The purpose of this Legal Studies Update is to provide teachers and their students with some of the recent developments that have taken place so far as they relate to the VCE Legal Studies Study Design. In this 2nd edition, these have been applied to the relevant key knowledge points from Area of Study 2 from Unit 3, and Area of Study 1 from Unit 4.

FEDERAL ELECTION

The federal election has been called for Saturday 18 May and electoral rolls closed on Thursday 18 April 2019. If you are eighteen years old, or will be by the date of the election, it is important that you are enrolled to vote and that you remember to vote on the Saturday or in an early voting booth or by postal vote.

Unit 3, Area of Study 2
The Victorian civil justice system

AFL CONCUSSION CLASS ACTION

A number of former AFL players are threatening to launch representative proceedings against the AFL for the effects of on-field concussions: the suit could cover negligence, in terms of allegedly inadequate treatment and management of concussions, but it could also include more serious complaints about allowing players to continue receiving damaging blows despite medical evidence warning of the dangers – similar to complaints made against tobacco companies after the cancer risks of smoking were known.

Legal practitioner Greg Griffin spoke to the media in March 2019 about a contemplated lawsuit; he is currently in discussions with a number of ex-players including a former Brownlow Medal winner and a premiership player who all now suffer memory loss, mood swings and other cognitive issues associated with brain damage from repeated blows to the head and concussions. Griffin says that a lawsuit could be filed as soon as winter 2019, focused on the duty of care owed by the League to its players. Approximately five dozen concussions are recorded every season, and Griffin argues that it is only fairly recently that the League has started to take any responsibility to ensure the game is not needlessly or dangerously violent and that concussions are managed appropriately. Nowadays, if a player is hit in the head they are assessed by a doctor using the Sport Concussion Assessment Tool and are removed from the match if they are concussed, but Barnes says “In our day, you got hit, they ran a finger in front of your eyes, and then it’s ‘Yep, you’re right to go.’ If you asked to come off the ground, the attitude was, ‘You might as well go home, weak prick.’” The earliest Australian study was done by the University of Melbourne from 1989-1992 and focused on 130 players from Melbourne, Geelong and Fitzroy; it found that symptoms such as headache and nausea disappeared within hours or days, but that decision-making and cognitive processing were often affected for weeks.

Griffin began building the action is November 2017, and has since released stories to the media such as former Geelong and Essendon player John Barnes, now 49 years old, who suffers random seizures; former Hawthorn player John Platten, aged 55, who suffers acute memory loss; and former North Melbourne player Shaun Smith, now 49, who suffers serious mood swings, anxiety and depression. Five former players have officially signed their names as group members, however Griffin says he has identified 100 possible members of the class.

If the suit goes ahead, Griffin will have to contend with the state of science on the issue, which is not yet settled. Similar class actions have settled in the United States, such as the claim against the NFL that settled for more than $895m in 2017 (but is expected to rise to $1.82 billion as more claims are lodged by class members), and another against the US National Hockey League that settled in November 2018 on behalf of 318 former players. However, evidence on the impact of concussion, and specifically on the types of injury sustained by AFL players, is not entirely agreed-upon. Neuroscientist Dr Alan Pearce has found cognitive impairments in Barnes, Platten, Smith and dozens more former players, but he says “There’s so much we don’t know – so many questions we have to answer.” Dr Mark Cook, chair of medicine at the University of Melbourne and head of neurology at St Vincent’s Hospital, treats Barnes for epilepsy, though, and says there is no hereditary explanation for his condition. Cook says that large studies of people with traumatic brain injuries, even mild ones, show at least a double risk for epilepsy, and says the link between hits to the head and epilepsy is obvious: “I don’t
understand why that’s a difficult thing to accept.” An American study of retired gridiron players from 2005 onwards found that three or more concussions correlated with five times more cognitive impairment later in life. However, in 2017, a former doctor for the Sydney Swans published his own records from 12 years working with the Sydney Swans in which he said that all 140 players suffering recorded concussions played again the following week, and that none of them showed impaired performance in that next match.

In March 2019 former Adelaide Crows player Sam Shaw, aged 27, launched his own legal action against the club, its team doctors and other related medical professionals. Shaw suffered concussion in 2016 and was unable to recover; he went into early retirement in 2017. The writ was filed in the Supreme Court of Victoria and states: “Specifically, it is alleged that the concussion suffered by the Plaintiff was not managed in accordance with reasonable medical practice.” Maurice Blackburn is representing Shaw.

- This connects with the key concepts of representative proceedings and the civil standard of proof.

**CIVIL ACTION AGAINST CARDINAL GEORGE PELL**

In December 2017 Cardinal George Pell, Catholic Church leader, was found guilty of five charges of historic child sexual abuse against two former choirboys. A second case was abandoned by the prosecution. In March a now-50 year old man filed a civil suit against Pell for sexual abuse he alleges occurred at St Joseph's Boys Home in Ballarat from February 1974 until 1978, committed in part by Pell. The man was a complainant in the second County Court criminal case that was dropped by prosecutors due to concerns over the strength of the evidence.

