accused person is presumed to be innocent until proven guilty. The onus of proof is therefore generally on the prosecution, but it may be reversed.

Right to silence (at trial): the right of an accused person not to give evidence in his or her defence at trial. The responsibility of the state to ask questions is matched by the right of the suspect or an accused not to answer them.

A fair trial is designed to prevent innocent people being convicted of crimes. By helping to prevent the punishment of the innocent, fair trials justify and promote the prosecution and punishment of the guilty. In *Jago v the District Court of New South Wales* (1989) 168 CLR 23 (at page 29), the Hon Justice Mason said that a right to a fair trial is:

> *…commonly manifested in rules of law and practice designed to regulate the course of the trial.*

The attributes of a fair trial, as we know them today, have their basis in English legal history. These attributes are from time to time challenged by statute law. Whenever, for example, the **onus of proof is reversed**, so that the defendant must prove his or her innocence rather than be presumed innocent until proved guilty, this common law right is eroded. There may be good reasons for this, for example the recent changes to the *Bail Act* in Queensland (see Chapter 6).

Since the *Magna Carta* was promulgated in 1215, English law has based the fairness of its criminal justice system on the idea of a jury trial, where decisions of fact are made by the peers of the accused.

In a closely contested jury trial, someone may be disappointed. It will either be the victim, or the accused. The outcome is likely to be seen by one of the parties as 'not natural justice', even though in the criminal trial process the rules of law and practice which regulate the course of the trial have been followed rigorously. **In the Australian legal system, there is a strong view that where there has been procedural fairness, natural justice has been served. Your studies of the criminal justice system will give you the tools to make your own decisions about how well the system works, both in individual cases, and as a whole.**

The rules of practice and procedure, when correctly applied, protect the basic principles of the criminal justice system. Namely:

- the presumption of innocence,
- the jury trial,
- the court rules of evidence,
- the burden of proof, and
- the standard of proof.

Conforming to these principles is often difficult for legislators (politicians) when faced with what they see as overwhelming support for a change to make it hard for criminals to avoid justice. Reversing the onus (burden) of proof is one way legislators attempt to achieve better outcomes for victims. Judge only trials is another. Then Chief Justice of the High Court of Australia Gleeson, explained in *Ex Parte Lam* (2003) 214 CLR 1:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*

8.2 Statutory rights to a fair trial

When the *Human Rights Act 2019* (Qld) was passed, Queensland joined Victoria and the ACT as the third state in Australia with legislation setting out the principles of a fair trial. The *Australian Constitution* only applies to trials for offences committed against laws of the Commonwealth.

In other countries, bills of rights or human rights statutes provide some protection in the form of fair trial procedures. The right to a fair trial is protected in the United Kingdom, Canada, and New Zealand by statutes. In the United States the *US Constitution* provides:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory processes for obtaining witnesses in his favour, and to have the assistance of Counsel for his defence.*
>
> *United States Constitution* (Amendment VI), 1791.

It is also the case that international treaties and covenants, signed on behalf Australia are not able to override clear and valid provisions of Australian national law. However, where an Australian statute is ambiguous, courts will generally favour a meaning in accordance with Australia's international obligations. This means that, in certain circumstances, Article 14 of the *International Covenant on Civil and Political Rights* (open for signature 16 December 1966, entered into force 23 March 1976) which sets out the elements of a fair trial, can be applied in Australia.

There are two important pieces of legislation that give support in Queensland and in Australia to the common law right to a fair trial. These are the *Commonwealth of Australia Constitution Act 1901* (Cth) and the *Human Rights Act 2019* (Qld).

The Constitution

The *Commonwealth of Australian Constitution Act 1901* (Cth) s80 states:

…the trial on indictment of any offence against any law of the Commonwealth shall be by jury.

The words 'trial on indictment' have been interpreted by the High Court of Australia to mean that Parliament may determine whether a trial is to be on indictment, and thus, whether the requirement for a trial by jury applies. Further, because of this, commentators have said that s80 does not restrict Commonwealth power to enact legislation where citizens can be tried for an offence in the absence of a jury. This of course does happen in the state Magistrates Courts exercising Commonwealth jurisdiction for minor offences and in the Federal Circuit Court where legislation does not require a jury trial.

There is also the question of the power given by the *Constitution* requiring the courts to exercise the judicial power of the Commonwealth. Australian courts, both Commonwealth and State, unless otherwise required by statute, apply common law principles of fairness and equality.

Practical Application

The Hon Justice Gaudron in *Nicholas v The Queen* (1998) 193 CLR 173, 208-209, after quoting the passage set out above said:

> *In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in the manner that does not ensure equality before the law, impartiality, and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, which brings or tends to bring the administration of justice into disrepute.*

1. What criteria does the judge say should be observed to ensure the essential character of a court and the nature of judicial power are observed? [C]
2. The judge identifies criminal proceedings separately and says that it is important that the determination of guilt or innocence by means of a fair trial according to law is what is required in these cases. With regard to the common law principles you have studied so far outline what you consider is 'a fair trial according to law'. [C] [S]
3. Which elements of a fair trial you have listed in answer to Question 2 do you think are clearly present in the Australian legal system? [C] [A]

Human Rights Act 2019 (Qld)

The courts in Queensland are now subject to the *Human Rights Act 2019* (Qld) which sets out the right to a fair and impartial hearing in s31, and in s32, the practices and procedures required for a trial to be fair. The application of the Act was considered in *Volkers v The Queen.*

Case Study

Volkers v The Queen [2020] QDC 25

Facts: The applicant (Volkers) applies for the permanent stay of an indictment charging him with 5 counts of indecent dealing with two complainants who were at the time of the alleged offences under the age of 16.

Timeline of events

1984-1987 ↓	The applicant is a former Australian swimming coach. It is alleged that in 1984 and 1985, when he was about 26 years of age, he indecently dealt with a female swimmer then age 13. It is also alleged that in 1987 he indecently dealt with another swimmer, then aged 12.
25 July 2002	The applicant was committed to stand trial on 7 counts of indecent dealing involving the two complainants.
↓ September 2002 ↓	The Director of the Office of the Director of Public Prosecutions (ODPP) enters a 'no true bill' in relation to each of the charges (which meant that were not going to proceed with the prosecution). This decision was made after applicant's lawyers gave to the ODPP 20 redacted statements of witnesses the applicant proposed to rely on at any trial. Those statements, by swimmers trained by the applicant and by some parents, were in part to the effect that the applicant did not have the opportunity to leave the pool deck during training sessions, and in fact did not do so, and so lacked the opportunity to commit offences during that time. This decision attracted significant publicity. The matter was referred to the Crime and Misconduct Commission (CMC) who investigated and provided a detailed report that was critical of the DPP.
December 2003	The Director asked the New South Wales equivalent, Mr Nicholas Cowdrey QC, to advise about the matter. His advice, and that of a senior New South Wales prosecutor, Ms Margaret Cunneen, was there not sufficient evidence to consider recharging the applicant.

Case Study ...

November 2004	The older complainant herself sought leave under the *Criminal Code 1899* (Qld) s686 to present an indictment against the applicant in relation to some of the alleged offending against her. The application was dismissed. Her Honour was significantly influenced by the extensive publicity about the matter. The Hon Justice Holmes said in her judgement: *An ordinary trial conducted by an independent prosecutor has the distance and authority of the Crown. In this case, that will not occur. The effect of the media coverage, has been to characterise the allegations of sexual misconduct as a contest between the applicant and the respondent, both seeking public support.*
July 2014	The *Royal Commission into Institutional Responses to Child Sexual Abuse* held a hearing in which each of the complainants gave evidence. Their evidence was again subject to extensive media coverage and public commentary. Subsequently, each complainant, and a third complainant, made submissions to the ODPP for the prosecution of the applicant to be reinstituted.
9 June 2016	The Director advised the applicant that submissions about another allegation of sexual interference were received from a third complainant.
13 November 2017	Proceedings were commenced against the applicant.
November 2018	The Applicant was committed to stand trial for counts involving the older complainant in late 1984 and 1985 and for one count involving a younger complainant for an alleged offence in summer 1986/7.

There was an issue relating to statements given by potential witnesses. The statements provided by the defendant to the ODPP in 2004 were destroyed by the defendants' solicitors after the 7 year limit, the time for which records are usually kept. Some of the testimony that the applicant would or might, have relied on at any trial, had, it was submitted, been permanently lost. The Crown now wished to rely on the evidence of 84 persons engaged in the applicant's swimming coaching and who had provided recent statements to police. Some of these statements were from people familiar with the applicant's swimming coaching routines at the relevant time.

His Honour Judge Reid considered the evidence about the statements and concluded that despite the view taken by the ODPP in 2004, it would currently be open to the jury to conclude that the applicant would have had the opportunity on occasions to leave the pool deck without attracting undue interest.

On behalf of the applicant it was submitted that the stay ought to be allowed on two separate but related grounds, namely lack of fairness and oppression amounting to an abuse of process by the prosecuting authority.

Legal Issues:

1. Was it likely that the prosecution of the defendant would result in an unfair trial or be such as to undermine public confidence in the administration of justice? That is, is the decision

Case Study

to further prosecute now, contrary to the 2002 decision not to do so, likely to have the effect of undermining public confidence, when there is no critical new evidence to justify a change of view.

2. Does the *Human Rights Act 2019* (Qld) apply to this case? Does the ODPP, as a public entity under the Act, behave in a manner which involves a breach of s29(5)(b) and 32(2)(c) of the Act, being the right to a trial 'without unreasonable delay' and of s31, namely the 'right' to a fair trial'?

Decision:

1. At common law

His Honour Judge Reid discussed various cases where decisions were made regarding a permanent stay of criminal prosecutions. He commented that prior to the decision of the High Court of Australia in *Jago v District Court* (NSW) [1989] HCA 46 there was uncertainty over whether the courts power to prevent abuse of process by safeguarding an accused person from oppression extended to stopping the prosecution by granting a permanent stay of proceedings to prevent unfairness generally (as contrasted to a stay to prevent an unfair trial).

He identified 5 key factors the High Court said should be considered in determining whether proceedings should be stayed on the grounds of prosecutorial delay causing unfairness as being:

1. Length of delay.

2. Prosecution reasons to explain or justify delay.

3. The accused's part in any delay.

4. Proven or likely prejudice.

5. Public interest in the disposition of serious criminal charges and the conviction of the guilty.

His Honour quoted with approval the High Court's comments in *R v Edwards* [2009] HCA 20 where it was asked to consider approving a stay of proceedings, where there was a delay and evidence was lost. Their Honour's stated:

> *Trials involve the reconstruction of events and it happens on occasions that relevant material is not available: documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon matter does not make the trial unfair.*

His Honour then concluded that he would not be inclined to order a stay on the grounds the trial would be unfair even though:

- there was loss of the knowledge of the identity of a significant number of people whose redacted statements were provided to the ODPP in 2002;
- the Crown had now obtained statements from a significant number of further witnesses, who may be called at trial, and whose evidence is variable; and
- the delay since the 1980s may have an effect on the ability of witnesses to accurately recount exactly what occurred.

