

Isbester v Knox City Council [2015] HCA 20

Tania Isbester owned a Staffordshire Terrier, Izzy, who attacked another dog. The owner of the other dog was also attacked, and received a 1.5cm wound to her finger.

Ms Hughes, the Council's Co-ordinator of Local Laws was the person responsible for the regulation of domestic animals under the **Domestic Animals Act 1994** (Vic). She led the investigation into Ms Isbester's dog Izzy and determined the charges to be laid.

The Council convened a panel to consider the case and decide Izzy's fate. Ms Hughes sent a letter to Ms Isbester inviting her to attend the panel and present evidence. The letter also outlined the conclusions that could be reached by the panel, the make up of the panel, and the roles of those on the panel.

The letter stated that

*"[t]he officer involved in the investigation may be present but they will not be involved in the decision making."*¹

Ms Isbester attended the panel and presented evidence in support of Izzy. Ms Hughes was also involved in the panel, and the decision making process. After hearing evidence and discussing the case with the panel members (including Ms Hughes), the Chairman of the panel instructed that the dog should be destroyed and had Ms Hughes draft reasons for his approval and signature.

Ms Isbester was then informed of the decision by letter.

Ms Isbester challenged the decision in the Victorian Supreme Court claiming that Ms Hughes had **apprehended bias**.

What is apprehended bias?

The concept that "a judge is disqualified if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."²

The Supreme Court ruled that there was no **apprehension of bias** as the setting of a local council was very different to that of a Court.

They wrote that "the institutional setting being quite different from that of a court, the fair-minded observer will expect little more than an **absence of personal interest** in the decision and a willingness to give genuine and appropriate consideration to the application"³.

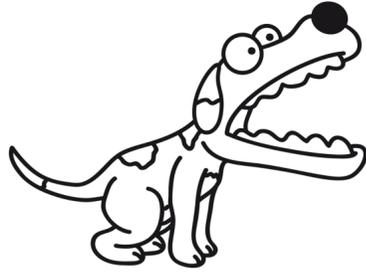
They ruled that Ms Hughes' previous involvement in the case **did not result in apprehension of bias**.

Ms Isbester took her case to the Court of Appeal who also dismissed her application. Special leave was granted by the High Court to hear the case.

The High Court reversed the decision of the other courts and found that a "fair-minded observer might reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision"⁴.

It is important to note that the High Court did not say that Ms Hughes was biased, only that a **fair minded observer** might think that she was not impartial because of her role as an investigator in the case.

As a result of this decision a new panel has to be convened to re-hear the case. This shows the importance of legal processes being perceived to be impartial and free from bias.



Important Note regarding Ms Hughes:

Four of the High Court judges stated that the finding of apprehended bias "implies nothing about how Ms Hughes in fact approached the matter. It does not imply that she acted otherwise than diligently, and in accordance with her duties."⁶ However this did not negate the circumstances that led to the conclusion of apprehended bias.

Justice Gageler wrote that:

*"Ms Hughes might have developed, as Ms Isbester's prosecutor, a frame of mind incompatible with the dispassionate evaluation of whether administrative action should be taken against Ms Isbester ... Ms Hughes' frame of mind might have affected the views she expressed as a member of the Panel."*⁵

¹ Kiefel, Bell, Keane, Nettle [7]

² Kiefel et al. [12]

³ Kiefel et al. [27]

⁴ Kiefel et al. [50]

⁵ Gageler [68]

⁶ Kiefel et al. [50]

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Access to Justice & the Rule of Law Case Studies



Pro bono - Mabo v Queensland (No 2) [1992] HCA 23

In 1982 Eddie (Koki) Mabo and five other Meriam people from Murray Island in the Torres Strait started a legal case to seek recognition of native title for the Meriam people of Murray Island.

The High Court decided that the legal doctrine from the time of colonisation, *terra nullius*, was not valid. *Terra nullius* meant that the British believed the land (of Australia) belonged to no-one at the time of colonisation and therefore the Meriam people could not 'own' their land.

The High Court recognised that Indigenous people had continued ownership of their land after colonisation in certain cases. This principle is called **native title**.

Unfortunately Mr Mabo did not live to see the success of his case, he died six months before the High Court judgment was delivered. The case was very controversial at the time because farmers were concerned that they may lose their land to Indigenous people.

Two barristers, **Mr Ron Castan and Dr Bryan Keon-Cohen gave 10 years of their time for free to assist Mr Mabo in his case** because they thought it was important for the Indigenous people of Australia.

The Mabo case led to the Native Title Act 1993 and other laws that enshrined native title in Australian law. The High Court has continued to make decisions that reinforce native title rights.

