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Dispute resolution

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The legal system is a defining characteristic of Australian society. It is the framework for Australia’s system of government and for the organisation of our society. It forms part of our history. It provides mechanisms for how we address the challenges of the future.

For students and practitioners of law, the mechanics of the legal system can be difficult and complex. That is hardly surprising. The problems the legal system deals with are difficult and complex. It is the difficulties and complexities that provide both the law’s challenge and its fascination.

But what gives the subject its central importance, and its never-ending interest, is that law is about society and about people. The achievements and disappointments of the legal system record our efforts, as a society, to maintain a nation based on ideals of justice and the rule of law.

Learning about the law and its role in society is very important to the individual student and to society as a whole. I offer my best wishes to all students of the law.

K. M. Hayne
A Justice of the High Court of Australia
Canberra

Kenneth Hayne was appointed to the High Court of Australia in September 1997. He graduated in Arts and Law from the University of Melbourne and as a Bachelor of Civil Law from the University of Oxford. Elected Rhodes Scholar for Victoria in 1969, he joined the Victorian Bar in 1971 and was appointed Queen’s Counsel for Victoria in 1984. He was appointed a judge of the Supreme Court of Victoria in 1992. He practised in State and Federal courts principally in commercial, constitutional and general civil matters. Justice Hayne was appointed a Companion in the General Division of the Order of Australia in 2002.
Introduction

About this book
Our legal system both responds to the needs and demands of the community, and shapes relationships between individuals and groups in society. In this book, we will explore the role of the individuals in influencing change in the law and law-making institutions as well as the processes and institutions for enforcing the law and settling disputes. The issues discussed, and the activities suggested, follow the requirements of Units 3 and 4 of VCE Legal Studies.

Throughout the text exercises, essays, assignments, written reports, structured questions and case studies have been incorporated and examples discussed. Case files have been included to provide extended case studies and to highlight contemporary legal issues. These case files provide teachers with flexibility in their approach to using the text.

Case files provide:
- extended case studies as examples of issues that may be discussed in class
- case study material that may be used as the basis for assessment tasks.

Sample examination questions cover the content that may be examined at the end of the year. Key terms have been listed at the beginning of each chapter and highlighted on first mention in the text. Margin notes provide students with a running summary of the key points that should be included in their revision summaries.

The internet icon refers to relevant internet sources. Students are encouraged to use this technology in their learning and research activities.

Please note that articles in this book without a byline were written by the authors in conjunction with a journalist.

We would appreciate your comments, and welcome your criticisms and recommendations for future editions.

Correlation grid
A VCE correlation grid for Making and Breaking the Law is located on the OneStopDigital website. The correlation grid links assessment tasks and page numbers from the book to areas of study and the key knowledge requirements for the new study design. Please view www.onestopdigital.com.au and follow the links for a free download. Additionally, there is a free document for students that explains the outcomes and assessment for VCE Legal Studies.

Teacher resources
Additional support for teachers is also provided in the Making and Breaking the Law Teacher Resources available at OneStopDigital (www.onestopdigital.com.au). Designed to save you time and improve student outcomes, this resource is your complete guide to the text. It incorporates a range of student worksheets, content summaries, crossword puzzles, guidelines for organising mock trials, an exam revision booklet, multiple-choice questions and answers and a list of relevant websites. The teacher resources, developed by both beginning and experienced teachers, were created by the Head of Curriculum at Canterbury Girls’ Secondary College and accredited De Bono trainer, Jim Ouliaris.
UNIT 3

Law-making
Law and society: an introduction

This chapter provides an introduction to the sources of rules and laws. We will examine the difference between legal and non-legal rules. We will also look at the classification of laws as criminal or civil, statute or common law.
Key terms

- **civil law**: Laws regulating the behaviour of private individuals
- **contract**: A legally enforceable agreement
- **criminal law**: Laws concerned not only with the rights of individuals directly involved but also with the welfare of society as a whole
- **judge-made law**: The development of legal principles through the declaration of common law or statutory interpretation
- **legal rules**: Laws created by institutions within the legal system and enforced by the legal system
- **legislation**: An Act of Parliament or piece of delegated legislation
- **non-legal rules**: Rules established within a group but not laws generally enforceable in the community
- **norms**: Social expectations within social groups
- **statute law**: Acts of Parliament
- **tort**: A civil wrong that amounts to an act or failure to act that infringes on the rights of an individual; for example, negligence, trespass and nuisance
Rules and laws

Law consists of rules that establish modes of behaviour and procedures. However, not all rules are laws. As members of the community, we are subject to a range of rules, non-legal and legal, which determine our relationship with other members of society. Not all the rules that govern our actions have the same effect, importance or repercussions.