Criminal trial process

Chapter 10: Barriers to justice and equity

10.1 A fair and impartial approach

10.2 Children

10.3 First Nations peoples

10.4 Persons with a disability

10.5 Gender equality

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - that the criminal justice system in Australia aims to treat persons who come before it, in whatever capacity, impartially and fairly
  - that children have the same rights as adults, but that special arrangements and protections have been set in place to take into account their special needs and their vulnerability
  - that First Nations Peoples, have been, and continue to be, disadvantaged by our criminal justice system, despite policies and procedures implemented to remove impediments in the administration of justice
  - that the criminal courts have rules and procedures that ensure persons the disability are treated fairly and impartially when they come before them
  - that historically, women have been disadvantaged in the criminal justice system, and that many laws have been changed or created, and continue to be, to ensure the scales of justice are more fairly balanced in favour of women.
- analyse and evaluate the legal issues concerning the court processes experienced in the criminal justice system by disadvantaged groups in the community.

Key Terms

***Anunga rules*:** guidelines formulated by the Northern Territory Supreme Court in 1970 for the questioning of Aboriginal suspects to provide them protection.

***Doli incapax*:** (from the Latin 'incapable of deceit') a term used at common law describe that a child under the age of 40 years is presumed to lacked the capacity to be criminally responsible for their acts.

Gag-laws: laws designed to prohibit the publication of information about persons involved in court cases, in particular, victims and perpetrators (defendants) in cases involving sexual offences.

Special witnesses: as defined in the *Evidence Act 1977* (Qld) s21A, these are persons that are able to be assisted by judges and lawyers in the conduct of court cases to give their evidence in accordance with the Act.

Youth defendants: used to refer to those not yet 18 years of age and who are dealt with by the courts according to the *Youth Justice Act 1992* (Qld).

10.1 A fair and impartial approach

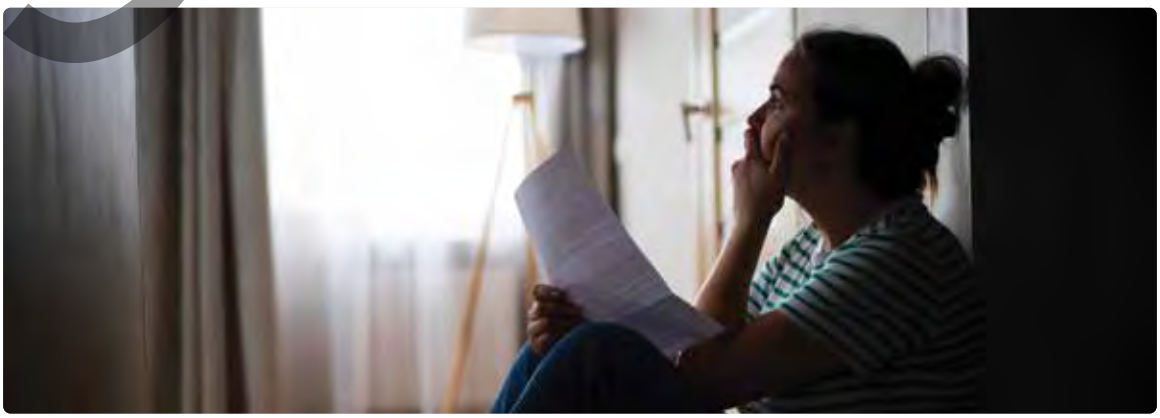
In the foreword of the first edition of the *Equal Treatment Benchbook*, The Hon Justice de Jersey, (the Chief Justice of Queensland at the time), said:

Equal treatment of participants in court proceedings is fundamental to the judicial role. The prospect of differential treatment - whether of litigants, lawyers, or witnesses - is repugnant. All judges and magistrates, commissioners and tribunals members, would strive to avoid it. A risk, however, is that even a conscientious approach may not these days pick up the subtleties of a particular situation.

No judicial officer or tribunal member could be expected, in the absence of a work of this character, to comprehend all those subtleties, or necessarily recognise an instance of them.

Supreme Court of Queensland, *Equal Treatment Benchbook*, (1st ed., 2011).

It has become increasingly important for judicial officers to be aware that they are responsible for the decisions that affect the lives of people who come before them in the courts, and that some of those persons will have special needs. **In Queensland, the *Equal Treatment Benchbook* provides a set of standards against which the operation of the criminal justice system in the Courts can be measured.**



10.2 Children

Children and the courts

The common law

The common law presumes that a child under 14 years of age is *doli incapax* (Latin 'incapable of deceit'), meaning that they are considered to lack the capacity to be criminally responsible for their acts. If a child is between the ages of 10 and 14 years, this presumption may be rebutted by evidence that the child knew that it was wrong to engage in the act. In *RP v The Queen* [2016] HCA 53;259 CLR 641 the High Court of Australia found that the prosecution's evidence was insufficient to rebut the *doli incapax*, and stated:

> *what suffices to rebut the presumption that a child defendant is doli incapax will vary according to the nature of the allegation and the age of the child. The child will more readily understand the seriousness of an act it concerns values of which he or she is direct personal experience… Rebutting (the doli incapax) presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children possess the capacity to understand the serious wrongness of the acts while other children aged very nearly 14 years old will not.*
>
> The Hon Justices Kiefel, Bell, Keane and Gordon [12].

Queensland law

The *Criminal Code Act 1899* (Qld) specifies that the person under the age of 10 years is not criminally responsible for any act or omission (s29 (1)). The *doli incapax* presumption is included in s29 (2) which states:

a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

In Queensland, legal adulthood, including adult criminal responsibility, commences at 18 years. The age at which a child can be charged with an offence is stated in the *Criminal Code* where the offence is set out. For example, a 14-year-old child can be charged in the Supreme Court of Queensland with murder. Serious offences are heard in the Supreme Court, but otherwise children appear in the Childrens Court divisions of the Magistrates and District Courts of Queensland, whose processes are governed by the *Childrens Court Act 1992* (Qld).

What do you think?

The Australian Institute of Health and Welfare (AIHW), in its report, *Youth Justice in Australia* 2021-2022, stated that:

On an average day in 2021-2022, there were around 3700 young people aged 10 and over under community-based supervision and around 820 young people in detention. On an average day in 2021-2022 just over 3 in 4 (76%) of young people in detention were unsentenced. Nearly all (95%) young people who were in detention during 2021-2022 had been in unsentenced detention at some point during the year.

What do you think?

By supervision type, when all time during 2021-2022 is considered, young people who were in unsentenced detention during the year spent an average of 56 days almost 8 weeks in unsentenced detention.

Source: Australian Institute of Health and Welfare, 'Continued decline in the number of young people under youth justice supervision' AIHW media releases (Online, 31 March 2023) <aihw.gov.au/news-media/media-releases/2023/march/continued-decline-in-the-number-of-young-people-un>.

1. What does 'youth justice supervision' refer to? [C]
2. How many young people aged 10 and over were in supervision on an average day in 2021-2022? [C]
3. How many young people aged 10 and over were under community-based supervision and how many were in detention in 2021-2022? [C]
4. Should this information about young people be of concern to the criminal justice system? Write a letter to the Premier of Queensland expressing your concerns, setting out the basis for them. Ask the Premier to commit to policy objectives that you consider to be appropriate to address your concerns. [A] [E] [R]

Tip

The media in Queensland regularly reports the details of offences committed by young people, including the views of community groups, and the need for firmer policing to protect safety. Read these reports in the context of this Australia wide information and form your own views about policy objectives for young people caught up in the criminal justice system

Children have the same human rights as adults and can also have the capacity to make decisions affecting those rights and their lives. When a child appears in court as a **victim, a witness, or an offender**, the court needs to know that the child has achieved:

a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.

This is the **test for capacity** set out by the majority in the High Court in *Marion's Case, (Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218). This recognises that each child is different because of the way mental development occurs. In addition, research into children's comprehension of legal systems and court processes has shown children and young people lack understanding of the system in which they are to take part. The research has concluded that lack of understanding of the system can lead to considerable anxiety for a child victim or witness participating in court proceedings.

As more and more studies of the behaviour of children, both as offenders and victims, have been conducted by social scientists, the criminal justice system has changed to recognise that young children are vulnerable because of physical and mental immaturity, and in particular, there is reliable research to show that abuse and neglect of children can lead to altered brain functionality. There is a link between child abuse and neglect or involvement with the child protection system and subsequent youth offending (see Judy Cashmore, *The Link between Child Maltreatment and Adolescent Offending, Systems Neglect of Adolescents.*

Young victims and witnesses

Years of experience, and recent research conducted by the court, and from overseas in New Zealand and the United States, has been available to assist judges and lawyers in the conduct of court cases involving children and young people. Parts of s21A of the *Evidence Act 1977* (Qld) are reproduced below for you to consider.

Practical Application

Evidence Act 1977 (Qld)
21A Evidence of special witnesses

(1) In this section

special witness means

(a) a child under 16 years; or

(b) a person who, in the court's opinion-

(i) would, as a result of mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or

(ii) would be likely to suffer severe emotional trauma; or

(iii) would be likely to be so intimidated as to be disadvantaged as a witness;

if required to give evidence in accordance with the usual rules and practice of the court; or…

(c) ……

(d) a person---

(i) against whom domestic violence has been or is alleged to have been committed by another person;……..

(e) a person

(i) against whom a sexual violence has been, or is alleged to have been, committed by another person;……..

(1A) This section does not apply to a child to the extent division 4A applies to the child.

(1B) A party to a proceeding or, in a criminal proceeding, the person charged may be a special witness.

(2) Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon application made by a party to the proceeding, make or give 1 or more of the following orders or directions--

(a) in the case of a criminal proceeding--that the person charged or other party to the proceeding be excluded from the room in which the court is sitting or be screened from the view of the special witness while the special witness is giving evidence or is required to appear in court for any other purpose;

(b) that, while the special witness is giving evidence, all persons other than those specified by the court be excluded from the room in which it is sitting;

(c) that the special witness give evidence in a room--

Practical Application

(i) other than that in which the court is sitting; and

(ii) from which all persons other than those specified by the court are excluded;

(d) a person approved by the court be present while a special witness is giving evidence or is required to appear in court for any other purpose in order to provide emotional support to the special witness;

(e) that a video recording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the video recorded evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness;

(f) any other order or direction the court considers appropriate about the giving of evidence by the special witness, including, for example, any of the following-

(i) a direction about rest breaks for the special witness;

(ii) a direction that questions for the special witness be kept simple;

(iii) a direction that questions for the special witness be limited by time;

(iv) a direction that the number of questions for a special witness on a particular issue be limited.

The *Evidence Act 1977* (Qld) Division 4A deals with the arrangements the court must make for a child who is a witness in a proceeding where the defendant has a prescribed relationship to the child.

A prescribed relationship is one:

- where the defendant is the parent, grandparent, brother or sister, uncle, aunt, nephew, niece or cousin of the child, or
- where the defendant lives in the same household as the child or has the care of, or exercises authority over, the child in a household on a regular basis.

For these arrangements to apply the proceeding against the defendant must relate to an offence of a sexual nature, or an offence involving violence.