The writ and statement of claim were filed in early March with the Supreme Court and name Pell, the trustees of Nazareth House (formerly named St Joseph's), the State of Victoria and the Catholic Archdiocese of Melbourne. The statement of claim alleges that Pell sexually abused him three or four times in a swimming pool at the home. The plaintiff is suing for medical expenses, lost wages and emotional harm. “It took a lot of courage and soul searching to be prepared to tell my story,” he said, “accusing one of the most senior Catholics in the world of serious criminal offences, and eventually I was ready to have my day in court.” When the criminal trial was abandoned, he felt “an injustice” had occurred, and that a civil suit was the only way to get that justice.

- This connects with the civil standard of proof, compared with the criminal standard of proof.
- This also connects with the relationship between criminal and civil law, and factors to consider when initiating a civil claim.

**FORMER SENATOR TO PAY LEGAL COSTS AFTER FAILING TO STOP DEFAMATION ACTION**

On 28 June 2018 the Senate debated whether women should be armed with tasers to respond to sexual violence against women, and Senator Sarah Hanson-Young opposed this by saying that the responsibility to not be sexually violent lay with men and not with women to stop it. Now-former senator David Leyonhjelm responded to this by calling out “Well now you’ll have to stop shagging men, Sarah.” Hanson-Young asked whether she had heard him correctly, he repeated it; Hanson-Young said he was a “creep” and Leyonhjelm told her to “f*** off”. Leyonhjelm was asked to withdraw his first comment as sexist and offensive, but he refused and repeated it in the media through June and into July. His original comments were protected by parliamentary privilege, but Hanson-Young sued him for defamation based on those subsequent media interviews.

Justice White has also refused a request from Leyonhjelm for Hanson-Young to answer interrogatories about her sex life, such as whether “as at 28 June 2018, voluntarily had sexual intercourse with more than one male persons.” Lawyers for both parties have confirmed that mediation was not successful. Hanson-Young said she is persisting in the suit “because no woman and no girl deserves to feel bullied in their workplace and treated with disrespect by her colleagues.”

- This connects with the costs of engaging in a civil claim, with the purposes of civil pre-trial procedures, and with judicial powers of case management.
- It also connects with the methods used to resolve civil disputes, including mediation.

**VCAT MAKES ORDERS ON FAILED HAIR BLEACHING**

In April 2019 Jessica Bray sued a South Melbourne hair salon for overbleaching her hair to the point that it started breaking and falling out in clumps. She asked for $30,230.60 in damages because of shattered confidence, difficulty continuing with her work in sales and retail, $13,000 in hair extensions, and the cost of an almost $2000 wig that she took out in clumps. She asked for $30,230.60 in damages because of shattered confidence, difficulty continuing with her work in sales and retail, $13,000 in hair extensions, and the cost of an almost $2000 wig that she took out in clumps. Justice White has also refused a request from Leyonhjelm for Hanson-Young to answer interrogatories about her sex life, such as whether “as at 28 June 2018, voluntarily had sexual intercourse with more than one male persons.” Lawyers for both parties have confirmed that mediation was not successful. Hanson-Young said she is persisting in the suit “because no woman and no girl deserves to feel bullied in their workplace and treated with disrespect by her colleagues.”

- This connects with the costs of engaging in a civil claim, with the purposes of civil pre-trial procedures, and with judicial powers of case management.
- It also connects with the methods used to resolve civil disputes, including mediation.
Saint James Hair Studio owner James Yong said that Bray’s hair was in poor condition because of being bleached for many years, and it was therefore vulnerable to breaking. VCAT member Danica Bulian found that the studio had breached consumer laws, but found that the $15,000 claim for humiliation and distress was “excessive and without justification”; the claims for the wig and the hair extensions were similarly dismissed. Instead, Bray was awarded a refund of $270 for the hair treatment and $114 compensation for a session with a psychologist. Bray said she did not believe she had been given a fair hearing and was considering an appeal to the Supreme Court. She said she has not applied for any jobs since the hair bleaching because she knew she would be rejected, and that it would take years to return to its former style.

- This connects with the role of VCAT, and with the purposes of civil remedies, specifically damages.
- This also connects with the reasons for a Victorian court hierarchy, specifically appeals.

GEORGEF RUSH WINS DEFAMATION CASE AGAINST NATIONWIDE NEWS

In 2017 the Daily Telegraph, owned by Nationwide News, published two articles claiming that Rush had behaved in an inappropriate manner towards, and had sexually harassed, one of his younger female co-stars in a 2015-16 stage production of King Lear. Rush sued for defamation in the Federal Court, and Nationwide News defended the action by saying that the imputations of the articles, concerning Rush’s character, were true. Even though the female actor, Eryn Jean Norvill, had not been the one to originally contact the paper as a source for the story, she did agree to have her name be public and to give evidence at the trial.

After a three-week trial in October and November 2018, Justice Wigney found that he could not rely on Norvill’s claims, and that the reporting was therefore unsubstantiated and sensationalist. Evidence was provided by her and other actors and theatre workers, but contradictory evidence was also provided by other people from the production who say they did not see the behaviour. Actor Robyn Nevin from the King Lear cast, for instance, gave evidence that Norvill once came to her crying, complaining about “the trouble with Geoffrey,” but that Nevin interpreted this to mean the trouble that Norvill was having with the role of Cordelia. The director gave evidence that he had not seen anything inappropriate, but another actor on the production gave evidence that “I saw Geoffrey’s hand cupping around the bottom of EJ’s breast, which was something I hadn’t seen before on stage.”