Non-legal rules

Not all rules are legal. Groups within society have rules to set out how they interact and to establish the rights and responsibilities of individual members. They are known as non-legal rules and they help reduce the conflict within that particular group. These rules are not found in the law. They are established by norms or rules.

For instance, within our families we are bound by rules of behaviour that set out the individual rights and responsibilities of each member. In a family the rules are clearly communicated, but not usually written. Clubs, sporting associations and schools also require rules to function smoothly. Such rules may be more formally stated than norms and may impose sanctions on members.

Legal rules

Legal rules are known as laws. These laws set out our rights as members of the community. For instance, Equal Opportunity legislation establishes the right of all individuals to be treated equally. The law also establishes our responsibilities to other members of the community or to the community as a whole. For example, laws about the use of motor vehicles in the community impose responsibilities on all owners and drivers of motor vehicles.

In any society it is inevitable that there will be conflicts. The law provides a means of settling these disputes peacefully. In Australia, the law provides a range of dispute settlement institutions and processes. For instance, courts have been established to resolve disputes. The Victorian Civil and Administrative Tribunal (VCAT) was established to resolve disputes between individuals. VCAT and the courts resolves disputes using a range of dispute resolution processes. We will look at the operation of these processes in more detail later.
For laws to be established in a community, the authority of those rules must be recognised. This recognition comes from the ability of the law to reflect the collective needs and values of society. In Australia, the individual is encouraged to take an active role in the development of the legal system through a number of democratic processes. These processes include the electoral system, the provision of representative and responsible government, and the use of the jury system.

In summary, the basic features of a law are:

- the statement of a particular type of behaviour (this usually takes the form of either prohibiting or regulating certain types of behaviour)
- the provision of a sanction or remedy against anyone who violates the law
- the formation of the rule by an authority recognised by the community.

For example, the criminal law establishes expected behaviour by prohibiting certain actions. The criminal law is made by parliament, which is recognised by the community as having the authority to make the law for the community as a whole. If a person does something that has been prohibited by the criminal law, they will be punished by either having their liberty restricted or a fine imposed.

**Sport—defining legal and non-legal rules**

Some actions are only permitted within legally recognised games. For instance, the sport of boxing is strictly regulated and recognised organisations control boxing events. In a boxing match, punches are thrown with the intention of physical contact that may result in harm. Outside the boxing ring these same actions would come under legal rules, in particular the law of assault.

A boxer who agrees to take part in a legally recognised boxing match consents to actions that would otherwise be considered assault—provided that the match is conducted according to the rules of the sport of boxing. However, if a boxer were to continue the fight after the end of the match, then that person would be acting outside the rules of the sport. In this case, the boxer may be subject to the legal rules of assault.

There can sometimes be a fine line between legal and non-legal rules. For instance, the AFL requires all players to agree to abide by the AFL rules (non-legal rules). However, the agreements made by professional players to play AFL football are contractual agreements (legal rules). Sometimes conflicts may arise between how the AFL applies rules and the principles of natural justice. In such cases, the courts may be asked to review decisions made by the AFL Tribunal.
A legal system

Legal rules differ from non-legal rules in that legal rules apply to the community as a whole. The legal system establishes procedures and institutions to make, administer, adjudicate and enforce the law in the community.

In our legal system, law-making is primarily the responsibility of the Commonwealth Parliament and the state parliaments. Courts (judges and magistrates) are responsible for interpreting the meaning of the law and resolving disputes when it is claimed that the law has been broken (adjudicating).

A variety of bodies have been established to enforce the law. For instance, the police have the power to impose on-the-spot fines and the Department of Justice is a government department responsible for the administration of justice. Because our legal system is complex, individuals may require assistance. Solicitors and barristers act as legal advisers and representatives for individuals in their dealings with the legal system.