These arrangements are for the protection of the child. Section 21AB (part of Division 4A) requires the child's evidence to be pre-recorded in the presence of a judicial officer, but in advance of the proceeding. If this is not possible, the child's evidence must be given at the proceeding with the use of an audiovisual link or with the benefit of a screen.

Division 4A goes on to set out other requirements which must be followed, for example, preventing repetitive questioning and delay when the child is being cross-examined.

1. Who is a special witness under s21A of the *Evidence Act?* [C]
2. What are the arrangements which can be made for a special witness under s21A(2) of the *Evidence Act*? [C]
3. Describe the additional protections which the court must make where a child is a witness to a sexual offence or an offence of a violent nature involving a person in respect of which the child is in a prescribed relationship. What reasons can you give to explain why these additional protections were added to the Act? [C] [A]

Hypothetical?

Facts: Kyle walks to and from school with some fellow students that live in his neighbourhood. Kyle's neighbourhood is 3 kilometres from the local state high school where they all go to school. On the way they pass another nearby high school and often interact with its students. Some of these students also live in Kyle's neighbourhood and he knows them personally because he attends community activities and the local church with them.

There are usually 4 or 5 in Kyle's group. A regular is an older boy, Sean, who is 17, and is mature for his age. There has recently been some ill-feeling between the two schools because of sport rivalry, which has escalated to name-calling, swearing and occasionally throwing small objects at each other. One day the two groups clash on the footpath. Kyle is knocked down, cutting his knee when he falls. Sean comes to his help and pushes two boys away from Kyle, and in the process, one of them (Jake) trips on the uneven footpath, hits a low brick fence, and breaks his forearm. Jake's parents take him to the police and make a complaint. Sean is charged with assault causing grievous bodily harm. Because he is 17, the matter is heard in the District Court. Kyle is frightened of Jake and is in the same bible study group at the local church. Sean's lawyer asks him to give evidence at Sean's trial, and after talking to his parents, he agrees to do it if one of them can be with him during the process.

Legal Issue: How can Kyle be assisted to give his evidence under the *Evidence Act 1977* (Qld) in the trial?

Decision: Section 21A of the *Evidence Act* applies to Kyle because he is a child under 16. Division 4A of the Act does not apply because he is not in a prescribed relationship with the defendant Sean. It will be necessary for Sean's lawyer to set out the circumstances which justify special arrangements for Kyle as a special witness and make submissions to the judge as to what arrangements are appropriate.

1. If Sean was Kyle's brother would this make a difference to the legal position applying to Sean under the *Evidence Act?* [C] [A]

2. Imagine you are Sean's lawyer. Prepare submissions to the judge explaining why Kyle is a special witness under s21A of the *Evidence Act* and set out the arrangements that you consider to be appropriate for Kyle to give his evidence. [C] [A] [E] [R]

Youth Justice Act 1992 (Qld)

The *Youth Justice Act 1992* (Qld) governs how youth defendants (those who are not yet 18 years of age) are to be dealt with by the courts. Youth defendants charged with an offence heard by the Supreme Court of Queensland are committed to trial in that court. All other offences are dealt with by the Magistrates or District Courts of Queensland, and are therefore dealt with by the Childrens Court, subject to the *Youth Justice Act*.

The Childrens Court is a **closed court**. The only persons who are allowed to be present are set out under s20 of the *Childrens Court Act 1992* (Qld). These include the child, a parent or other adult member of the child's family, a victim or a person who is representative of the victim, a witness giving evidence, a party or person representing a party to the proceeding (for example a police officer or lawyer), and if the child is a First Nations persons, representatives of the child's community. Section 20 does allow other persons to be present, subject to the court's discretion, and requires the court to exclude an alleged victim of the child's offence if the court considers that person's presence would be prejudicial to the interests of the child.

Punishment and sentencing

Chapter 11: Sentencing in Queensland

11.1 What is sentencing?

11.2 Types of penalties and sentences

11.3 Purpose of sentencing

11.4 Sentencing principles and factors

11.5 Mandatory sentences

11.6 Sentencing children

11.7 Appealing a sentence

Learning objectives

At the conclusion of this chapter, students will be able to:

- describe the range of sentencing options.
- explain the principles that affect sentencing decisions in the *Penalties and Sentences Act 1992* (Qld).
- analyse the principles of sentencing as they apply to scenarios.
- select legal information, analyse legal issues about criminal justice and evaluate legal situations involving:
  - sentencing trends over time
  - the rate of incarceration of children
  - the appeals process.

11.1 What is sentencing?

Introduction to sentencing

Most judges regard sentencing in the criminal court as their most awesome responsibility. At that climactic moment when the jury returns a verdict of 'guilty' or the accused pleads 'guilty', a coalition of considerations weighs down upon the judge now obliged to pass sentence: fairness to the accused, solace to the victim, satisfying the community's reasonable expectations. Judges do their conscientious best to balance those considerations.

The Hon Paul de Jersey AC CVO, former Chief Justice of Queensland, 2001.

Sentencing is a legal process that determines according to law the fair and just penalty for a particular offence. Sentencing occurs after a defendant:

- is found guilty by a jury, magistrate or judge alone, or
- pleads guilty to a criminal offence.

At the sentencing hearing:

The sentencing process (simplified)

The Police Prosecutor or Crown Prosecutor makes submissions to the court about the circumstances of the offence and raises any other relevant facts including whether the defendant has any previous convictions; before making submissions about what an appropriate sentence may be, using precedent and statute law to support his or her submission.

▼

Next, the defendant's legal representation will make submissions to the court. This may include providing information on the defendant's socio-economic circumstances, responding to points made by the prosecutor, and any contextual information about the offending; before also making submissions about what an appropriate sentence may be.

▼

The judicial officer (a magistrate or judge) decides a sentence, giving reasons explaining the decision.

Sentencing is a complex exercise that involves a magistrate or judge considering a range of factors. Some include:

- the maximum or mandatory penalty for the criminal offence,
- the nature and circumstances of the offence and its seriousness,
- any harm caused to the victim,
- the extent to which the defendant is to blame for the criminal offence, and
- any sentences imposed for similar cases committed in similar circumstances.

This means that judicial discretion is an important aspect of the sentencing process.

In this chapter you will learn more about the different types of sentences a defendant can receive, the factors or guidelines found in law that are applied by judicial officers when deciding a sentence; as well as investigate several issues concerning sentencing in Queensland.

Tip

You may like to visit the Queensland Sentencing Advisory Council webpage (sentencingcouncil.qld.gov.au) to view a range of information, research, statistics and resources (including the interactive Judge for Yourself program) when completing work in this chapter.

11.2 Types of penalties and sentences

Key Terms

Concurrent sentence: a concurrent sentence may be applied when someone is sentenced for different crimes. It allows the sentences to be served at the same time. For example, if a defendant was sentenced to 6 months imprisonment for the most serious criminal offence (count 1) and 2 months imprisonment (count 2), they would serve a total of 6 months imprisonment.

Cumulative sentence: cumulative sentences are served sequentially. For example, if a defendant was sentenced to 6 months imprisonment for the most serious criminal offence (count 1) and 2 months imprisonment (count 2), he or she would serve a total of 8 months imprisonment.

Custodial sentence: a custodial sentence involves a term of imprisonment.

Incarceration: an alternative term for imprisonment.

Non-custodial sentence: a non-custodial sentence does not involve a term of imprisonment. Examples of a non-custodial sentence include a fine, community service order or a good behaviour bond.

Recidivism: the tendency of a person who has been convicted of a crime to reoffend.

As there are a wide range of criminal offences and regulations that can attract a legal sanction, **there are many different types of sentencing options a magistrate or judge can hand down**. Generally, sentences are divided into two broad categories:

- **non-custodial sentences** (which do not involve being sentenced to term of imprisonment), and
- **custodial sentences**, which do involve a defendant being sentenced to be imprisoned or incarcerated.

We will now discuss each of these categories in detail.

Non-custodial sentences

Some common non-custodial sentences are:

Type of sentence	Explanation
Absolute discharge	An order where no punishment is imposed.
Fine	A fine is an amount of money that a defendant pays to the Queensland Government. The fine can be given in addition to, or instead of, any other sentence. Some criminal offences have mandatory fines, such as traffic offences. The non-payment of a fine can be a criminal offence. Fines are referred to the State Penalties Enforcement Registry (SPER) for collection. If a fine cannot be paid by the due date, it can be paid by instalments.
Good behaviour bond	A requirement for a defendant to 'be of good behaviour' (not break the law) for a set period of time. A court can make an order that the defendant is pay money if the bond is broken and attach additional conditions, such as attending education courses.
Community service order	An order that sees the defendant do unpaid work in the community for between 40 to 240 hours within a specific time period. The defendant must consent to this order, and it can be given in conjunction with other conditions.
Graffiti removal order	An order of up to 40 hours to remove graffiti, which usually needs to be completed within 12 months.
Probation order	An order releasing the defendant to serve their sentence in the community under the supervision of the Probation and Parole Service (PPS). A probation order can be for a period of 6 months to 3 years. A probation order requires the defendant to fulfil certain conditions, such as: • reporting to a PPS district office as directed, • getting permission before leaving Queensland, • telling a correctional officer if you change your address or employment status, • participating in programs or counselling, and/or • promising not to commit another offence. If defendants breach a probation order, they are bought back before the court to be re-sentenced.
Compensation order	An order that requires a defendant to pay for any property loss or damage, or to compensate for an injury caused by the defendant's actions.
Driver licence disqualification	An order disqualifying a person from holding or obtaining a Queensland drivers licence for a period of time. Some driving offences have a mandatory disqualification period which the court must impose.

Practical Application ...

WE NEED EVIDENCE-BASED LAW REFORM TO REDUCE RATES OF INDIGENOUS INCARCERATION.

Minor fines create a cycle of poverty

Indigenous and vulnerable Australians are more likely to fail to pay fines on time and incur further sanctions. Fines coupled with enforcement costs become impossible to pay for people on low incomes, or those who are homeless or unemployed.

Fine amounts can be prohibitive. In 2014, the NSW government increased the fine for the continuation of intoxicated and disorderly behaviour following a move-on direction from A$200 to A$1,100. A report by the NSW Ombudsman found Indigenous Australians accounted for 31% of the 484 fines and charges issued for this offence in the review period.

Every state and territory has progressive sanctions regimes for fine default. If fines are not paid on time, people accumulate further debts, have their drivers licence suspended or disqualified, have property seized, perform community service work, and — in some cases — are imprisoned.

Drivers licence sanctions operate especially harshly on Aboriginal people living in regional, rural or remote communities. Private vehicles are often the only practical means of transport available to access work or basic services, such as health care.

Source: Elyse Methven, 'We need evidence-based law reform to reduce rates of indigenous incarceration', *The Conversation* (Online, 9 April 2018) <theconversation.com/we-need-evidence-based-law-reform-to-reduce-rates-of-indigenous-incarceration-94228>.