Rush was seeking more than $25 million in damages based on imputations that he was a “pervert”, a “sexual predator” and had engaged in “scandalously inappropriate” behaviour. Part of this claim was compensatory, for lost acting work, however some was aggravated damages, based on an accusation that the newspaper acted unreasonably and maliciously. In April 2018 Rush was awarded $850,000 in initial damages; the judge reserved his decision on the damages for lost wages until a later date. Rush’s barrister, Bruce McClintock QC, said Rush was earning $128,000 a month before the stories were published, but had since been too scared to work – he suggested the actor may never work again.

Either party can appeal the final decision on damages, but Nationwide News could also appeal on a question of law if, for instance, it argues that the judge misinterpreted or misapplied the defence of truth, and set a higher bar for it than he should have.

- This connects with the civil standard of proof, and with the purposes of civil remedies, specifically damages.
- This also connects with the reasons for a Victorian court hierarchy, specifically appeals.

ONLINE DISPUTE RESOLUTION AT VCAT

In September 2018 VCAT conducted an Online Dispute Resolution (‘ODR’) pilot for one month. Although VCAT in the past has used online resolution facilities for filing papers in the Residential Tenancies List (called ‘VCAT Online’), this was a Victorian-first in terms of the entire resolution experience being negotiated online. The pilot was used for disputes over goods and services where less than $10,000 was claimed, and involved 65 cases in which 71 parties engaged in full online hearings and parties in 21 disputes settled beforehand.

VCAT began looking into the programme after participating in the 2016 ‘Access to Justice Review’ by Engage Victoria, organised by the Department of Justice and Regulation, which recommended ODR as one solution to the problem of the gap growing wider between “the community’s needs and the justice system’s ability to meet those needs”. VCAT conducted its own surveys on the matter, and found a 70% positive response from the community in relation to the ODR programme proposal (according to Justice Quigley, the President of VCAT, in the Tribunal’s information video on the pilot). VCAT intends for ODR to make it faster and easier to resolve disputes, particularly for uses with a disability, and to reduce the “tyranny of distance” for rural parties.

A video was published by VCAT explaining the project: https://www.vcat.vic.gov.au/resources/online-dispute-resolution-pilot, as well as a hypothetical case study: https://www.vcat.vic.gov.au/resources/future-of-online-dispute-resolution

Assuming that it is picked up, the service is expected to become available from 2022.

- This connects with the role of VCAT, and with recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice.
LATHAM’S UNSUCCESSFUL DEFAMATION DEFENCE

Former member of parliament Mark Latham was sued for defamation by former editor of Junkee Media Osman Faruqi for accusing Faruqi of aiding and abetting Islamic terrorism and fostering “anti-white racism” in Australia. In August 2018 Federal Court judge Michael Wigney struck out Latham’s 76-page defence in its entirety, calling it “extraordinary” and telling him to “start from scratch” because his fundamental argument that “anti-white racism” facilitates Islamic terrorism did not raise a reasonable defence.

Justice Wigney’s decision began in the following way, commenting on the matters raised in Latham’s defence filings:

1. What does the martyrdom of Christians in the Roman Empire between the reign of the Emperor Nero Claudius Caesar Augustus Germanicus and Emperor Flavius Valerius Aurelius Constantinus Augustus have to do with a defamation action commenced in Australia in 2017? How could the persecution of ethnoreligious Huguenots in the French Kingdom during the French Wars of Religion of the Sixteenth Century be said to rationally affect the assessment of the probability of a fact in issue in a modern-day defamation action in which the defamatory imputations are said to be that the applicant knowingly assists terrorist fanatics who want to kill innocent people in Australia, or condones the murder of innocent people by Islamic terrorists, or encourages and facilitates terrorism? Could the fact of the segregation and ill-treatment of ethnic Negro people under the doctrine of Apartheid in South Africa between 1948 and 1991 reasonably be said to be relevant to the defences of justification, contextual truth, qualified privilege, honest opinion and fair comment pleaded by the respondent in that defamation action?

2. These and other equally beguiling questions are raised by the interlocutory applications filed by the parties in this matter.

On 26 November 2018 Faruqi’s lawyers from Maurice Blackburn published a media release announcing that a settlement had been reached and that Latham had agreed to pay damages plus costs in the region of $100,000 or more. Faruqi said “It’s unfortunate that the case had to proceed this far. It’s taken over a year, but this is exactly the result my team and I were hoping for when we initiated this action – the comments to be removed and a payment of damages and costs. I hope that this settlement sends a message to other members of the community that, while robust debate is part of a healthy democracy, using your platform to harm the reputation of individuals comes at a cost.”

Three solicitors from Maurice Blackburn and two barristers had been engaged in the case.

- This connects with the purposes of civil pre-trial procedures and judicial powers of case management.
- It also connects with the costs of being involved with a civil action.

VCAT RULES ON TINY APARTMENTS

On 1 December 2018 VCAT ruled on an apartment standard for the first time, finding that the area directly in front of a kitchen bench cannot be counted as living space, as the area the oven door and cupboard doors needed to open out into could not be used for ‘living’. This is particularly important for those small apartments with only one living area and a galley kitchen running along one of the walls.

