

**LEGAL RESEARCH,  
WRITING AND  
REASONING SUMMARY**



**LAWSKOOL.COM.AU**

**LAWSKOOL PTY LTD**

**TABLE OF CONTENTS**

<b>TABLE OF CONTENTS</b>	<b>2</b>
<b>TOPIC 1 LEGAL RESEARCH</b>	<b>4</b>
1. Introduction	4
1.1 Getting Started	4
1.2 Knowing when to Stop Researching	6
1.3 Other Useful Tips	7
<b>TOPIC 2 RESEARCHING CASE LAW</b>	<b>9</b>
2.1 Introduction	9
<b>TOPIC 3 RESEARCHING LEGISLATION</b>	<b>20</b>
3.1 Introduction	20
3.2 Researching Legislation by Title	21
3.3 Researching Legislation by Subject	28
3.4 Noting-Up Legislation	34
<b>TOPIC 4 LEGAL WRITING</b>	<b>36</b>
4.1. Introduction	36
4.2. Know your target audience	36
4.3 Keep it simple	37
4.4 Be precise	37
<b>TOPIC 5. FORMALISM</b>	<b>38</b>
5.1 Avoid legal jargon	38
5.2 Definition clauses	38
5.3 Conditional statements	39
5.4 Active voice	39
5.5 Use gender-neutral language	39
5.6 Use of 'we' and 'you'	40
5.7 Remember concepts appropriate to other forms of English writing	40
5.8 Document design/layout	41
5.9 Legal citations and referencing	41
<b>TOPIC 6 PRINCIPLES OF LEGAL REASONING</b>	<b>43</b>
6.1 Introduction	43
6.2 What is reasoning?	44
6.3 Characteristics of legal reasoning	44
6.4 Logical requirements of legal reasoning	45
6.5 Understanding legal reasoning in Australia	46
6.6 Skills in legal reasoning	47
<b>TOPIC 7 LEGAL REASONING AND THE RULE OF LAW</b>	<b>48</b>

7.1 Conceptual framework	48
<b>TOPIC 8 LEGAL REASONING AND THE COMMON LAW</b>	<b>51</b>
8.1 Introduction	51
8.2 Forms of legal reasoning in the common law	51
8.3 Rationale	53
8.4 The doctrine of precedent	53
8.5 Judicial decision-making	54
<b>TOPIC 9 THE FIVE STEPS OF LEGAL REASONING</b>	<b>56</b>
9.1 Introduction	56
9.2 The five steps	56
1. Issue	56
2. Rule	57
3. Facts	58
4. Analysis	58
5. Conclusion (Most likely conclusion)	59
<b>TOPIC 10 PRAGMATIC APPLICATION OF REASONING</b>	<b>60</b>
10.1 Introduction	60
10.2 Legal theory is action-orientated	60
10.3 Knowledge objective against non-knowledge objectives	60
10.4 Legal Reasoning occurs in real time	61
<b>TOPIC 11 LANGUAGE, EVOLUTION AND LOGIC</b>	<b>62</b>
11.1 Introduction	62
11.2 Logic of legal reasoning	62
11.3 Evolution of legal reasoning	63
<b>TOPIC 12 INTERSECTION WITH SOCIAL SCIENCE</b>	<b>64</b>
12.1 Introduction	64
12.2 What do social scientists study when they study legal reasoning?	64
12.3 How social science theories and methods may affect legal reasoning in court	65
12.4 Future of social science in legal reasoning	65
<b>TOPIC 13 RONALD DWORKIN ON LEGAL REASONING</b>	<b>66</b>
13.1 Introduction	66
13.2 Dworkin's four types of rules in legal reasoning	66

# TOPIC 1 LEGAL RESEARCH

## 1. Introduction

### 1.1 Getting Started

Cook et al have stated that the 'single most common mistake' when undertaking legal research is to 'start looking for specific cases or legislation too early'.<sup>1</sup> To avoid making this mistake, remember to follow the steps below:

#### 1.1.1 Analyse the facts

In analysing the facts, Cook et al have suggested using the *SCARP* method.