1. Identify the specific group(s) of Australians that are more likely to face difficulty paying a fine. [C]
2. How much did the NSW government increase the fine for intoxicated and disorderly behaviour following a move-on direction in 2014? [C]
3. What further consequences may a person experience if a fine is not paid or a person's licence is suspended? [C]
4. Although people may receive the same fine for the same offence, this article makes the case that it leads to unequal results. Do you think fines are fair and just? Use legal reasoning to support your decision. [E]

Recording a conviction

Courts also have the power to decide whether to record a conviction or not. This is a separate decision from deciding what sentence to give. This means that a defendant can state that he or she has not been convicted of a criminal offence, which can be important when traveling outside Australia or for employment reasons.

Custodial sentences

In sentencing an offender, a court must have regard to…a sentence of imprisonment should only be imposed as a last resort…

Penalties and Sentences Act 1992 (Qld) s9(2)(a)(i)

Custodial sentences involve the defendant being given a sentence of imprisonment. Sometimes a court 'suspends' the entire custodial sentence for a period of time. This means that the defendant does not have to serve their term of imprisonment immediately, but if they commit another serious offence, the court can order them to serve all or part of their original sentence in addition to any punishment given for the new offence.

A court may also give them an intensive correction order, which allows a defendant to serve their custodial sentence in the community under the supervision of Queensland Corrective Services (QCS).

Custodial sentences include:

Type of sentence	Explanation
Imprisonment	Imprisonment (also called **incarceration**) is the most severe penalty a court can impose since the death penalty was abolished in Queensland in 1922. If a defendant receives several sentences of imprisonment for multiple criminal offences, a judge can decide whether each sentence is served sequentially (called a **cumulative** sentence) or **concurrently** (which sees a defendant serve one sentence). A defendant may be imprisoned for their entire sentence, or they may be eligible or be granted parole by the Parole Board Queensland. If a defendant is given parole they must follow certain conditions. We will investigate the incarceration rate more deeply in a moment.
Indefinite detention order	The *Dangerous Prisoner (Sexual Offences) Act 2003* (Qld) gives the Attorney-General the power to keep a person who has committed a very serious offence (such as a violent, sexual offence) in prison after their sentence has been served. This is called an indefinite detention order as there is no 'end date'. This order is given by the Supreme Court of Queensland and is regularly reviewed. An example of this process is explored in the case study below.

Case Study

Attorney-General for the State of Queensland v Fardon [2019] QSC 2; [2019] 4 QLR

Facts: The respondent, Robert Fardon, had a significant criminal history. He had been convicted of many serious sexual offences involving children. His last conviction occurred in 1989 with the sentencing judge commenting that he, 'brutally assaulted her and then you inflicted a series of most degrading acts upon her'.

After serving a 14 year term of imprisonment, Fardon was due for release in 2003. The Attorney-General successfully applied for respondent be detained in custody for an indefinite

Case Study

term for control, care and treatment (a continuing detention order). The order stayed in place until late 2006, where he was released subject to a supervision order.

He returned to custody when he was charged with raping a woman in 2008. Although he was found 'guilty', his conviction was set aside, and he was acquitted by the Queensland Court of Appeal. He was released from custody subject to a supervision order in 2013 after the Attorney-General failed to apply for a further continuing detention order to be made against the respondent.

In 2019 the Attorney-General applied for a further supervision order for the respondent.

Legal Issue: Does Fardon present an unacceptable risk of committing a serious sexual offence and should continue to be subject to a supervision order?

Decision: His treating psychologist reported that Fardon had progressed from tight 24 hour supervision to a 'maintenance' level of supervision, which saw him take regular outings in the community to approved locations independently and in company. He had abstained from alcohol and drugs for many years and there was an absence of evidence of a sexual paraphilia.

Three other psychologists also agreed that Fardon had a low risk of reoffending. The Attorney-General's application was dismissed. The Hon Justice Bowskill stated:

> *[3] I am not satisfied that the evidence establishes to the requisite high degree of probability that the respondent is a serious danger to the community in the absence of a further supervision order. Accordingly, the application will be dismissed.*

1. Identify the respondent in the case. [C]
2. How many years had Fardon been subject to continuing detention order? What caused him to return to custody in 2008? [C]
3. Analyse the viewpoint of both parties of the case and their consequences. [A]
4. After the decision was published, the ABC News called Fardon '[o]ne of Queensland's worst sex offenders.' Based on the evidence given by all psychologists, do you think it would be fair to keep Fardon subject to a supervision order? Justify your decision using legal criteria. [E]

Inquiry Focus

What is the incarceration rate of First Nations peoples in Australia and how can we address these disparities to promote justice and equity?

Introduction

At an event marking the seventh anniversary of the apology to the Stolen Generation in 2017, former Prime Minister Kevin Rudd said: '*Australia is now facing an indigenous incarceration epidemic.*'

Civil law foundations

Chapter 12: Introducing the civil law

12.1 What is civil law?

12.2 Sources of civil law

12.3 Distinguishing civil law from criminal law

12.4 The branches of the civil law: contract and torts

12.5 The doctrine of precedent

12.6 How does international law influence Australia's civil law?

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - that the civil law of Australia, its subject matter and processes are derived from customary law and English common law and statute
  - there are fundamental differences between the civil and criminal law
  - there are two predominant branches of the civil law, contract and torts (including negligence), which originally existed in English law
  - that all Australian law is subject to the doctrine of precedent, and it is with the High Court of Australia, that final authority rests
  - some Australian civil law is determined by international obligations.
- analyse and evaluate equitable access to, and legal barriers preventing, access to the civil justice system.

Key Terms

Civil law: the law established to define the rights and responsibilities of individuals, government entities, and private or non-government organisations, in their interactions with each other.

Contract law: the body of law which governs the legal rights and obligations entered into between two or more parties making an agreement.

Precedent: the process whereby courts are obliged to follow the decisions (the *ratio decidendi*) of the higher courts in the hierarchy, unless they can be distinguished.

Tort law: the body of law which governs the legal relationship between a person who causes an actionable wrong to another person thereby causing that person damage and loss.

12.1 What is civil law?

Introduction

One of the purposes of law is that it assists society to operate in an orderly, fair, and efficient manner. When people interact each other, or with an organisation that affects their lives, these interactions, are in many cases governed by laws which have been established to regulate interactive behaviour. When individuals do something, it is usually because they think they are entitled to do it. It might be walking across a busy road where cars travel up and down. When you do that, laws regulate your conduct. In certain circumstances, crossing a busy road is not breaking the law. However, if you are careless, or a driver is not sufficiently careful to look out for you, and you are struck and injured by the driver of a car, certain questions might arise.

- Should you have walked an extra 200 metres to cross at a pedestrian crossing?
- Was the driver of the car travelling too fast?
- Did the driver of the car fail to slow down when he saw you?

Sometimes what you think you are entitled to do involves interaction with another person or organisation. Suppose you need to travel by public transport to go shopping. To do so in most Australian cities, involves buying a ticket (or travel card) to 'tap and go' to pay for the journey. If you do this, and get on the train or bus, you are entering an agreement with the Department of Transport, who is responsible for the train or bus system. By paying you have the right to travel for the journey for which you have paid. Are there laws governing what you can and can't do while travelling? You can be sure there are.

Practical Application

Individually, or in small groups, conduct a class exercise about an activity in which you or another person is involved, where there is interaction between individuals, or between individuals and an organisation. Identify rights that the individuals and organisations have, and the obligations that the law has imposed on the parties. For example, find out what happens when you decide to get a car driver's licence or work as a casual employee for a local business, or choose your own activity. Write a short report you can present to the class orally. [C] [A] [R]

The nature and scope of civil law

Civil law defines the rights and responsibilities of individuals, government entities and private or non-government organisations in their interactions with each other. In other words, it defines rights, imposes obligations, and resolve disputes. Some of these rights are set out below, and the area of law which imposes obligations relevant to that right is identified. You may not recognise all of these rights and obligations at this stage. Search each of them on the internet and make notes to help you understand each of the rights set out.

CIVIL RIGHTS	LAWS IMPOSING OBLIGATIONS
First Nations Peoples' right to land	*Native Title Act 1993* (Cth)
The right to protect a significant First Nations Peoples' cultural site from mining damage	*Native Title Act 1993* (Cth)
Protecting your property	Tort law-trespass to property
Use and enjoyment of land	Tort law-nuisance
Compensation for injury to your person at work	*Workers Compensation and Rehabilitation Act 2003* (Qld)
Compensations for injury to your person in a car accident	Tort law-negligence
Protecting your name and reputation	*Defamation Act 2005* (Qld)
Reinstatement for unfair dismissal and lost wages	*Fair Work Act 2009* (Qld)
Protecting your person	Tort law-trespass to the person
Damages for breach of contract	Contract law

Practical Application

With respect each of the sources set out below, answer the following questions:

1. What is the right which is the basis for the legal action? Who is making the claim? [C]

2. Who is the party against whom the legal action has been taken or is proposed? [C]

3. What outcome has occurred, if any? Describe what has happened. [C]

Source 1

GEOFFREY RUSH CASE: DAILY TELEGRAPH AND NATIONWIDE NEWS LOSE DEFAMATION APPEAL AGAINST ACTOR

Oscar winner to be awarded full $2.9 million in damages after judges reject all publishers grounds of appeal

Practical Application ...

The Sydney Daily Telegraph will have to pay the actor Geoffrey Rush a record $2.9 million damages after the tabloid lost its appeal against a historic defamation ruling.

The newspaper and its publisher Nationwide News-had challenged the Australian Federal Court decision from April 2019 that found claims conveyed in two of its news articles from 2017 that the Oscar winner had behaved inappropriately towards a colleague were not credible.

On Thursday the full court of the Federal Court upheld the 2019 ruling that the articles portrayed the actor as a sexual predator and 'pervert' in detailing his behaviour towards a co-star during the 2015-16 run of the Sydney Theatre Company production of King Lear.

Source: Elias Visontay, 'Geoffrey Rush case: Daily Telegraph and Nationwide News lose defamation appeal against actor', *The Guardian*, (Online, 2 July 2020) <theguardian.com/film/2020/jul/02/geoffrey-rush-case-daily-telegraph-and-nationwide-news-lose-defamation-appeal-against-actor>.

Source 2

ROBODEBT CLASS ACTION LAW FIRM PREPARED TO SUE FOR ALLEGED 'MISFEASANCE IN PUBLIC OFFICE'.

The law firm behind the $1.8 billion robodebt class action says it is prepared to launch a fresh civil case alleging misfeasance in public office, against former ministers and public servants, unless a settlement for further compensation is reached.

Peter Gordon, a senior partner at Gordon legal, confirmed on Tuesday the firm had written to the Albanese government seeking to address the claims of persons who weren't compensated by the original case.

Gordon told Guardian Australia the firm has already received instructions from robodebt victim clients and was 'exploring a number of possible claims including a claim of misfeasance in public office-which is both a civil tort and a crime-' and a range of other causes of action'.

The settlement approved was for the claim in unjust enrichment, it did no more than get the money back the government had stolen,…

Source: Paul Karp, 'Robodebt class action law firm prepared to sue for alleged misfeasance in public office', *The Guardian* (Online, 11 July 2023) <theguardian.com/australia-news/2023/jul/11/robodebt-class-action-law-firm-prepared-to-sue-for-alleged-misfeasance-in-public-office>.