The rule currently states that living areas in one-bedroom apartments need to be at least 3.3m wide, and some developers have measured this right up to the start of the sink and cupboards. According to the landmark ruling, they can no longer do this, although VCAT member Michelle Blackburn did not clarify what the additional width needed to be to accommodate the kitchen.

Mark Rosedale, director of the development company 631 Plenty Road Pty Ltd that was the respondent in the matter, said he did not agree with the finding: “What she’s saying is there’s an area for the kitchen and living and those can be separate, but what we’re arguing is they can overlap.” He said that people should not look for small apartments if they had an issue with the floor space – suggesting that all people have choice in the matter and are not restricted by lack of money. A resident of a small apartment interviewed in the media disagreed, though, saying “It means you couldn’t comfortably have one other person living there because if one person’s cooking you take up the whole living area as well.”

AUSTRALIA’S LARGEST REPRESENTATIVE PROCEEDING PLANNED AGAINST UBER

Law firm Maurice Blackburn is currently preparing what looks to be the largest representative proceeding in Australia’s history, taken against ride-share company Uber on behalf of licenced taxis, hire-cars, limousines and charter vehicles. Uber is being sued for lost income and loss of licence values as a result of it operating illegally in Victoria, New South Wales, Queensland and Western Australia for a period of time before the parliament of each state legislated to allow it.
been advanced so far. Maurice Blackburn has asked that group members register by Monday 29 April 2019, and has established a webpage for the action:  

Senior Associate Elizabeth O'Shea confirmed back in October 2018 that over 1200 people had joined the action. The firm expects that, if successful, the payout will run to the hundreds of millions.

- This connects with the key concept of representative proceedings, and with the purposes of civil remedies, specifically damages.

**VLRC REPORT INTO REPRESENTATIVE PROCEEDINGS**

In March 2018 the VLRC finished its report into class actions and litigation funding, *Access to Justice – Litigation Funding and Group Proceedings*, finding that “Each of the three components – litigation funding, contingency fees, and class actions (group proceedings) – does, or has the potential to, contribute to access to justice.” It found specifically that litigation funding and contingency fees could reduce the risk to litigants of taking action, and that class actions “take advantage of economies of scale.”

The Commission recommended national regulation of litigation funding and greater transparency when a funder was involved in proceedings, as well as court control of costs paid to the funder. It also recommended that the law be changed nationally to permit contingency fees, and to govern their operation. And, finally, in relation to representative proceedings, the Commission recommended that the court’s power to case manage aspects of class actions be strengthened. It said: “The Supreme Court of Victoria has a crucial role in ensuring the just, efficient, timely and cost-effective resolution of the real issues in dispute. In class actions, it has additional broad powers that can be used to protect the interests of class members.”

In its report, the VLRC made a number of recommendations to the Supreme Court of Victoria regarding the way in which class actions should be managed internally by the Court. It prefaced these recommendations by saying that “Recommendations in relation to the Supreme Court of Victoria are expressed with the words ‘The Supreme Court should consider,’ rather than as a direct recommendation to act, to acknowledge and signify the independence and standing of the Court. The Commission recommended that the court’s power to case manage aspects of class actions be strengthened. It said: “The Supreme Court of Victoria has a crucial role in ensuring the just, efficient, timely and cost-effective resolution of the real issues in dispute. In class actions, it has additional broad powers that can be used to protect the interests of class members.”

Recommendations were also made to the Attorney-General of Victoria and the Parliament. For instance that “Section 33T of the *Supreme Court Act 1986* (Vic) should be amended to empower the Court, of its own motion, to substitute another class member as representative plaintiff, and make other such orders as it thinks fit, if it appears that the representative plaintiff is unable to adequately represent the interests of class members”, and that the Court should take into account whether the class action was a ‘test case’ or a public interest case when making adverse costs orders in a losing claim.

- This connects with the key concept of representative proceedings, and with recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice.
- This also connects with the role of the VLRC from Unit 4 AOS 2.

**REFORM TO JURY DIRECTIONS**

In October 2018, John Gibbons, Adjunct Professor in Linguistics at Monash University, author of texts including *Forensic Linguistics: An Introduction to Language in the Legal System* and former worker with the Victorian Charge Book Committee on Jury Instructions, recommended a simplification of jury charges.

Gibbons argued that there are three dominant problems with jury directions. Firstly, “[i]n order to ensure their jury directions are legally watertight and avoid successful appeals,” the language has evolved to be wordy and complex. He says that avoiding appeals has “come to dominate the process and undermine the primary purpose of communicating with the jury.” Secondly, the jurors themselves may not be able to take in the directions – perhaps because they are too long, stretching over several hours; perhaps because they have limited understanding of legal language and the legal system, or because they are intimidated by the formality and procedures of the courtroom. Thirdly, that the method of communication between the jurors is unnatural and one-way: the jury must decide on a question and then give it on a piece of paper to the tipstaff, who gives it to the judge.