Types of laws

The types of laws that we have in our society can be classified in a number of different ways. Whatever method we use to classify the law it is necessary to remember that, in a developed society such as ours, the law is complex and constantly changing. New areas of law develop that may not neatly fit into existing categories. No one method of classification can cover all aspects of our law.

By looking at the different ways of classifying the law we can start to appreciate the complexity of our legal system. The methods used to classify our laws include:

- statute or common law (sources of law)
- criminal or civil law (type of behaviour).

The method that we choose to classify the law will reflect the purpose for which the classification is needed. For example, in Unit 3 we look at the law-making process. For the purpose of our study in this section we might want to classify the law according to the different processes used to make the law (or sources of law). In Unit 4 we look at dispute settlement processes and procedures, and so may want to classify the law according to the different processes used to resolve disputes. The dispute settlement processes and procedures differ according to whether they are for criminal or civil cases (or according to type of behaviour).

In some cases, a wrongful act may involve more than one area of law. It may involve both the rights of individuals, and the relationship between the individual and the state.

This is often the case in car accidents. For instance, a speeding driver who fails to stop at a red light is guilty of a criminal offence. This behaviour constitutes a danger to the community as a whole. While driving through the red light the driver collides with another car. As a result of the collision, the second car has been damaged. The rights of the owner of the second car have been infringed. The driver of the second car could recover this loss through the civil law by suing the other driver.
Chapter 1  Law and society: an introduction

1.1 Sources of law

There are two sources of law in Australia.

- Parliaments are responsible for making **statute law**. Statute law is also referred to as **legislation** or ‘Acts of Parliament’. Parliaments may also delegate their law-making powers to other bodies, known as ‘subordinate authorities’. The rules made by these bodies are known as ‘regulations’, ‘orders-in-council’ and ‘local laws’.

- Courts also have responsibility for the development of the law, either through the process of interpreting the meaning of statutes as they apply to individual cases or through the declaration of common law. This is sometimes known as **judge-made law**.

We will discuss these two sources of law in more detail in the following chapters.

1.2 Types of crimes

<table>
<thead>
<tr>
<th>Offences against the person</th>
<th>Offences relating to action that results in some form of personal injury, such as murder, assault, rape or kidnapping</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offences against property</td>
<td>Offences involving conduct that results in damage to or loss of property, such as theft or acts of vandalism</td>
</tr>
<tr>
<td>Offences against morality</td>
<td>Offences concerned with maintaining certain values in our society, including incest, street prostitution and bigamy</td>
</tr>
<tr>
<td>Offences against the legal system</td>
<td>Offences regarding our responsibility to participate as responsible citizens in the administration of justice—they include offences such as perjury or failure to appear for jury service</td>
</tr>
</tbody>
</table>
Types of civil laws

Civil law includes both contract law and the law of torts. Contract law is concerned with legally enforceable agreements made between individuals. Torts are concerned with the wrongful actions of one individual against another individual. Some of the different types of torts are set out in the following table.

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negligence</td>
<td>Where the actions of an individual who has failed to exercise reasonable care adversely affect another individual</td>
</tr>
<tr>
<td>Nuisance</td>
<td>Where an individual interferes with another's enjoyment of their rights</td>
</tr>
<tr>
<td>Defamation</td>
<td>Where an individual damages the good name or reputation of another through false or misleading statements</td>
</tr>
<tr>
<td>Trespass</td>
<td>Where an individual physically interferes with another person, their goods or land</td>
</tr>
</tbody>
</table>

It is important to understand the difference between the two types of behaviour. Criminal law and civil law are dealt with by different procedures and have different consequences for the individuals involved. Criminal law is enforced by the police, the courts and the departments of corrective services. An individual who has been charged with a criminal offence will be prosecuted by the state and, if found guilty of an offence by a court, will be sanctioned. A sanction may include a fine, a community correction order or imprisonment.

Civil law is concerned with the enforcement of an individual’s rights. In civil law, the individual affected by a breach of their legal rights is responsible for taking the case to court. If their case is successful, the court may award monetary compensation or issue a court order to stop any further infringement.