Source 3

QANTAS FACES CLASS ACTION LAWSUIT FOR NOT REFUNDING TICKETS FOR COVID CANCELLED FLIGHTS

Qantas has been hit with a class action lawsuit seeking millions of dollars in refunds and compensation for customers who had flights cancelled following the COVID outbreak.

Echo law filed a lawsuit against Australia's national carrier in the Federal Court on Monday, alleging the airline misled customers about their refund options, withheld funds, and engaged in a 'pattern of unconscionable conduct'. Qantas has completely rejected the allegations.

Source: AAP/ABC, 'Qantas faces class action lawsuit for not refunding tickets for COVID cancelled flights', *ABC News* (Online, 21 August 2023) <abc.net.au/news/2023-08-21/qantas-hit-with-lawsuit-for-holding-over-1b-credits/102755916>.1b-credits. (excerpts only)

12.2 Sources of civil law

What do we mean by sources of law?

The phrase '**sources of law**' is used in two ways and it is important to distinguish between those two different meanings. **First,** it is used to refer to the **authoritative source of a law**, that is, whether a law has been made by parliament (statute law) or by judges (common law). **Second,** it is used to refer to the **historical development of the law or a legal system**.

It is important to study the historical development of the law because it informs our understanding of our current system of laws. This is because our laws evolve and change to reflect changes in society. They are a living thing, as you have no doubt discovered in your study of the criminal law.

The historical development of our legal system

The medieval common law in England (in the 12th century) was largely concerned with serious crime and land tenure (ownership and other rights). It was not concerned with breach of informal agreements reached by word-of-mouth or damage to persons or to property caused unintentionally by accident. The central courts administering justice on behalf of the King were concerned with breaches of the King's peace. Such cases were decided by the Royal law of the central courts, but otherwise:

> *…It is not the custom of the court of the Lord King to protect private agreements*
>
> Glanville, *tractatus de legibus et consuetudinibus angliae*, 1180

At the time, the common law was therefore not concerned with remedies for breach of informal agreements (oral agreements), although there were remedies available for what are now described as intentional torts (e.g. trespass to the person). It was possible, however, to seek justice elsewhere, in county courts, borough courts, and courts of markets and affairs, for example.

In the 13th century, the common-law system recognised formal contracts (agreements in writing) first. The practice was to authenticate these agreements by sealing them. Sealing a document involved placing a wax seal on it thereby identifying the documents owner and establishing its importance as an agreement. Sealed agreements became actionable in central law courts.

By the 13th to the 17th centuries, the common law courts in England allowed actions to be brought on informal (oral) contracts. In reaction to these developments, a view took hold that the unregulated character of the 17th century jury trial had made it too easy for plaintiffs to bring actions on verbal promises inadequately proved. The *Statute of Frauds* (1677) (UK) required that there be formal agreements in writing under signature to transfer land and to sell goods worth more than £10. This was the first statutory intervention in the common law of contract.

You will find in Topic 2: Contractual Obligations, which follows, that the 19th century was a period during which many decisions were made in the common law of contract, when it was necessary to decide the many disputes in the commercial world of the Industrial Revolution. During this period the idea reached its peak that men of full age and competent understanding should have the utmost liberty in contracting, and that their contracts should be enforced by the courts. You will also find that as the world became more complicated, it became more necessary for governments to intervene and pass laws to make the common law of contract more equitable.

Until the case of *Donoghue v Stevenson* [1932] AC 562, the law of torts had not been able to formulate a general test for whether or not a person who was negligent owed a duty of care. Therefore, unless the courts had previously decided that a particular duty of care to a particular

class of persons was enforceable by the law, actions in negligence would fail unless the court created a new duty of care category. This case marked the beginning of the modern law of tort, and this is where Topic 3: Negligence and the Duty of Care essentially begins later in this book.

A number of matters should be clear to you after following this brief simplified history of our common law from the 12th century and from revising key concepts raised in Chapter 2.

1. Customary law existed prior to British settlement in 1788.
2. British settlement brought English common law and statute law to Australia in 1788 and applied it in Australia. It became the Australian common law, and statute law, to the extent that it applied in Australia.
3. In 1992, in *Mabo (No 2)*, the High Court of Australia recognised common law native title and it became part of Australian common law.
4. Common law native title was enshrined in Australian statute law in the *Native Title Act* 1993 (Cth).
5. In 1901, the *Australian Constitution Act 1901* (Cth) was passed, creating the Commonwealth of Australia and a Federation of six Australian States, each of which, according to its powers and jurisdiction, passes laws which must be observed by the people each state or the whole of Australia.
6. Each state has a judicial system, in which its own laws are applied, and where allowed, they apply the law of the Commonwealth, and vice versa.
7. The High Court of Australia since 1968, when appeals to the Privy Council in Great Britain were abolished, has generally (some states did not accept this as appropriate initially) been the ultimate Court of Appeal and interpreter of the *Australian Constitution*.

Tip

We will now look at the meaning of the common law as it is applied in the Australian courts, and in Queensland courts in particular. The topic has already been covered in Chapter 2.5: **Common Law**. Go back of this chapter and read it. As you read it make notes under the following headings to help you revise what it said. [C]

1. The Queensland hierarchy of courts.
2. Judge-made law.
3. Judicial precedent.
4. *Ratio decidendi* and *obiter dicta*.
5. *R v Kaporonovski* [1972] Qd R 465; *Kaporonovski v R* (1973) 133 CLR 209.
6. Statutory interpretation.

Statute law and the common law

We have seen in Chapter 2.3: Separation of powers: the legislature, executive, and judiciary, and in Chapter 2.4: **Statute Law**, that the Parliaments of the Commonwealth of Australia and Queensland have the authority to make laws which apply to our lives, and that these laws override the common law to the extent that they are applicable. Again, it would be very useful for you to read these earlier chapters. Make notes to describe and explain statute law and common law, what they mean, where they come from, and how they are applied.

Contractual obligations

Chapter 16: How a contract is formed

16.1 Introduction

16.2 Intention to create legal relations

16.3 What is an offer?

16.4 What is acceptance?

16.5 What are consideration and formalities?

16.6 Contract law and technological change

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the need for contract law
  - the elements of a legally binding contract found in case law
  - the precedents derived from case law which determine the outcomes of contract disputes
  - the flexibility of common law when faced with technological change.
- analyse and evaluate
  - the legal issues which arise in the study of the formation of contracts
  - selected legal information to resolve legal issues involving online contracts and transactions.

Key Terms

Contract: a valid contract is an agreement made between two or more parties that creates legal rights and obligations which the law will enforce.

Offer: an offer is a proposal by one party to enter into a legally binding contract with another. An offer can be made orally, by conduct, or in writing.

Acceptance: acceptance occurs when the party to whom an offer is made (offeree) agrees to the proposal of the person making the offer (offeror).

Mutuality: a word used to describe the relationship of parties who intend to be legally bound by a mutual set of obligations in a contract.

Consideration: the gain or benefit given by each party to a contract to the other in return for something of value.

Valid: legally sound, effective, or binding.

Illegal: not legal, not authorised by law.

Formalities: the process of putting a contract in writing to make it valid and enforceable. For example a deed.

16.1 Introduction

A valid contract is an agreement made between two or more parties that creates legal rights and obligations which the law will enforce. Certain elements must be present for a binding or valid contract to be created. These are:

- intention to create legal relations
- offer
- acceptance
- consideration

Even though a legally binding agreement exists, it may be able to be challenged for other reasons. Generally, a contract can be set aside if one of the parties lacks legal capacity, there is not genuine consent to the agreement or the contract has an illegal purpose

In the 18th century English case of *Everet v Williams* (1725) Ch., Everet sued Williams. Everet claimed he was in business selling silver, rings and watches. When Williams asked to be taken into partnership, Everet agreed. After dealing together for some time, they had a disagreement over their respective shares of the profits. Everet claimed that Williams was not keeping to the contract and was holding onto more than his proper share. Everet commenced court proceedings and filed 'a bill against his partner for an account'. That is, to calculate what the partnership was worth and divide it equally.

It turned out, however, that the business was illegal. Everet and Williams were highway robbers! The agreement was illegal and unenforceable at law. The bill was dismissed with costs. The barrister who signed the bill was made to pay the costs. The solicitors acting in the case were fined £50 and the parties were both hanged!

This case raises a special problem. When should a court enforce the promises people make to each other? What is the reason for doing so? Why should the law enforce promises and why should we have to keep them?

People seeking to rely on another person's promise need certainty and predictability. A broken promise by a friend is upsetting. However, it is not the function of our courts to become involved with purely social arrangements. In the commercial world and, at times, in a domestic or social context, a broken promise can mean financial loss. Our court system has developed a body of law (contract law) to decide which agreements will be enforced. **The law becomes correctly involved when the parties intend that their promises to each other will have legal consequences if not carried out.** In such cases both parties intend to be legally bound. The promises exchanged can be described as occurring in a mutual set of obligations. All legal contracts have this characteristic of mutuality.

Contract law has its origins in the decisions made by judges, as they have adjudicated a variety of disputes in the courts. **Decisions made by judges form the body of law known as common-law, hence the term common law of contract.** It can be contrasted with statute law which is law made by Parliament. Over the years, the common law of contract has been changed and modified by statute law which has been introduced from time to time. For example, the Commonwealth Parliament passed the *Trade Practices Act 1974* (Cth) to;

- promote competition and fair trading, and
- provide for consumer protection.

Each of the Australian States and the Territories have passed similar laws applying to their respective jurisdictions.

16.2 Intention to create legal relations

In some cases people making agreements do not intend to be legally bound. **Private and social arrangements are not usually intended to carry legal consequences**. If they did, and every private or social arrangement was legally enforceable, life would be complicated, expensive and very difficult. The courts have, on many occasions, considered whether or not an arrangement is intended to have legal consequences. Consider the following cases.

Case Study

Simpkins v Pays (1955) 107 ALR 1, 66 ALJR 408

Facts: An elderly woman and her boarder frequently entered competitions in newspapers. The boarder drew up the form in the name of the woman and the entry fees were shared. The woman promised to share any winnings. However, when she won a prize of £750 in a competition, she refused to share it with her boarder.

Legal Issue: Was the arrangement with the boarder a binding contract?

Decision: It was the combined effort of the woman and the boarder and the sharing of expenses which led to the prize. The woman was obliged to share the prize. An intention to create legal relations was evident from the conduct of the parties and the promise of the woman.

You be the judge

In *Simpkins v Pays*, suppose that the elderly woman always drew up the form on her own and she mostly paid the entry fees herself. Sometimes the boarder contributed.

Do you think that the court would have made the same decision? [A] [E]

Case Study

Todd v Nicol (1967) SASR 72

Facts: Mrs Nicol wrote to her sister-in-law in Scotland. She invited Mrs Todd to migrate with her daughter to Australia and to share her home on a permanent basis. They accepted this invitation and travelled to Australia and took up residence. Soon they were in dispute. Mrs Nicol would not share her home with Mrs Todd.

