

**LEGAL RESEARCH  
AND WRITING  
SUMMARY**

**2011**



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**SAMPLE ONLY**

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

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

<sup>2</sup> Ibid 276.

<sup>3</sup> Ibid 277.

### **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 which 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 (cases, legislation) and secondary (textbooks, legal encyclopaedias and periodical articles) sources, 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:

- 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 do more than what is beneficial.

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 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>

## 1.3 Other Useful Tips

### 1.3.1 University Research Guides and Resources

If you are enrolled at a university, do not forget to consult your university's online legal research guide. These sites invariably contain links to invaluable online research resources, as well as many other useful tips. Also remember that law librarians are employed to be of assistance to students, so ask your librarian if you need help with using a resource listed on your university's research site.

### 1.3.2 Secondary Sources

Begin your research by consulting a secondary source. Not only will most secondary sources provide you with a 'jumping off' point as they list 'pertinent primary sources', but they also contain a 'statement of the particular rule or rules on the subject as well as an outline of some of areas of uncertainty and controversy in the law'.<sup>7</sup> Be warned, however, it is important to remember that the law is continually changing. This means that an older secondary source will not be as useful as a more-recently published secondary source. It also means that you may discover upon further research (of primary sources) that the areas of uncertainty discussed in secondary sources are now more certain.

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<sup>4</sup> Ibid 279.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 283.

### 1.3.2.1. PERIODICALS

Many legal researchers forget to periodicals in their research. This is not always disadvantageous, for periodicals are most useful when researching recent case law and statutory developments.

One of the most useful indexes to periodicals the *Attorney-General's Information Service* ('AGIS') available by subscription from *Informit Online* (thus once again access this resource through the appropriate link on your law library's online research guide or ask your law librarian if your university has a subscription to *Informit Online*). AGIS provides 'a comprehensive index to Australian, New Zealand and Asian Pacific law Journals', and it also 'selectively abstracts and indexes major journals from the Unites States, Canada and the United Kingdom'.

You may also find links to other useful periodicals on your university's online research guide, listed under 'periodicals' or 'journals'.

### 1.3.2.2 COMMENTARY SERVICES

Commentary services offer current information and commentary upon the analysis of specific topics of law. Commentary services generally offer:

- Relevant legislation (including regulations, notices and practice notes);
- Recent case law;
- New developments in the law (which includes new legislation, case law, and government reports and policies which impact upon the law);
- 'Annotated commentary with comprehensive subject, case and statute law indexes'.

Commentary services can be found both online and in hardcopy. As the online commentary services limit access to subscribers it is best to locate an appropriate link on your university's online legal research guide. Ask your law librarian if you need help accessing an online commentary service. The hardcopy commentary services are generally found in the reference section of your law library.



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