We look in more detail at the difference between criminal and civil law in Unit 4.

Drug addict doctor infects patients

A MELBOURNE ANAESTHETIST, Dr James Latham Peters, 63, was sentenced to 14 years’ prison with a minimum of 10 years before parole. He had pleaded guilty to 55 charges of negligently causing serious injury. It was alleged that the former anaesthetist infected patients with hepatitis C at the Croydon Day Surgery between 2008 and 2009.

Since 1996, Peters had been addicted to an opioid used in general anaesthesia: the drug fentanyl. At Peters’ committal hearing, the prosecution claimed that Peters would use pre-filled syringes of fentanyl, that were intended to be administered to patients before surgery, to inject himself with partial doses. He would then return the syringe to general stocks to be used on patients.

Peters had known that he had hepatitis C since 1997, although he had not informed the clinic. Furthermore, Peters was known to have had a drug problem at the time that the alleged infection of the patients took place. Strict conditions had been imposed on his access to drugs.

Fifty former patients have initiated a civil action against the Australian Health Practitioner Regulation Authority—the successor at law to the former Medical Practitioners Board of Victoria—Dr Peters and the director of the former Croydon Day Surgery, Dr Mark Schulberg.

In May 2012, the law firm Slater & Gordon issued a Supreme Court class action. The class action is seeking unspecified compensation for pain and suffering, medical expenses and loss of income. It alleges that all three defendants breached their duty of care to the women who underwent procedures at the clinic. As a result of those breaches of care the women have become infected with hepatitis C.

Slater & Gordon practice group leader Julie Clayton said, ‘This has been a distressing and traumatic event for all of the women involved. They put their faith in the medical profession and they feel betrayed at a time when they were most vulnerable.’

Dr James Peters
Why do we need laws?

The main function of law is to enable individuals to live peacefully together. Laws allow individuals to work cooperatively towards meeting their needs for the benefit of all members of the community. This is a concept known as social cohesion. The term ‘cohesion’ means the act of uniting or sticking together. Laws aim to ‘unite’ or ‘stick’ society together.

To achieve social cohesion the law needs to be recognised or acknowledged by the community. The community will recognise the authority of the law if it:

- sets out the expected behaviour of individual members
- provides a means by which disputes can be resolved
- reflects the values of the majority of the community
- provides a means for changing the law.

Establishing expected behaviour

The law helps keep society together by prohibiting conduct that is disruptive. Prohibitions include laws about aggressive behaviour, the use of property and the use of roads. These matters are all regulated by the criminal law. To ensure that members of society abide by its rules, society imposes punishments (sanctions) on those who violate them. We look at this in more detail in chapter 10.

The rights of individuals are contained in the civil law. For example, the tort of negligence protects the rights of individuals to be free from harm that may result from the careless actions of another. Where the rights of individuals have been violated, the law provides for a range of remedies to restore the individual to their original position.

There is an array of remedies, because monetary compensation is not appropriate in all circumstances. For example, the law provides for court injunctions or orders that require an individual to behave in a prescribed manner. Remedies provided in civil cases are examined in more detail in chapter 11.

By stating the rights and responsibilities of individuals and society, the law makes explicit the boundaries of behaviour. Therefore, each individual can know what is expected and how to plan their interactions with other members of society.

Resolving disputes

The law is necessary to provide for peaceful dispute resolution. Life in society would be impossible if each individual was free to resolve a dispute by any method. The law establishes a range of dispute settlement bodies to deal with the variety of disputes that may arise in the community. These dispute settlement bodies include courts and tribunals. We will look at the role and function of courts and tribunals in chapter 6.

The law also provides methods that can be used to resolve disputes. They include:

- methods of dispute resolution (chapter 7)
- the adversary trial (chapter 9)
- the jury system (chapter 12).

Reflecting values

One common element in all legal systems is the reliance of law on a set of values that are shared by that society. These values are a collection of beliefs and attitudes about what is right or good. The values that are shared by the community form the basis of what is right or good in law.