With the assistance of Matthew Weatherson of the Judicial College of Victoria, Gibbons has recommended a rewrite of jury charges in line with the practices of the ‘plain legal language movement’. He gives an example of the jury direction given at the start of trial, to make their decision solely on the evidence presented in trial, that also explains what evidence is and what it is not. The directions given to a civil jury are written at the following address, in the Civil Juries Charge Book: [http://www.judicialcollege.vic.edu.au/eManuals/CJCB/index.htm#45323.htm](http://www.judicialcollege.vic.edu.au/eManuals/CJCB/index.htm#45323.htm). The criminal ones in the Criminal Charge Book are similar, but more detailed: [http://www.judicialcollege.vic.edu.au/eManuals/CCB/1285.htm](http://www.judicialcollege.vic.edu.au/eManuals/CCB/1285.htm)

Instead of these, Gibbons gives the suggestion of:

**What is evidence?**

*There are two kinds of evidence.*

**First** – *what the witnesses say or agree to. It is not what the lawyers suggest.*

**Second** – *exhibits. These are things that we will show you. I will tell you when there is an exhibit, and we will give it a reference letter or number.*

This language is more simple than some of the directions. It does, however, omit a lot of important information that could be relevant to
the decision-making of one of the jurors.

Gibbons runs through other procedural changes that could be made, too: such as questioning jurors about the meaning of directions to ensure they have understood them; making written versions of the directions available during the trial; and having more direct interaction between the judge and jurors. He concludes: “Currently, jury directions inadequately instruct jurors because the need to address a secondary audience, the appeal court, has overridden the needs of the primary audience, juries.”

- This connects with the responsibilities of the jury, and with recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice.

**VCAT GIVEN THE POWER TO FINE SHORT-STAY ACCOMMODATION HOSTS**

In August 2018 the Victorian Parliament passed legislation to allow VCAT to stop owners from renting out their apartments for short-stay accommodation if those apartments have been used for unruly parties. VCAT can also now fine short-stay guests up to $1100 for making unreasonable noise, causing a health or security hazard, damaging common property or obstructing another resident from using their property. The owners of the property could also be forced to pay their neighbours up to $2000 in compensation.

The regulations apply only to apartments that are part of an owners corporation. They were passed on Wednesday 8 August, more than two years after they were first introduced into parliament.

- This connects with the role of VCAT.

**SELF-REPRESENTED WOMAN IN CIVIL CLAIM AGAINST QUEENSLAND POLICE**

In 2018 a Brisbane woman, ‘Julie’, launched a civil breach of privacy claim against the Queensland Police Service (‘QPS’) and a specific police officer in their employ, Neil Punchard, who accessed her address from the police database and sent it to her violent former husband who had been convicted of domestic violence and faces another charge of breaching a domestic violence order. Punchard sent Julie’s former husband the new private address of her and her family, and then texted him “Just tell her you know where she lives and leave it at that. Lol. She will flip.”

Julie launched a claim in the Queensland Civil and Administrative Tribunal (‘QCAT’) against Punchard personally, and against the QPS for negligence in how they protected the personal details of citizens and prevented unauthorised access by officers. The maximum amount she could receive by law was $100,000 but she said that this was inadequate after she had had to go into hiding. Punchard was removed as a co-defendant when he argued that breach of privacy claims could only be made against organisations, not individuals, and the Queensland Government Insurance Fund instructed the government legal service, Crown Law Queensland, to fight the claim on behalf of the QPS. They said that the QPS should not be liable for the actions of ‘rogue’ officers. A barrister was briefed for the QPS, and Julie represented herself.

In October 2018 the QPS missed the deadline given by QCAT for the filing of its defence, but the hearing went ahead on 9 November 2018. Both parties accepted as fact that Punchard breached Julie’s privacy, and that an individual could not be held liable under the Act; QCAT, therefore, only needed to determine whether the QPS was vicariously liable for Punchard’s actions, or negligent in its own data management practices. The member overseeing the hearing, Susan Gardiner, disallowed dozens of questions posed to witnesses by Julie, saying they were irrelevant: “There is not a lot of point to asking me to listen to evidence that is not relevant to what I have to decide.” The tribunal also heard that the QPS could restrict access to the database information on vulnerable groups, such as domestic violence victims, but that it had not done so.

Gardiner reserved her decision after the hearing and handed down a finding on 7 March 2019 that the QPS was liable. Parties were then asked to make further submissions regarding compensation, to be heard at a later date. The QPS may yet appeal the decision.

- This connects with the responsibilities of parties and legal practitioners in a civil action, and to accessibility as a factor that affects the ability of the civil justice system to achieve the principles of justice.

**PLAINTIFFS CANNOT SATISFY AN ADVERSE COSTS ORDER**

In 2017 Mouhammad and Pamela Tabbaa sued the Nine Network over a 60 Minutes episode that claimed they allowed the kidnapping of their 13-year-old daughter and her forcible detention in Syria until she married a cousin 15 years older than her. Justice Des Fagan deliberated for one day after the trial, before finding in favour of the defendant – Fagan described Pamela Tabbaa’s evidence as “absolutely appalling” and held that she gave evidence she knew to be false.

On this basis, Fagan ordered that Tabbaa pay the legal costs of Nine Network on an indemnity basis, because of her bad faith conduct. The exact figure has not been disclosed, but is estimated to be in excess of $1 million, plus the Tabbaa’s own legal fees. The Tabbaas have launched a number of appeals, but, since they are unemployed and likely unable to pay the costs already awarded against them, the Nine Network asked the Court of Appeal to order a payment of $173,000 in security for costs before being allowed to proceed with the appeals. Court of Appeal Justice Richard White agreed it was unlikely that the Tabbaas would be able to satisfy any adverse costs order let alone more for the appeals, but refused to order a security. He said that the appeal cases were weak, but could not be characterised as “hopeless or unarguable.”