Legal Issue: Did the parties intend the agreement to be binding?

Decision: The court decided it was a binding agreement. Mrs Todd had incurred considerable expense and inconvenience. She had relied on Mrs Nicol's promise. This took the arrangement beyond the social to the commercial realm.

You be the judge

In *Todd v Nicol*, suppose the facts were different as follows:

Mrs Nicol only wrote to Mrs Todd telling her how wonderful it was to live in Australia. Mrs Nicol did not promise Mrs Todd that she could live in her home on a permanent basis. Mrs Todd was attracted by Mrs Nicol's description of Australia and came out to Australia to live on her own accord. When she arrived in Australia she did not like it and blamed Mrs Nicol.

Do you think that the court would still decide that Mrs Nicol and Mrs Todd had a binding agreement? Why or why not? Justify your decision. [A] [E]

16.3 What is an offer?

An offer is a proposal by one party to enter into a legally binding contract with another. An offer can be made orally, by conduct, or in writing. The offer must be clear and certain.

In our cartoon example, an offer is made by the words, 'I'll buy it for that'. The words 'I wish I could sell my car. It's probably only worth $2000', are merely an invitation to make an offer. They are not an offer because they are too ambiguous. Their intention is uncertain. The words do not convey a clear, unambiguous offer.

An invitation to make an offer is called an invitation to treat. An invitation to treat is not an offer. For example, what might appear to be an offer is a mere willingness to trade or deal. When shopkeepers display their stock in windows or on shelves, they are usually inviting the customer to make an offer. This is an 'invitation to treat'.

The system used in each shop will determine when the offer occurs. For example, if the customer simply hands all the items to an attendant at a cash register, who enters a price on each item producing a total, and then says 'that will be $54.25 please' then these words are the offer. Clearly a customer can change his or her mind at this point and take out any items so that the total cost is changed. Acceptance would then be the act by the customer of tendering the money.

It is not hard to think of different scenarios which may occur at the point of sale in a self-service shop which would change this. For example, people who buy a newspaper from a corner store often go into the store, pick up the paper, hand the correct money across the counter and the owner or attendant says thank you and nothing else. In this case the act of tendering the money would be an offer and the act of accepting the money and saying thank you together would constitute acceptance.

There are a number of cases in which the courts have distinguished between statements (orally or in writing) to decide if they constitute an offer or not. An important and well known case, in which this question was considered, was set in a self-service chemist in 1953 in the United Kingdom. This case is set out below, then followed by another case in which the same question was important in the judge's decision.

Case Study

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern Limited) (1953) AC 1 QB 401

Facts: Drugs and medicines were displayed on shelves in packages or other containers in a shop. The shop was one room with two exits. The customers used a wire basket to collect what they wanted themselves. The customers then took the articles they collected to a cashier at one of the exits. The cashier totalled the price and received payment. One of the items submitted by the customer was labelled with the wrong price. The cashier refused to sell the item at the labelled price and the customer objected.

Legal Issue: Did the display of goods at specified prices (self service system) amount to an offer by the owner of the shop to sell the goods which could be accepted by the customer?

Decision: The self service system was not an offer to sell but merely an invitation to treat. The offer was made when the cashier offered to sell the articles by telling the customer the price. Acceptance occurred when the customer paid the cashier for the articles.

You be the judge

In a modern supermarket, sometimes the price of an item is labelled incorrectly. If the cashier scans the bar code and the price displayed electronically is greater, a dispute can arise.

1. Are these facts similar to those in the case of *Boots Cash Chemists* above? [A]
2. Would the same decision be made? Why? Check with your local Woolworths, Coles or IGA [A]
3. What would you do if you were in charge of the supermarket? [A] [E]

Case Study

Harris v Nicolson (1873) 8 QB 286

Facts: The defendant advertised that certain things would be sold at auction on named days. The plaintiff went to the auction with the intention of bidding for certain pieces of furniture. Some of the lots in which the plaintiff was interested had been withdrawn from sale. The plaintiff claimed to be entitled to compensation for breach of contract. The plaintiff said that the defendant's advertisement was an offer of an opportunity to bid for the particular pieces of furniture. The plaintiff said that he accepted that offer by travelling to the auction.

Legal Issue: Was the advertisement an offer which the plaintiff could accept?

Decision: The court decided that the advertisement only set out items for auction to indicate an intention to sell those items. It was not an offer which could be accepted, but was merely an invitation to treat.

You be the judge

Suppose that in the above case the defendant's advertisement reads –

'The dining room suite in the picture can only be bought at the auction on Friday and will be sold on that day. Come and bid for this wonderful piece of furniture!'

1. If the plaintiffs travelled to the auction on Friday specifically to buy the dining room suite and the defendant had withdrawn it from the auction, would the decision in *Harris v Nicolson* be the same? [A]
2. Can you think of a different advertisement which would make the plaintiff succeed? [A] [E]

From time to time, the courts have been required to consider the nature of an offer which has been made, and whether or not the person purporting to accept the offer (the offeree) has been able to do so in a valid manner. This is led to many precedents to which judges have had a valuable source of law to refer to and follow, if appropriate. Where a statute does not impose a legal obligation, the common law has found appropriate solutions which have met the needs of our private and commercial arrangements. Some of these are set out in the cases that follow.

In each case, the precedent is set out before the case study.

An offer may be made to a particular person, to a class of persons, or to all the world.

The case of *Carlill v Carbolic Smoke Ball Company* set out below established this precedent. It is a very famous case. Mrs Carlill successfully sued the company by responding to their advertisement. Do you think Mrs Carlill would respond to this advertisement in the same way today? We are much more cynical about reacting to such advertisements.

Contractual obligations

Chapter 20: Consumer law

20.1 The need for consumer protection

20.2 *Australian Consumer Law* (ACL)

20.3 Australian Competition and Consumer Commission (ACCC)

20.4 Resolving disputes and remedies

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - that consumer protections provisions are needed in addition to the general law of contract
  - the role of the *Australian Consumer Law* in providing consumer protection
  - the remedies available to consumers.
- analyse the role of the Australian Competition and Consumer Commission (ACCC) in consumer contractual arrangements.
- analyse and evaluate the mechanisms and avenues of dispute resolution in consumer disputes.
- select legal information, then analyse and evaluate to resolve a contract law issue.

20.1 The need for consumer protection

Key Terms

Caveat emptor ('let the buyer beware'): the notion that a buyer needs to complete their due diligence and check the quality and suitable of a good or service before making a purchase.

The relationship between a consumer and a business has changed considerably over time.

Today, the size, influence and resources held by big businesses and global corporations has left many consumers vulnerable to unethical practices, manipulation and exploitation. In response the State and Federal governments have created law to:

- develop and maintain an environment that fairly balances the rights and interests of larger corporations, businesses and the individual consumer,
- equalise the power between consumers and manufactures,
- keep consumers safe from faulty goods,
- encourage ethical behaviour and practices, and
- create market conditions that encourage competition to provide consumers with greater choice at lower prices.

Current legislation covering consumer protection includes:

- *Fair Trading Act 1989* (Qld)
- *Competition and Consumer Act 2010* (Cth).

These laws share a similar objective and operate in parallel with each other, as they aim to protect and attempt to achieve just outcomes for the consumer. The *Australian Consumer Law* (ACL) is found in Schedule 2 of the latter Act.

What do you think?

Are notions such as *caveat emptor* (buyer beware) still relevant today in the face of size, influence and resources held by big businesses and global corporations? Analyse your own viewpoint and its consequences on modern consumer law. [A]

20.2 *Australian Consumer Law* (ACL)

The Australian Consumer Law is the largest overhaul of Australia's consumer laws in 25 years. It will introduce a single, national consumer law that will apply consistently in all Australian jurisdictions.

Dr Steven Kennedy, 'An introduction to the Australian Consumer Law', 2009.

The *Australian Consumer Law* (ACL) replaced 17 Commonwealth, State and Territory consumer protection laws and applies nationally into **a single uniform Act that applied throughout Australia**. It was a key recommendation of the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*.

The ACL came into force on 1 January 2011. It applies to goods and services purchased after this date in any part of Australia. If a good or service was purchased prior to 1 January 2011, the customer would look to the law that was in force at the time of the purchase.

Defining the 'consumer'

The meaning of 'consumer' is defined in s3 as:

…in relation to an industry, means a person to whom goods or services are or may be supplied by participants in the industry.

Consumer guarantees

The ACL sets out several consumer guarantees (or rights) in statute law. These guarantees are not expressly started in a consumer transaction, but are obligations that are implied into the consumer contract. **In consumer law, implied terms are used to protect consumers and ensure that certain minimum standards are met in transactions involving goods and services.** These guarantees can't be taken away by a business and are in addition to any product warranty.

Guarantees apply to goods and services bought for personal or household use. However, a businesses can also be covered by a consumer guarantee if the good or service:

- costs less than $100,000 (GST inclusive)
- is commonly bought for personal, domestic or household use
- is a vehicle or trailer used mainly to transport goods on a public road.

Consumer guarantees related to the supply of goods include that the:

- supplier must have a right to sell (s51)
- consumer has a right to undisturbed possession of the goods (s52)
- goods must be free from any security, charge, or encumbrance not disclosed to the consumer (s53)
- goods must be of acceptable quality (s54)
- goods must be reasonably fit for any disclosed purpose (s55)
- goods must match their description (s56).
- goods must match the sample or demonstration model (s57).
- manufacturer of goods must take reasonable action to ensure that facilities for repair and parts for the goods are reasonably available for a reasonable period (s58).
- supplier and manufacturer must comply with any express warranty given or made by the manufacturer (s59).

Consumer guarantees related to the provision of services include that the:

- service will be provided with due care and skill (s60)
- any product resulting for the provision of a service is fit for the purpose articulated by the customer (s61)
- service will be supplied in a reasonable time period (unless a time is fixed or agreed to by the consumer and supplier) (s61).

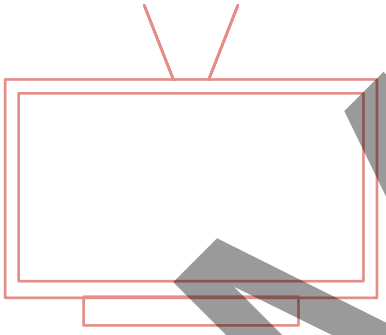
We will now look at some of these in more detail.

Acceptable quality

When a consumer purchases a good from a supplier or manufacturer they have a guarantee that what they buy will be of an acceptable quality. The ACL s52(2) defines acceptable quality as being a good that is:

- fit for all the purposes for which goods of that kind are commonly supplied, and
- acceptable in appearance and finish, and
- free from defects, and
- safe, and
- durable.

Let's apply this to the purchase of a television.



- the television is **fit for all the purposes** it should be—for example, you should be able to watch a program
- the television is **acceptable in appearance and finish**—for example, it should be free from scratches
- the television is **free from defects**—for example, the power button is securely fastened
- the television is **safe**—for example, a user shouldn't feel a shock when they turn it on
- the television is **durable**—for example, it works for a reasonable time.