Throughout the world, religious beliefs have strongly influenced the development of law. Australia is a diverse community consisting of numerous religious, cultural and ethnic groups that uphold a variety of values. However, there are some values that are common. For example, the value that we place on human life is upheld by the majority of people in our community. The law upholds this value by making it an offence to take
another person’s life (the offence of murder). The law also recognises that there are some circumstances in which it may be excusable to take another’s life. The right of each individual to use reasonable force for self-protection is recognised by the laws relating to self-defence.

It is difficult for the law to preserve the values of all members of society. In order for us to live together as a group, it is necessary for the law to uphold the values that are predominant. For example, the rules on marriage may vary from one religion to another. However, the law recognises the prevailing value that marriage is the union of one man and one woman. In Australia, only monogamous, heterosexual marriages are legally binding. This does not necessarily reflect the values of all groups and individuals in society. Many people strongly disagree with the idea that marriage can exist only between one man and one woman and have called for the law to change.

The law reflects a variety of values:
- the way in which members of society relate to others (social values)
- the fundamental beliefs about right and wrong (moral values)
- the rights of individuals in the economic system (economic values)
- the rights of individuals in the organisation of our legal system (political values).

How a country interprets these values will vary according to historical, religious and cultural influences.

**Aboriginal law and values**

IN SEPTEMBER 2010, a talented footballer, 21-year-old Kwementyaye Watson, was fatally stabbed in an Alice Springs town camp. Three Warlpiri men were charged over the death. Only one of the men was sentenced. He was given six years in jail for manslaughter.

In November 2010, several Watson family members were jailed after an attempted spearing of Alistair Turner in the leg, in a traditional payback for the death of Kwementyaye Watson.

Watson’s football team, the Yuendumu Magpies, had not played a game in over 18 months. The dispute between groups within the Yuendumu community, 300km west of Alice Springs, resulted in violent confrontations.

In May 2012, the ongoing dispute between the families flared up again. A group of between 50 and 70 people were involved. A man and a woman were attacked outside the community’s health clinic. When police tried to intervene they were pelted with rocks. Superintendent Peter Gordon said ‘He’s got massive head injuries—it looks like he’s been scalped, the skin has detached from the scalp’. The man was Alistair Turner.

Traditional law forms a part of the complex rules that govern the rights and responsibilities of Indigenous people in Australia. The Aboriginal system of law—customary or traditional law—contains some sophisticated elements that reflect the cultural tradition of Indigenous people. For instance, this system allows informality in dispute settlement, conciliation procedures and participation in the administration of justice, and stresses the rehabilitation of offenders.

Such dispute settlement methods are still evolving in more developed legal systems. Although European contact has lessened their influence in many regions, some Indigenous groups in isolated areas still follow the traditional way of life. The strength of the Aboriginal legal system can be seen by the fact that it has bound a people together and maintained a stable lifestyle for more than 40000 years.
Chapter 1  Law and society: an introduction

Providing for change

The law must be able to provide for the changing needs of the community. To do this the legal system provides ways in which the law may be changed. We look at the role of law-making bodies in Unit 3. In chapter 4 we look at the ways in which individuals, groups and institutions in the community can influence the law-making process.

French secularism says no to hijab

A law banning the wearing of face-covering headgear, including masks, helmets, balaclava, hijab and other veils covering the face in public places (except under specified circumstances) was introduced in France in 2011. These laws were introduced because the face coverings prevent the clear identification of people. Those breaking this law face a fine and/or citizenship education.

A ban on Islamic headscarves (known as hijabs) in France’s public schools was adopted in the 2003–04 school year. Then President Jacques Chirac said such a law was needed to protect the French principle of secularism. The French believe that secularism, or the separation of church and state, is the cornerstone of the modern French state. So important is this principle that it is guaranteed by the French Constitution (Article 1):

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

Given that the Constitution also guarantees respect for all beliefs, it may be surprising to discover that France banned the wearing of religious apparel and signs that “conspicuously show” a student’s religious affiliation. Jewish caps (known as kippa) and large Christian crosses would also be banned. However, the law is more directly aimed at removing Islamic hijabs from classrooms in state-run public schools. The Council of State, France’s highest administrative body, said hijabs should be banned only when they are of an “ostentatious character”. The final judgment of when a hijab is “ostentatious in character” is left to the school.