- This connects with factors to consider when initiating a civil claim, specifically enforcement issues, and with factors affecting the ability of the civil justice system to achieve the principles of justice, specifically costs.

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HIGH COURT TIMETABLENG

The 2004 High Court case of *Al-Kateb v Godwin* concerned Ahmed Al-Kateb, a Palestinian man born in Kuwait, who moved to Australia and applied for a temporary protection visa. The application was refused, but neither Kuwait nor Gaza would accept him, so Al-Kateb was declared stateless and kept in detention. The Court upheld the detention by a majority of 4:3, effectively declaring that indefinite administrative mandatory detention was neither unlawful under the *Migration Act 1958* nor unconstitutional. That ruling is currently being challenged by multiple cases, one in which the plaintiff is represented by human rights barrister Julian Burnside QC.

In a directions hearing before Justice Michelle Gordon in November 2018, Burnside requested that the hearing not be timetabled for February because he would be overseas. Gordon replied: “Right. Well, the difficulty about it is twofold, Mr Burnside. One is that – and this is why they are insurmountable hurdles – this case, your client, has been in detention for a long time; that is the first. The second is that the Court’s workload in March and April is extraordinarily large and so, in the circumstances, the Court thinks that it would be in a sense the only opportunity and window to hear what I suspect is a one day case in the second week of February.” She apologised and sympathised, but rejected his request. Burnside replied that “I do not want my convenience to stand in the way of his rights.”

This connects with factors that affect the ability of the civil justice system to achieve the principles of justice, including time.

Unit 4, Area of Study 1

The people and the Australian Constitution

NSW ELECTION AD SPENDING LAWS

In May 2018 the NSW parliament passed laws that cut the amount of money ‘third-party’ campaigners such as trade unions could spend on political advertising in the six months before an election: $1.28 million was cut to $500,000. Any organisations that pooled their resources and combined funds to collectively exceed the cap were described as “acting in concert” and the organisers were liable to receive jail terms of up to 10 years. In the same legislation, the amount that political parties could spend on pre-election advertising was increased to $11 million. The NSW Government justified the laws on the grounds that large sums of money spent by third-party groups were distorting the electoral process. A coalition of six unions, led by Unions NSW, brought an urgent High Court challenge to the laws before the state NSW election in March. They argued that they were an impermissible burden on the freedom of political communication.

The High Court heard the challenge in early December, and handed down a unanimous judgment on 29 January 2019 that the laws were unconstitutional. In a joint judgment, Kiefel CJ and Bell and Keane JJ did not dispute the validity of the great purpose – wanting to protect all voices in the democratic system – but said the NSW Government had not established that the spending cap was necessary to “prevent the drowning out of voices” during an election campaign. Justice Stephen Gageler agreed, and said in a separate judgment that a cap of $500,000 had not been shown to give a third-party campaigner “a reasonable opportunity to present its case.” Prof Anne Twomey, a constitutional law expert lecturing at the University of Sydney, said that the decision permitted the Government in future to conduct an inquiry that provided sufficient grounds for the cap: “The court did not itself decide that the $500,000 cap was inadequate -- just that it had not received sufficient evidence to be satisfied that it was necessary.”

Former Commonwealth solicitor-general Justin Gleeson SC appeared for the unions, and argued that “The Constitution does require that there be an ability for these types of third-party campaigners to n ost only exist but to have at least the chance of being successful. That is exactly what should be guaranteed, not something which should be treated as a mischief that needs to be shut down.”

- This connects with the role of the High Court in interpreting the Constitution, and with the significance of one High Court case interpreting ss7 and 24 of the Australian Constitution.

LACK OF COMMUNITY KNOWLEDGE ABOUT THE HIGH COURT

In February 2019 the results of a November 2017 survey of Australians were published in the *Federal Law Review*. Authors Ingrid Neilsen and Russell Smyth used the survey to ask approximately 500 people questions about their knowledge of the High Court, and found that knowledge and understanding are both low, with the level of knowledge being determined primarily by age and level of education.

Neilsen and Smyth found that between 82-92% of the participants failed to recognise the names of the current seven justices as the names of the current High Court justices – an equal number of people recognised the names of the US Supreme Court Chief Justice John Roberts and the fictional US president from *Veep*, Selina Meyer. More Australians could identify the occupation of TV’s ‘Judge Judy’, Judy Sheindlin, than any current High Court justice. A number of respondents said that Chief Justice Susan Kiefel was the New Zealand Prime Minister.

Over 60% of participants knew of the High Court’s work on the eligibility of federal MPs to sit in parliament, but around 75% responded “Don’t know” to whether the High Court had, in the last 12 months, handed down a decision on the legality of capital punishment in Australia, or on the validity of OJ Simpson’s conviction for armed robbery. These findings could partly be explained by the ‘noise’ theory, where people become overwhelmed by questions about facts they aren’t confident in and tend to default to dismissive or joke answers, but the authors of the study and Chief Justice Susan Kiefel have different opinions on its significance. Kiefel has a less concerning explanation, in a speech from 2017, prior to the release of the results: “The reason I suggest why the community is uninterested in the judges who make these decisions is because of an unstated acceptance that the decisions are made on legal merit and not on the political or ideological sympathies of the judge.”