When making a decision about whether a good is of acceptable quality the law also takes into account:

- the nature of the goods
- the price paid for the goods
- any statements about the goods made on its package or labels
- any representations made about the goods by the manufacturer or supplier.

If a customer damages a good through abnormal use or doesn't take reasonable steps to care for it, this guarantee does not apply.

Case Study

The case below occurred before the ACL came into force, but considered the application of the concept of 'acceptable quality' under the *Trade Practices Act 1974* (Cth). The ACL replaced this Act.

Case Study

Courtney v Medtel Pty [2003] FCA 36

Facts: Mr Courtney had a Tempo pacemaker implanted in his body. The purpose of a pacemaker is to regulate a person's heartbeat to ensure it is regular and normal. It delivers an electrical pulse when it detects an irregular pulse in the heart. The Therapeutic Goods Administration (TGA) issued a hazard alert on 5 June 2000 warning that a particular batch of pacemakers:

- had an increased risk of early battery depletion; and
- affected some 1,048 people in Australia.

The only way Mr Courtney's pacemaker could be checked was by taking it out of his body and testing it. Courtney's pacemaker, when removed, was found to be functioning normally.

A class action, of which Mr Courtney belonged, was brought against Medtel Pty Ltd. Mr Courtney alleged that the pacemaker was not of acceptable quality.

The manufacturer argued that the quality of an item should be considered on a case-by-case basis, as not all pacemakers were faulty. They submitted the question that must be asked is whether a particular item was fit for purpose or of merchantable quality.

Legal Issue: Was Courtney's pacemaker not of acceptable quality, given that both before and after removal, the device was found to be operating normally?

Decision: The judge concluded that a reasonable consumer would expect that the Tempo pacemaker would not be manufactured using materials that would create a substantially greater risk of premature failure than that applicable to pacemakers generally. As each of the pacemakers were subject to a hazard alert and many of them had actually failed, even though Courtney's was not actually defective, the judge found that none of the pacemakers were of acceptable quality.

Courtney was successful and was awarded compensation for pain and discomfort, but he did not receive compensation for stress, worry and anxiety (damages available under the ACL) because he said that he was already worried before the hazard alert and was only 'slightly worried' upon becoming aware that his pacemaker might be defective and would need to be removed to be checked.

Research Task

1. Visit the Supreme Court Library Queensland CaseLaw database (sclqld.org.au). [S]
2. In the *Full text:* field type 'acceptable quality'. [S]
3. In the *Limit* to: field select 'QCAT & QCATA'. [S]
4. In the A*dvanced search* field *Legislation cited*: type 'Australian Consumer Law'. [S]
5. Locate two recent Queensland Civil and Administrative Tribunal (QCAT) decisions that have addressed the legal concept of 'acceptable quality' in consumer goods and services and explain how these cases contribute to your understanding of the application of this section of the ACL. [C] [A]

Fit for any disclosed purpose

The ACL includes a guarantee that a good must be fit for a particular purpose specified by a business or consumer. This guarantee applies when:

- a consumer tells a business they want to use a product for a particular purpose
- the consumer buys the product based on the advice given by the business
- the business advertises that a product can be used for a particular purpose

This guarantee does not apply if:

- the consumer did not rely on the businesses' skill or judgment, or
- under the circumstances it was unreasonable for the customer to have relied on the supplier's skill or judgment (or lack of it).

Case Study

Campbell v Lane (No 2) [2013] QCATA 307

Facts: Mr and Ms Campbell placed an advertisement for the sale of horse which was described as having, 'clean sound legs, vet check welcome'.

Miss Lane responded to the advertisement, as she required a horse as a show hack (a horse that performs at horse shows). She rode the horse and arranged for an examination by a veterinarian. She asked the Campbells whether the horse had ever had any problems with its legs and whether she should obtain an x-ray. The Campbells replied that the horse had never had any problems and the cost of an x-ray would not be justified. Shortly after Miss Lane purchased the horse for $12,000, it became lame.

Legal Issue: Was the horse reasonably fit for the disclosed purpose?

Decision: Miss Lane clearly disclosed the purpose of wishing to purchase the horse to the Campbells. She asked questions about the horse's suitability as a show hack and the soundness of the horse's legs. The Tribunal found this was a disclosed purpose for the purposes of section 55.

The Campbells were ordered to pay Ms Lane $12, 975.00.

Ryan v Great Lakes Council [1999] FCA 177

The case below occurred before the ACL came into force, but considered the application of the concept of 'merchantable quality' under Trade Practices Act 1974 (Cth). The ACL replaced this Act.

Facts: After heavy rain in late November 1996, the Great Lakes Council allowed faecal matter to escape from its sewage system into Wallis Lake. As a result, oysters growing in the lake became contaminated with the Hepatitis A Virus (HAV). Mr Ryan had consumed oysters grown in Wallis Lake over Christmas and contracted HAV. Approximately 440 people had contracted HAV from eating oysters.

Ryan, as the lead plaintiff in a class action, sued the Great Lakes Council and a number of oyster growers from Wallace Lake for negligence and breaches of the *Trade Practices Act 1974* (Cth). It is the specific allegation that the oysters were of 'unmerchantable quality' and 'not fit for their purpose' that we will focus on.

Legal Issue: Were the oysters 'not fit for purpose' and of 'unmerchantable quality'?

Case Study

Decision: The Hon Justice Wilcox held that 'the contaminated oysters were not reasonably fit for human consumption. The judge also found that the contaminated oysters were not of merchantable quality. Ryan was granted compensation.

You be the judge

Rebecca is a self-employed graphic designer and wishes to purchase a computer. Rebecca tells the salesperson at City Computers that that she requires a computer with a fast-processing speed, large memory size and high-quality screen resolution to create advertising campaigns, promotion and marketing material and branding work. Almost immediately, she discovers that the computer she purchased is slow, freezes frequently and she cannot load all the programs she wishes to use.

Is this good fit for purpose? Apply the legal concept of 'fit for any disclosed purpose' to Rebecca's case. [A]

Matches description

The ACL provides consumers with a guarantee that any description of a product must be accurate, whether written or spoken.

Case Study

Decorative Imaging Pty Ltd v Stewart Homes Pty Ltd [2018] QCATA 36

Facts: Decorative Imaging Pty Ltd supplied Stewart Homes Pty Ltd with an aluminium product that was powder coated with a woodgrain finish coloured American Oak. When the product arrived Stewart Homes contacted Decorative Imaging to advise them the colour of the product did not match the colour of previous products supplied by the company and the homeowner would not accept the product and refused to pay the final instalment of the building contract until the product was rectified.

Decorative Imaging attempted to resolve the issue but could not match the colour of the previous product it supplied. Stewart Homes found another powder coating company to complete the job. They filed a civil claim asking Decorative Imagining pay the cost incurred by them to rectify the issue.

Legal Issue: What forms part of the contract description? Do the goods supplied by Decorative Imaging correspond with the description?

Decision: As the catalogue of the business asks customers to select their finish and colour, American Oak forms part of the description of the goods supplied by Decorative Imaging. Member Allen also found that the colour of the goods supplied did not match, applying the test set out in *Arcos v Ronaasen* [1933] AC 470:

If the goods do not fit the contractual description then, unless the discrepancy is of a trivial character as to justify it being disregarded by the court, the buyer is entitled to reject the goods as failing to conform to the description even though the goods are merchantable and 'commercially' within the contract

Therefore, Stewart Homes was entitled to a remedy.

Negligence and the duty of care

Chapter 23: Negligence law in contemporary contexts

23.1 The changing landscape of negligence

23.2 Defective goods

23.3 Drivers of motor vehicles

23.4 Teachers

23.5 Rescuers

23.6 Doctors and healthcare professionals

23.7 Negligence in sport

Learning objectives

At the conclusion of this chapter, students will be able to

- comprehend
  - the effect of the *Civil Liability Act 2003* (Qld) on the civil law of negligence
  - that class actions have removed barriers experienced by different groups to claims where plaintiffs have a common interest
  - governments can change the law to set higher or lower levels of compensation for injured workers
  - there are well established duties of care owed by drivers of motor vehicles, teachers, professional persons (doctors and lawyers), employers, manufacturers and retailers.
- analyse and evaluate
  - the legal issues and competing interests of litigants in contemporary negligence actions
  - the ability of the law of negligence to find just and equitable outcomes for plaintiffs and defendants.

Key Terms

Class Actions: where large numbers of plaintiffs join together, in accordance with the court rules, to pursue the same or a sufficiently similar claim, with the permission of the court.

23.1 The changing landscape of negligence

The basic proposition that has been presented to you about negligence is that the courts must find that the plaintiff is owed a duty of care before being able to award compensation to the plaintiff. The categories of negligence are never closed. It is always possible that a new set of factual circumstances will give rise to a new duty of care. **To combat this ever-growing octopus of negligence, with its variety of claims, Australian governments have tried to limit the rights of individuals to claim by both limiting the scope of the duty of care, and by putting ceilings on the amount of compensation that can be claimed.** We will look at two different areas which illustrate how negligence has developed. On the one hand, we will look at an example where the Queensland government introduced a ceiling to claims for compensation, but then reversed that when there was a change of government. On the other hand, we will look at examples of how persons with similar claims have joined together in what are called class actions.

Class actions

An area which is of great interest is the increased use by lawyers of class actions to make claims. This is where large numbers of people pursue the same or a sufficiently similar claim for the court to allow them to join a class action. **It is not so much any change in law but a change in the way cases are brought to court which represents one of the most significant current developments in the tort of negligence.**

The purpose of a class action is to allow plaintiffs who have the same interest in a legal case to obtain a court order in one action rather than in separate actions. **This assists the administration of justice by reducing the number of cases the court may need to deal with, reducing the costs of litigation, and speeding up the court process for the litigants.**

For a class action to proceed there must be at least seven members of the class, the claims of each of the class members must arise out of similar circumstances and raise a substantial common issue of law and fact. In short, a court will only allow one plaintiff to represent other plaintiffs if each of the plaintiffs have the same sort of interest in the court action.

A class action is either brought is an open or closed class. In an open class action everyone is included unless they expressly opt out. A closed class action occurs when a lead plaintiff brings a claim on behalf the group of people who are all known and any further potential parties must opt in to the proceeding.

Inquiry Focus

Do class actions remove barriers and improve access to justice for plaintiffs (claimants) in our adversarial civil justice system?

Does the Australian Class Action Regime operate in a balanced way?

Practical Application

OPERATION OF THE AUSTRALIAN CLASS ACTION REGIME

Introduction

…representative procedures themselves are not new, having been available under English law for a long time. For example, Order 16 rule 9 of the *Rules of the Supreme Court 1883* (UK) provided that *'... where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued ... on behalf or for the benefit of all persons so interested'*. These rules were replicated in Australia. However, interpretation of these provisions by the Courts led to procedural difficulties, which meant the provisions fell into disuse.

The modern class action procedure was introduced in response to the deficiencies of the former representative scheme… This modern procedure is an attempt to deal with the problems of mass claims arising from the very large civil wrongs that sometimes occur in modern economies - that is, a mass solution for mass wrongs.