Legal Aid - Dietrich v The Queen [1992] HCA 57

In December 1986, Olaf Dietrich arrived in Melbourne after a trip to Thailand. He was arrested the next day by the Australian Federal Police and was charged with importing seventy grams of the drug heroin. There was compelling evidence that Dietrich had swallowed small packets of the drug to smuggle them through customs. He claimed in court the drugs had been planted by the Police.

Dietrich was charged in County Court of Victoria on four charges relating to drug trafficking under the *Customs Act 1901 (Cth)*. During the trial he had no legal representation. He had applied for assistance from the Legal Aid Commission of Victoria but they would not represent him unless he agreed to plead guilty to all charges. He also applied to the Supreme Court of Victoria for legal assistance but this request was also denied.

He was convicted in the Victorian County Court of three out of four charges brought against him. Dietrich appealed his convictions to the Supreme Court, but the Court refused to hear his appeal. He appealed to the High Court of Australia.

A majority of judges in the High Court decided that Dietrich had the **right to a fair trial**, and that the lack of legal representation meant that the original trial was unfair.

The justices also concluded that when an accused, through no fault of their own, does not have legal representation when charged with a serious offence, a judge may order the trial be stayed (delayed) until legal representation is available.

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Gary the Goat - The Court System & Appealing a Fine

The Appeals System

Comedian James Deamouids aka Jimbo Bazooobi was issued a \$440 fine in August 2013 after his goat Gary, was seen by police eating grass outside the Museum of Contemporary Art in Sydney.

The fine issued was for damaging vegetation without authority. Jimbo appealed the fine and a date was set for a court hearing.

Mr Bazooobi wrote to the Commander of the Rocks police station asking for the fine to be dropped. In his letter Jimbo claimed that he appealed the fine because:

a) "It wasn't me, it was my goat" and;

b) "My goat wasn't damaging vegetation. He was simply taking the top off some grass plus some leaves off some bushes (next to some council workers with a lawnmower and clippers who were doing the same thing)"

The case proceeded to court and the Magistrate ruled in favour of Jimbo and Gary. The Magistrate said that while Gary did eat plants it could not be proven that Jimbo had brought Gary to the MCA with the intention of vandalising the plants or that Jimbo put Gary up to the act.

Gary's lawyer said that police had issued the wrong infringement notice as the fine issued applied to people and not to goats.

This case shows the importance of being able to access the courts and appeal a decision.

In an open letter to the police, posted on Facebook, Jimbo claimed that:

"I was surrounded by Shame and about four other police officers ... Shame immediately started telling me that I'd broken a whole lot of laws. I then asked, 'well can you name one?' ... He then spent over an hour detailing for an out of control animal because my goat wasn't out of control. He couldn't get me while he tried to tell me what law I'd broken ... He couldn't get me for an out of control animal because my goat wasn't a dog. He couldn't get me for not having it on a leash because it wasn't a dog ..."

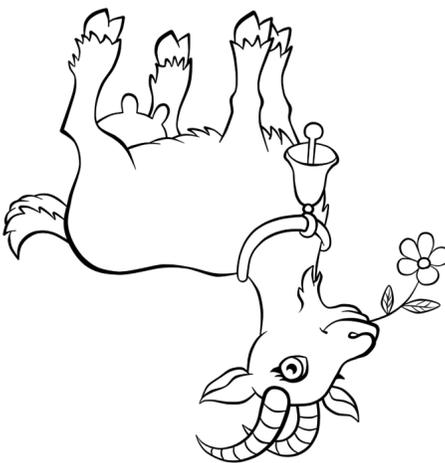
In the end he let me go saying he was going to continue to find a law that I had broken and send the fine in the mail to me."

The confusion over the actual charge, and the eventual dismissal of the charge on appeal, since it applied to humans and not goats demonstrates that the law selected by the police did not fit the alleged crime. The fact that Gary decided to eat the plants may have damaged them, however, there is no offence appropriate to charge a goat with an offence for doing so.

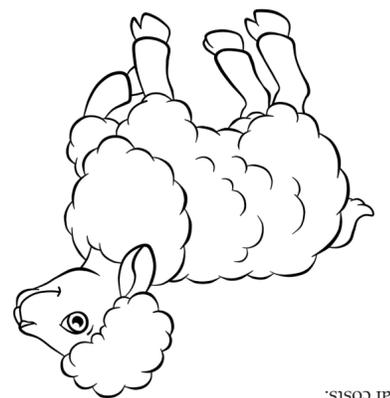
If goats eating plants in public became an issue, the Sydney City Council could consider passing a regulation stating that the owner of a goat who eats plants is guilty of an offence.

Unless more people have goats as pets, it is not likely that the Council will consider this as pressing matter for law reform.