'Under this method a given set of facts, or a specific incident, is broken down into its separate components. This is a useful means not only of helping to work through a complicated factual problem, but also in identifying the legal issues that need to be researched.'<sup>2</sup>

'Under the SCARP approach, facts can be analysed under four headings:

- **S: Subject matter** - Identify what area of law applies. Is it contract, property, tort, etc? Could more than one area of law be involved?
- **CA: Cause of Action (or defence)** - Identify the facts which give rise to an enforceable claim, or in the case of a defence, the facts which give rise to a basis of non-liability. For example, if you have identified the subject matter as tort law, and believe that negligence may be involved, you must identify facts that establish a duty of care, breach of the duty, and damages. If you are seeking to avoid liability for the tort of defamation, consider whether the defence of truth is available.
- **R: Remedy/Relief sought** - Identify what remedies a court may grant should the action succeed. For instance, in the negligence example above, a court would be likely to award damages.
- **P: Persons involved** - More often than not, this will be quite straightforward. However, it helps to consider whether the persons involved have 'special characteristics which are legally relevant.' Ask yourself: Are they of a 'particular type or class, such as medical practitioner'? Do they have 'special

---

<sup>1</sup> Catriona Cook et al, *Laying Down the Law* (5th ed, 2001), 275.

<sup>2</sup> Ibid 276.

legal status, such as a child'? Are they part of a 'special legal relationship, such as trustee and beneficiary'?<sup>3</sup>

### **1.1.2 Determine the legal issues involved**

This step essentially involves identifying the point of law or fact upon which the legal dispute/dilemma hinges.

To illustrate this step, consider the following fictitious legal dilemma:

Mrs Smith lives in a semi-rural house with two cats. The cats have free access into and out of the house via a cat-flap. Recently a cat from a neighbouring property has been seen both on Mrs Smith's property and inside her house, and has also been seen harassing Mrs Smith's two cats. Yesterday, the neighbour's cat came inside Mrs Smith's house through the cat flap. When Mrs Smith spotted the cat, she tried to scare it away so it would not bully her own two cats. Mrs Jones' cat ran back outside through the flap. However, in its haste to get outside, it knocked over and smashed a precious antique china vase.

If searching for legal authority that might apply to determine the neighbour's liability, a search for cases involving cats straying into neighbouring properties may prove fruitless. But there may be cases involving animals straying onto neighbouring properties. And there are certainly cases involving animals causing damage to third parties. Reasoning by analogy, both types of cases might lead a researcher to conclude that the legal question to be asked is what is the legal responsibility of animal owners to take steps to avoid damage to third parties caused by the actions of their straying animals?

### **1.1.3 Research the legal issues thoroughly**

This is where the process of research begins. Do not leave the success of your research up to chance – develop a plan to work methodically through relevant primary sources (cases, legislation) and secondary sources (textbooks, legal encyclopaedias and periodical articles), and stick to the plan!

### **1.1.4 Evaluate the results**

This step involves sorting the material according to its use in solving the legal problem/dilemma. In determining what is most useful, it is relevant to consider factors such as:

---

<sup>3</sup> Ibid 277.

- What jurisdiction the case authority originates from.  
For example, a case emanating from the New South Wales Supreme Court will not hold as much authority as a case originating from within the South Australian judicial system;
- The remedies available pursuant to the authority.

## 1.2 Knowing when to Stop Researching

Before starting your research, it is pertinent to know when to stop so that you do not waste time undertaking more research than necessary.

The most obvious answer to the question of when should you stop researching is when you have found the answer. This is easier with legislation because finding all the legislation on a topic is possible.<sup>4</sup> But it is not always possible with regards to case law, particularly if you are using persuasive precedent (i.e. cases emanating from another jurisdiction).

The best time to stop researching case law is when you keep turning up the same authority and citations. This suggests that the research paths are converging on a common set of authorities which hold the answer.<sup>5</sup> Cook et al suggest you should also stop researching when 'the cost exceeds the benefit'. This is perhaps more applicable to practising lawyers who must always be able to justify legal fees to their clients, but it is also true that legal research by law students should be ceased when it 'costs more in time and effort than it produces in useful information'.<sup>6</sup>

◆◆◆◆

**To order the complete version of the  
Lawskool Legal Research, Writing and Reasoning Summary  
please visit [www.lawskool.com.au](http://www.lawskool.com.au)**

---

<sup>4</sup> Ibid 279.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.