In 1977 the Federal Attorney General requested advice from the Australian Law Reform Commission ("ALRC") as to whether class actions ought to be introduced into Australia.

The ALRC said yes, for the expressly stated aim of enhancing access to justice by reducing the cost of court proceedings to the individual and improving the individual's ability to access legal remedies. It also aimed to promote efficiency in the use of Court resources, increase consistency in the determination of common issues, and make the substantive law more enforceable and effective.

The Class Action Regime in the Federal Court

Part IVA of the *Federal Court of Australia Act 1976* (Cth), which contains the class action provisions, came into effect on 5 March 1992. It set out a prescriptive regime for the conduct of class actions.

Section 33C sets out the threshold requirements for the commencement of a class action, namely that:

(a) there must be claims by seven or more persons against the same person;

(b) the claims must arise out of the same, similar or related circumstances; and

(c) the claims of all those persons must give rise to a substantial common issue of law or fact.

Other important provisions cover:

- the consent of a person is not required to be a class member (s 33E);
- the right of a group member to opt out of a representative proceeding (s 33J);
- the determination of issues not common to all group members, that is, sub-group issues (s 33Q);
- the determination of individual issues (s 33R);
- the prohibition on ordering costs against class members (except in relation to specific individual or sub group issues) (s 43(1A).

The climate in which the regime was introduced

The new class action regime was enacted by Federal Parliament following vigorous debate, and in a climate of concern that class actions would cause serious impediments to business through:

Practical Application ...

- legal entrepreneurialism;
- US style litigation; and
- misuse of the media in a litigation context.

In particular, there was a concern that the introduction of the new class action regime in Australia would:

- open the floodgates of litigation; and
- induce substantial out of court settlements (regardless of the merits of a case) due to financial and reputational pressures.

These early fears have gone unrealised in practice. Some important differences are apparent in the ways that class actions operate in the US and in Australia and these differences have assisted our system to remain balanced. It is now broadly accepted that the Australian class action regime is working well and this conclusion is supported by empirical and anecdotal evidence.

Source: The Hon Justice Bernard Murphy, '*The Operation of the Australian Class Action Regime*', (Speech, 8-10 March 2013) <fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy>.

1. What did order 16 rule 9 the *Rules of the Supreme Court 1883* (UK) say about 'representative'or class actions? Why were these rules not successfully adopted in Australia? [C]
2. Why was the modern class action procedure introduced in Australia? What were the Australian Law Reform Commission's reasons for recommending the introduction of the scheme? [C]
3. What legislation first set up the class action regime in Australia? What are the threshold requirements to commence an application set out in the legislation? [C]
4. Assume you have been invited to join as a member of a class action in the Federal Court. Read the provisions set out from the *Federal Court Act*. What would help you to make a decision to join or opt out. Give your reasons [C] [A]
5. Form small groups within your class. As a group discuss the matters set out in 'the climate in which the regime was introduced.' What did you think was meant by 'class actions would cause serious impediments to business'? What did your group decide is meant by each issue raised? Explain your answers. [A]

A statistical view of class actions

In his speech, the Hon Justice Bernard Murphy quotes empirical research which covers the period from March 1992 to 31 December 2009. This research was performed by Prof Vincent Morabito.

Practical Application

Professor Morabito's research shows that:

- The number of class actions that have commenced in Australia has been modest. The studies show that, in the Federal Court of Australia and the Supreme Court of Victoria, a total of about 281 class actions commenced in the 17 year period between March 1992 and 31 December 2009.

Practical Application ...

- Despite early concerns of an avalanche of such litigation, shareholder class actions still represent only 25 per cent of all class actions in the past five years.
- Close to 70 per cent of all class actions concluded within two years and, at the time of publication of Professor Morabito's research, the average duration was declining.
- Class actions are not always successful and in fact, 51 per cent of the time, class actions either do not continue or do not continue in that form. This result undermines the basis of concerns that defendants would be placed in such a disadvantageous position that claims would succeed despite a lack of merit.
- The 'typical' class representative was a married, middle aged, professional male residing in New South Wales. Professor Morabito's research indicates that, in Australia, there is no culture of organising class actions such that the obligation to pay costs would be avoided in the event the litigation was unsuccessful.
- 'Closed' or opt in classes has not led to any significant increase in competing class actions.
- During the 17 year period from 1992 to 2009, every class action under the federal system that was supported by a litigation funder resolved in favour of the class.

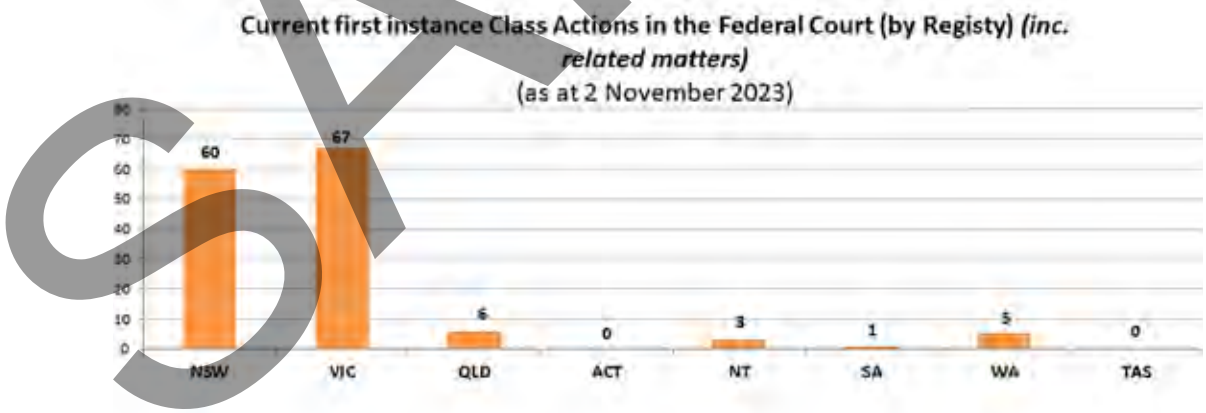
Source: The Hon Justice Bernard Murphy,' The operation of the Australian class action regime' (Speech, 8-10 March 2013) fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy

1. Do you support the view that the research results set out above show that the class action system is working well? Give your reasons. [C] [A] [E]

Practical Application

CLASS ACTIONS STATISTICS

There are currently 145 current first instance Representative Proceedings in the Court nationally.



Source: Federal Court of Australia, Current Class Actions, *Federal Court of Australia* (Webpage, 15 August 2023) <fedcourt.gov.au/law-and-practice/class-actions/class-actions>.

1. What is the total number of class actions that are current as at 15 August 2023? [C]

2. What is the percentage of class actions (Australia 100%) for Queensland, NSW, Victoria? Can you explain the distribution of class actions among the States? [C] [A]

3. Do the 'current statistics' support the view that the class action regime is working well? [A]

The law in Queensland

Prior to 1 March 2017, it was possible for a representative action to be brought under the *Uniform Civil Procedure Rules 1999* (Qld), but specific legislation enabling class actions to be brought did not occur until that date.

From 1 March 2017, it became possible to bring a class action in the Supreme Court of Queensland, under Queensland legislation.

The Queensland legislation adopted the regimes already in place in the Federal Court and the New South Wales and Victorian Supreme Courts, meaning that decisions in these jurisdictions are useful in interpreting any issues which might arise out of the Queensland scheme.

The key features of the Queensland 'representative proceeding' regime, as set out in the *Civil Proceedings Act 2011* (Qld), Part 13A include that:

- there must be at least seven members of the 'group' for a proceeding to be commenced
- the action is brought be a single representative on behalf of all members of the group
- the claim must arise out of similar circumstances and raise a substantial common issue of law of fact and
- consent of a person to be a group member is not required, however, all members of the group must be notified of the action and their right to opt-out of the group (by a set date) should they not wish to be bound by the judgement or settlement.

A representative proceeding may be started in the Supreme Court of Queensland even if the cause of action arose before 1 March 2017. However, class actions already on foot in other jurisdictions are not be able to be transferred to Queensland.

What do you think?

What advantages do you think there are in having the same procedures for class actions in the Federal Court of Australia and each of the State courts in Victoria, New South Wales, and Queensland? [C] [A]

The stakeholders

The Hon Justice Murphy discusses the views of various stakeholders about class actions in his article. From his own personal contacts, and from publications attributable to different stakeholders he concluded that generally there was a positive perception about the successful implementation of class actions in the Federal Court. He canvassed the views of the Australian Law Reform Commission, the lawyers acting for defendants in class actions, Australian corporate regulators (The Australian Securities and Investment Commission), and his fellow judges. He stated that a good indication that the Federal regime was operating well was the fact that Victoria (in 2000) and New South Wales (in 2010) introduced class action regime is substantially the same as the federal regime. It is his comments about the relevance of the claimants' experience that is most telling.

Practical Application ...

THE CLAIMANTS (EXCERPTS ONLY)

Another obvious touchstone with regard to the success of the class action regime is its application to a large number of different causes of action, and on behalf of many hundreds of thousands of claimants in diverse areas. Examples include the following:

- **Personal injury through food, water or product contamination**
- **Personal injury through defective products** (eg defective breast implants)
- **Shareholder class actions**
  Class actions on behalf of shareholders against various listed companies for misleading or deceptive conduct and/or breaches of the continuous disclosure regime on the share market (eg the Centro and National Australia Bank class actions which settled for $200 million and $115 million respectively in 2012.
- I**nvestor class actions** - complaints about conduct by the promoters of various investments.
- **Anti-cartel class actions** - commenced on behalf of consumers and businesses against cartelists.
- **Disaster class actions** - commenced in Victoria in 2009 on behalf of thousands of people who suffered personal injury, property damage and economic loss as a result of bushfires. In broad terms they alleged that negligent maintenance and operation of power lines by power companies caused the fires.
- **Consumer class actions** - commenced by consumers induced by misrepresentations to purchase goods which were not as represented.
- **Environmental class action** -for example, an action brought on behalf of landowners who suffered losses when gas from a nearby former rubbish tip entered into their houses. This last case was settled for $23.5 million.
- **Human rights class actions** - an action commenced in 2011 on behalf of children and young adults wrongly arrested and jailed because of out of date or incorrect bail information in the New South Wales police computer system,.
- **Trade union class actions** - 40 class actions were commenced in Australia in the period between 1992 and 2011, (including).. employment issues such as underpayment claims, disputes about employer conduct in obtaining workplace agreements, and orders against imminent termination of employment.

The variety of these causes of action, the large numbers of claimants, and the various kinds of claimants (including 'mums and dads', private individuals, small companies, public companies and institutions) that sign fee and retainer agreements or litigation funding agreements so as to 'join' the actions indicates acceptance of the regime by the community.

In my view they do so because they expect some justice through the regime. Whilst there is no empirical research as to the total damages paid as a result of representative proceedings to date, the total appears to be well over $1 billion.

Laws which purport to provide protections to citizens but which are not capable of being used by them are no more than an illusion, and a balanced and effective class actions regime is important in improving access to the protection of substantive laws.