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Mr Vu Ho, a mechanic who lives in Springvale, a suburb on the outskirts of Melbourne was involved in a legal battle over his family's pet sheep called Dolly (the family calls her Baa). The family raised her from a lamb, at the time of the case she was almost 16 years old. Baa, a much loved part of the family, was hand fed and taken for rides in the family car. Mr Ho's neighbours saw Baa as being like a family dog. Mr Ho's legal dispute began when a Greater Dandenong Council ranger told him that he had to remove Baa because local council regulations did not allow **Ivestock** on land less than 1/2 hectare (5000 sq. metres) in size. **Ivestock** is defined as "any animal of any species...other than a dog or cat". Mr Ho applied for a permit to keep Baa but was not able to get one because the Council did not agree that a sheep can be a pet. Mr Ho took the Council to court to challenge this. His first case against the Council in the **Supreme Court of Victoria** challenged the interpretation of two laws that gave the Council the power to make and enforce laws about animals. He lost the case and was **ordered to pay the Council's costs of around \$100,000**. He appealed to the **Victorian Court of Appeal** and represented himself before the court as a **self represented litigant**. Garde AJA and the other two justices said his argument was "clearly presented" but dismissed his appeal. Their reasons stated that by not allowing someone with a small piece of land to keep Ivestock the Council was making sure that the welfare of animals and people who live in the area was taken care of, and that the Council had the power to make and enforce these laws. Mr Ho then applied to the High Court for **special leave** to appeal the decisions of the lower courts, but his application was denied. Although Mr Ho did not succeed, he was able to pursue his case through the courts, however, a significant issue for him as an individual was the large amount of money awarded against him for legal costs.

SRLs - Ho v Greater Dandenong City Council [2013] VSCA 168



What is Access to Justice?

An essential principle of the rule of law is that everybody has **access to justice**. This means that people who have a legal issue are able to access a solution to the issue.

Access to justice is an essential idea in both **criminal** and **civil** proceedings.

Elements of Access to Justice:

1) People require access to the courts and legal processes

The court system is an adversarial system, requiring both **parties** to present evidence and argue their case in court.

2) People who make legal decisions must be free from bias and make decisions based on the law

Decision makers in courts, and tribunals must make decisions according to the law and be impartial. They must also ensure that each party receives a **fair trial or hearing**.

3) Legal Aid is important in a complex and adversarial legal system

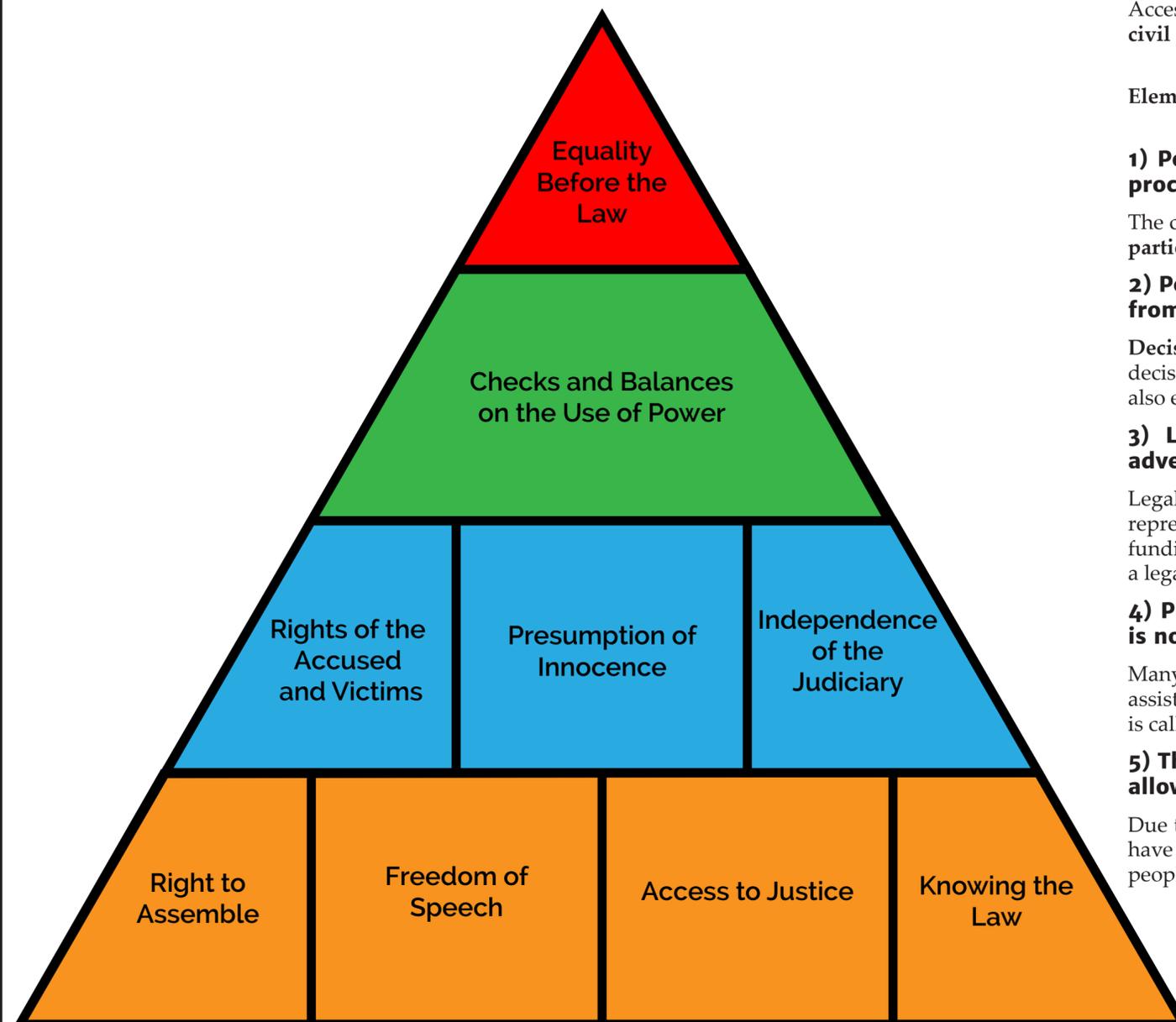
Legal Aid is an essential service that provides legal representation for those who cannot afford a lawyer. Its funding is limited and it cannot assist all people who have a legal issue.