The authors of the study have more concern, however: “Our findings are important because, in the absence of awareness of the High Court, the
potential exists for the public to see the Court as having a more overt political role than it has, which may lower esteem for the Court. The potential for this to occur is exacerbated if, and when, politicians attempt to drag the High Court into the political fray, by attributing political motives to it that it does not have.”

- This connects with the role of the High Court in interpreting the Constitution.

ABORTION PROTEST LAWS CHALLENGE

In May 2016 legislation came into effect in Victoria that created 150m ‘safe zones’ around state abortion clinics, preventing anti-abortion protestors from standing or approaching patients within that space. A number of Christian groups held vigils immediately outside the doors of clinics, and this law forced them to retreat. In October 2017 a member of the ‘Helpers of God’s Precious Infants’, Kathleen Clubb, became the first person convicted under s185D of the Public Health and Wellbeing Act 2008 for breaching the zone outside the Fertility Control Clinic in East Melbourne on 4 August 2016.

Clubb herself has 13 children because she does not believe in birth control, but said the arrest and subsequent High Court challenge were not about abortion, but the right to protest: “But the point is, if parliament can ban this kind of protest, what other kind of protests can they ban? I am fighting for all Australians.” In order to break the law she had to have communicated about abortions inside a safe access zone, “defiantly and deliberately”, and in a manner “reasonably likely to cause anxiety or distress.” The conviction in the Magistrates’ Court was appealed to the Supreme Court of Victoria on a question of law – the constitutional validity of the law. Victoria’s then-attorney-general Martin Pakula applied to have the case transferred to the High Court. The solicitor-generals for the Commonwealth, NSW, Queensland, Western Australia and South Australia intervened, and the Castan Centre for Human Rights Law, the Fertility Control Clinic in East Melbourne and the Human Rights Law Centre were all given permission to be heard as amicus curiae. The Access Zone Action Group was refused leave. Clubb was supported by the ‘Helpers’, the Human Rights Law Alliance and the Australian Christian Lobby.

The Victorian Solicitor-General, Kristen Walker QC, argued against the application of the freedom of political communication to the case, arguing that Clubb was “trying to ignore or downplay the demonstrable harm” caused to patients of the clinics by “harassing and intimidatory conduct”, and even the fatal shooting in 2011 of a security guard at that East Melbourne clinic. The Commonwealth argued that the protests are not political in nature because the protestors are not trying to change the law: instead, they are interfering with the lawful personal choice of another person. Also, that the freedom of political communication has not been taken away – Clubb can protest outside parliament, write to or lobby her local member, take out newspaper ads, or even run for office herself on an anti-abortion platform. The only thing she cannot do is approach a vulnerable woman within 150m of an abortion clinic. Clubb’s lawyers argued that this exact type of protest was the point, however: “Australian history is replete with examples of political communications being effective precisely because they are conducted at the place where the issue is viscerally felt.” Their submissions give the examples of the Franklin Dam blockade, the Pine Gap protests, the Freedom Rides and the Eureka Stockade. “In order to rouse, political speech must first excite. Sir Robert Menzies’ ‘forgotten people’ speech, Paul Keating’s Redfern speech, Kevin Rudd’s apology … each was apt to cause discomfort not incidentally but deliberately.”

The hearing was conducted from 9-11 October 2018 before the full bench of seven justices. Attempts by Clubb’s lawyers to expand Australian law were rejected by Chief Justice Susan Kiefel, who said that Australian law does not in fact recognise a general right to political communication – only an implied freedom, or protection, that limits inappropriate legislative power and is, in Kiefel’s words, “not a personal right.”

On 10 April 2019 the High Court delivered its judgment, finding that the laws served a legitimate purpose and were therefore allowable burdens on free political speech, to the extent that they were burdens at all. Kiefel said in her judgment: “The burden on political communication imposed by the protest prohibition is slight. To the extent that it does affect political communication, it does so only within access zone and without discriminating between sources of protest [in other words, it does not target any group or individual unfairly].” Two other justices agreed that the purpose of the law outweighed any burden. The remaining four justices found that Clubb’s speech was not political in nature, partly because she herself claimed she was not handing out “political” material. Outside the High Court Clubb said “It’s not enough that so many babies have been killed, but now free speech has been killed as well.” A man arrested under the Tasmanian laws, Graham Preston, argued that he was being penalised for promoting international law: “On the day I was arrested in Tasmania I was holding a sign that said ‘everyone has a right to life’. So now it’s a criminal offence to promote the Universal Declaration of Human Rights, which has been signed by Australia.”

- This connects with the role of the High Court in interpreting the Constitution, and with the significance of one High Court case interpreting ss7 and 24 of the Australian Constitution.
- This also connects with the topic of ‘standing’ from Unit 4 AOS 2.