The same rules apply to the kippa and Christian crucifix. But there have been no reported cases where schools have questioned the wearing of kippa or “ostentatious” crosses. Each year, there are about 150 complaints involving hijabs. These complaints are heard by mediators and, if unresolved, can lead to expulsion. These laws do not apply to private schools.

This approach to defining secularism in France is not new. Since 1905, France has enforced a legal separation of church and state. A century ago, in the name of secularism, France removed crucifixes hanging in its classrooms. Crosses were even forbidden on coffins during funeral processions. The removal of crucifixes was seen as necessary to symbolise the separation of the state from the Roman Catholic Church.

There has been growing concern in France over other demands seen to challenge the notion of the secular state. Muslim groups have been seeking segregated classrooms for boys and girls and the recognition of Muslim holy days in school calendars, and some students have refused to take oral exams with examiners of the opposite sex.

How the law defines religious freedoms within a secular state is an issue faced in many democracies. In 2004, the state government in Berlin proposed a law banning all religious symbols, including the kippa and crucifix, from jobs in the public sector. Other German states passed similar laws. In 2011 Belgium banned the full face veil. In 1981 Tunisia banned the hijab. Turkey imposed a ban in 1997. By comparison Syria lifted a ban on teachers wearing the Islamic veil in 2011. In Great Britain and Sweden, there is a value placed on multiculturalism rather than assimilation. This is similar to the approach taken in Australia. Teachers and students can wear the hijab, kippa or crucifix. In Australia, public servants who are Muslim are free to wear their headscarves.
Summary checklist

Do your notes cover all the following points?

- Individuals living in the community may be bound by a range of rule systems. Generally these systems can be classified as either:
  - legal rules—laws
  - non-legal rules—rules of games, associations, organisations, churches and other institutions, or the norms of behaviour.
- Legal rules differ from non-legal rules because:
  - legal rules apply throughout the community
  - legal rules are made by parliaments and courts
  - legal rules are enforceable by courts and tribunals.
- There is a number of ways in which we can classify the different types of laws. For our purposes, the two main ways of classifying the law are:
  - criminal law and civil law
  - statute law and case law.

Revision questions

1. Describe the different ways in which laws may be classified.
2. What is the difference between statute law and common law?
3. What type of behaviour is regulated by criminal law?
4. What type of behaviour is regulated by civil law?
5. Outline the differences between criminal law and civil law.
6. Describe and explain the significant features of a legal system. Could the legal system operate without one of these features?
7. Write a paragraph outlining the key differences between the legal system and a rule system.
8. Suggest ways in which the features of the legal system provide for:
   - the resolution of conflict in the community
   - participation by individuals
   - the establishment of rights and responsibilities.
9. What does the term ‘social cohesion’ mean?
10. The law recognises and upholds moral, social, economic and political values. Explain how the law achieves this by using examples.

Current issues folio

The law is constantly changing; to stay up to date you need to follow current events in newspapers and journals, or on television or the internet. The key to maintaining a current issues folio is organisation.

Keep your articles in a document wallet or a plastic pocket in your folder. Annotate each article. This may be done on a separate piece of paper stapled or clipped to the article.

The annotation should include the following points:

- the source and date of the article
- a heading identifying the key legal issue discussed
- a brief summary of the issue
- notes on the relevant legal questions raised.
Saw red over purple stamp

A man claimed that he stabbed his sister when an argument broke out because her pet guinea pig ate part of his stamp collection. The defendant claimed that when he saw his 1904 6-penny purple KEVII stamp in the guinea pig’s mouth “he just saw red”. He started yelling at his sister and, in the course of the argument, picked up a kitchen knife and struck her.

The man pleaded guilty in the Magistrates’ Court to one charge of recklessly causing injury. He was given three months’ prison, wholly suspended for six months.

After the case his sister said, ‘A suspended sentence, it’s like he didn’t get anything. It has trivialised my experience’.

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Make a start on your issues folio with the following exercise.

- Collect two articles illustrating aspects of criminal law.
- Collect two articles illustrating aspects of civil law.
- Collect two articles discussing proposed changes to statute law.
- Collect one article discussing an aspect of judge-made law.

Annotate your articles—as illustrated in the example above.