4) Pro bono work from lawyers where Legal Aid is not available

Many lawyers and law firms provide their time for free to assist people who cannot afford legal representation. This is called 'pro bono'.

5) The Legal System must make reasonable allowances for self represented litigants

Due to the high cost of legal representation many people have started representing themselves in court. These people are called self-represented litigants (SRLs).



Glossary

Access to Justice

That people who need the legal system, to resolve a dispute or make a decision about whether they have broken the law, can go before a court of law and be able to receive a legal decision regardless of their status in society.

Presumption of Innocence

The prosecution must prove the accused is guilty beyond a reasonable doubt. Until the court finds the person guilty, they are seen as innocent. If an accused is found guilty they can then be referred to as an 'offender'.

Right to Legal Representation

The High Court has found that a person charged with a serious criminal offence has the right to legal representation if they are unable to pay for it themselves, and that having no representation would lead to an unfair trial.

Accused

Person accused (but not convicted) of an offence.

Stay in Proceedings

Stopping the legal process of a trial.

Solicitor

A lawyer who prepares a brief of evidence and legal arguments to be provided to a barrister who will argue the case in court.

Barrister

A lawyer who specialises in presenting a case in court to the judge and jury. They question witnesses and evidence, and make opening and closing statements.

Trafficking

Disposing of (selling) something for money or something else of value.

Acquitted

When a judge or jury finds the accused person not guilty.

Special Leave to Appeal to the High Court

For a case to be heard by the High Court a party must seek special leave. A special leave hearing is held where reasons are presented to persuade the court the case is of sufficient interest/importance to be heard.

Means test

A tests that looks at a persons assets and valuables to decide whether they should be offered a service.

Costs Awarded Against A Party

Often a court will order the losing party to pay the legal costs of the other party. This can include the fees for their legal representation, and other costs associated with the case.

Court Hearing

A court proceeding at a fixed date and time where the parties are required to appear before the court.

The Magna Carta and Access to Justice

The Magna Carta is an important document in legal history which set out many of the principles on which we base the rule of law. It was granted in 1215, over 800 years ago, but the ideas about access to the courts, due process and that judges should know the law and follow it remain as important now as they were 800 years ago.

Clause 17 - Access to Courts

his hoibz futi n̄ ad corpul suū redimendū. 7 ad faciendū pinggentū filiū suū debet. Communia placita n̄ sequit̄ curiam n̄tam. s; teneant̄ i aliquo loco certo. Et i iusticiariol p̄ vniūqueq; Comitatu p̄. vij. vicel in Anno q̄ aī quoz milia

Common pleas shall not follow our court, but shall be held in some **fixed place**.

Clause 40 - Due Process

Nulli battz ponat de certo Alique ad legē simplicī loq̄la sua sine iē. Nulli ueridem nulli negabim̄ aut differēti rectū iū iusticia n̄ p̄p̄e ḡberre. 7 si sint de trā cont̄ nol̄ ḡuerriua. Et si rales

To no one will we sell, to no one will we **refuse** or **delay**, **right** or **justice**.

Clause 45 - A Qualified and Independent Judiciary

Hol̄ n̄ faciam̄ iusticiariol ul̄ Constablarol. Vicecom̄.

ut̄ Balliuol n̄ de raliū q̄ sciānt̄ Legē Regni 7 eam̄ bene uelut̄ obseruare.

We will appoint as justices, constables, sheriffs, or bailiffs only such as **know the law** of the realm and mean to **observe it well**.