REVIEW QUESTIONS

1. Explain what is meant by a ‘representative proceeding’ and what is meant, in that context, by ‘members of the class’.
2. How might either the AFL representative proceeding or the Uber representative proceeding give group members better access to the civil justice system?
3. How does the civil action against Cardinal George Pell illustrate the difference in the standards of proof for both criminal and civil cases?
4. What judicial powers of case management were exercised in the Hanson-Young defamation lawsuit?
5. How does the Bray case illustrate the appropriateness of VCAT as a venue for dispute resolution in addition to courts?
6. Outline the various purposes of the remedy asked for in the Bray case before VCAT.
7. Outline the various purposes of the remedy asked for in the Rush defamation case.
8. Using the Rush defamation case to illustrate your answer, explain ‘appeals’ as one reason for a court hierarchy.
9. Why might the ODR project in VCAT help the civil justice system better achieve the principles of justice?
10. Using the Faruqi defamation case to illustrate your answer, explain the purposes of pre-trial procedures in a civil claim.
11. How does either the tiny apartments case or the short-stay accommodation reform illustrate the role of VCAT as a venue for dispute resolution?
12. Using the Uber class action to illustrate your answer, explain the purposes of civil remedies, specifically damages.
13. How might the VLRC recommendations on representative proceedings and litigation funding better help the civil justice system to achieve the principles of justice?
14. Using the comments on jury directions made by John Gibbons to illustrate your answer, explain two responsibilities of a jury.
15. How might Gibbons’s recommendations on jury directions better help the civil justice system to achieve the principles of justice?
16. Using the case of ‘Julie’ against the Queensland Police Service to illustrate your answer, explain the responsibilities of parties and legal practitioners when pursuing a civil claim.
17. How might the case of ‘Julie’ against the Queensland Police Service illustrate issues that affect the ability of the civil justice system to achieve the principles of justice?
18. Explain how the case of ‘Julie’ against the Queensland Police Service illustrates the question of scope of liability.
19. How does the Tabbaa case illustrate the issue of problems affecting the ability of the civil justice system to achieve the principles of justice?
20. How does the Al-Kateb case illustrate the issue of time as one factor that affects the ability of the civil justice system to achieve the principles of justice?
21. Explain the significance of ss7 and 24 of the Constitution, in terms of the limitation they impose on parliament.
22. How has the precedent on the meaning of ss7 and 24 of the Australian Constitution been applied in the case of the NSW campaign spending laws?
23. How has the precedent on the meaning of ss7 and 24 of the Australian Constitution been applied in the case of abortion clinic safe access zones?
24. How does the judicial knowledge study from 2017 illustrate the significance of the role of the High Court in interpreting the Australian Constitution?

APPLICATION EXERCISE

In 2016 the Victorian Department of Justice and Regulation commissioned an Access to Justice Review through Engage Victoria. The aim of the review was to identify ways to improve access to justice for Victorians with an everyday legal problem and ensure that the most disadvantaged and vulnerable in our community, including Victorians from Aboriginal and Torres Strait Islander backgrounds, receive the support they need when engaging with the law and the justice system.

Documents relating to the entire review can be found on the Access to Justice Review website, at https://engage.vic.gov.au/accesstojustice

1. Locate the ‘Summary and Recommendations’ document.
2. Read the “Terms of Reference” and find two areas that relate to the VCE Legal Studies Study Design and that you have an interest in or understanding of.
3. Find the recommendations specifically concerning those areas in the body of the Summary and Recommendations document.
5. Find out how the Government responded to the recommendations you identified.
6. Discover whether, since 2016, those recommendations have in fact been implemented and, if so, in what year.

If the recommendations have been implemented, they will be options for you to use to answer the final dot-point in the Unit 3 AOS 2 section of the Study Design: recent reforms designed to improve the ability of the system to achieve the principles of justice. If they have not been implemented, they may be used as recommended reforms. The Access to Justice Report will also provide you with material to use for discussion of the problems the system has in achieving the principles of justice, and why the reforms are needed.
MEMORABLE QUOTATIONS

“I’ve taken this action because no woman and no girl deserves to feel bullied in their workplace and treated with disrespect by her colleagues.”

Senator Sarah Hanson-Young, regarding her lawsuit against former senator David Leyonhjelm, April 2019

“It took a lot of courage and soul searching to be prepared to tell my story, accusing one of the most senior Catholics in the world of serious criminal offences, and eventually I was ready to have my day in court.”

Complainant in a civil suit against Cardinal George Pell, March 2019

“It’s unfortunate that the case had to proceed this far. It’s taken over a year, but this is exactly the result my team and I were hoping for when we initiated this action – the comments to be removed and a payment of damages and costs. I hope that this settlement sends a message to other members of the community that, while robust debate is part of a healthy democracy, using your platform to harm the reputation of individuals comes at a cost.”

Osman Faruqi, November 2018

“The Supreme Court of Victoria has a crucial role in ensuring the just, efficient, timely and cost-effective resolution of the real issues in dispute. In class actions, it has additional broad powers that can be used to protect the interests of class members.”


“Currently, jury directions inadequately instruct jurors because the need to address a secondary audience, the appeal court, has overridden the needs of the primary audience, juries.”

John Gibbons, former worker with the Victorian Charge Book Committee on Jury Instructions, October 2018

“The Constitution does require that there be an ability for these types of third-party campaigners to not only exist but to have at least the chance of being successful. That is exactly what should be guaranteed, not something which should be treated as a mischief that needs to be shut down.”

Former Commonwealth solicitor-general Justin Gleeson, December 2018

“Our findings are important because, in the absence of awareness of the High Court, the potential exists for the public to see the Court as having a more overt political role than it has, which may lower esteem for the Court.”

Ingrid Neilsen and Russell Smyth, February 2019

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