COMMERCE PRESENTATIONS AND PUBLICATIONS

VCE LEGAL STUDIES 3/4

2011

Practice examination

SUGGESTED ANSWERS/ADVICE

Question 1
Explain the system of responsible government and the rationale behind it. 2 marks

Advice:

- ✓ The task word 'explain' requires more detail than a simple definition for full marks. An example can often be used to supplement the answer.
- ✓ In the 2007 examination the principle of 'responsible government' was confused with the principle of 'representative government'.

1 mark Definition, including the concept of accountability – mainly between the legislature and the executive government.
1 mark To keep the power of the government in check, or to prevent the abuse of power.

Question 2
The purpose of discovery is to protect the rights of the defendant by ensuring that there is enough evidence against them to justify going to trial.
Comment on the validity of this statement. 1 mark

Advice: The task word 'comment' indicates that the student should agree or disagree, and provide reasons.

1 mark This is not the purpose of discovery. The purpose is to ensure that each side is aware of the evidence that the other side has.

Suggestions for Answers:

- ✓ *Better students may indicate that seeing the opposition's evidence in pre-trial discovery encourages an out-of-court settlement.*
- ✓ *Better students may clearly explain that it is in a criminal trial that we aim to protect the rights of the defendant; in a civil trial the parties are on a more equal footing.*

Question 3
Outline the process and purpose of proclamation as one of the steps in the passage of a bill through parliament. 2 marks

Advice: The 2010 VCAA Assessor's Report indicated that important legal terms such as 'parliament' are frequently not being spelled correctly.

1 mark Proclamation is the date on which a new law comes into effect. The date will be published in the Government Gazette.
1 mark The purpose of the procedure is to ensure that the public knows when the new law begins (and they have to follow it).

Suggestions for Answers:

- ✓ *The purpose could also be described as informing the public that a new law has been made, or giving people the opportunity to inform themselves and make any necessary preparations to comply with the law.*
- ✓ *In addition to being published in the Government Gazette, students could also indicate that the date may be written into the act itself, or that the date is by default 28 days after Royal Assent if no other date is published.*

Question 4
Outline two reasons for employing a hierarchy of courts. 2 marks

Advice:

- ✓ The task word 'outline' requires more than simply naming the reason, but extensive discussion is not required.
- ✓ The 2010 Assessor's Report indicated that important legal terms such as 'precedent' are not being spelled correctly.

1 mark An outline of one reason.
1 mark An outline of a second reason.

Suggestions for Answers:

- ✓ *A hierarchy allows a system of appeals to exist. If one party is dissatisfied with an element of the decision made by a lower court, they can ask a higher court to scrutinise the decision and hopefully correct any mistakes.*
- ✓ *A hierarchy allows for greater specialisation. Lower courts like the Magistrate's Court can develop expertise in small cases such as traffic fines and petty theft, thereby processing them more quickly and avoiding delays.*
- ✓ *A hierarchy allows for greater speed and efficiency. More serious cases can be timetabled across weeks or even months in higher courts, allowing witnesses to be properly examined; while the Magistrate's Court can hear many small cases in one day, almost like a factory line.*
- ✓ *A hierarchy allows the doctrine of precedent to operate. Decisions made by higher courts will be binding on lower courts when the material facts of the cases are similar.*

Question 5
Using an example to illustrate your answer, explain how the referral of powers can change the division of power without formal amendment to the Constitution. 3 marks

Advice: Since the question asks that the example be used to "illustrate" the answer, the example must be more than simply named. It must be linked to the answer.

1 mark An outline of the ability of the states to refer residual powers to the Commonwealth.
1 mark An explanation of one example of a power being referred to the Commonwealth by one or more of the states.

Suggestions for Answers

- ✓ *The Commonwealth has the power (in s51) to make laws regarding any matter referred – handed over to them – by the states, but their legislation only applies to the state or states that referred the power.*
- ✓ *Students may describe these powers as becoming exclusive as a result, however this has not been confirmed by a majority of the High Court. It would be more correct to say that, because of the operation of s109, referred powers will be exclusive in practice because the Commonwealth can override any state legislation in the area.*
- ✓ *Students may also state that states can later take the powers back, however it is not yet confirmed by the High Court whether the Commonwealth can give them back.*
- ✓ *Example: The 1996 referral of the workplace relations power to the Commonwealth, done by the Victorian Parliament under the Kennett Government.*
- ✓ *Example: The referral of power over the custody and maintenance of children born outside marriage to the Commonwealth, done by all states between 1986 and 1990.*

- ✓ *Example: The referral of the power to set rules regarding the establishment of companies to the Commonwealth, done by all states after the Incorporations Case of 1990.*
- ✓ *Example: The referral of the power to make laws prohibiting terrorist acts. This referral was a specific text-based one: in their referral acts, the states wrote the exact wording of the legislation that the Commonwealth was allowed to pass, and said that any changes to it had to be agreed to by a majority of states.*

Question 6
Outline the two main roles of the Upper House in Federal Parliament, and comment on which role it performs more effectively and why. 2 + 2 = 4 marks

Advice:
- ✓ The task word 'comment' indicates that the student should agree or disagree, and provide reasons. Both sides of the argument may be looked at if the student wishes.
- ✓ The task word 'outline' requires more than simply naming the roles, but extensive discussion is not required.

1 mark An outline of the role as a States' House.
1 mark An outline of the role as a House of Review.
1 mark A response to the question of which role it performs more effectively.
1 mark Discussion and reasons for why it performs that role well or better.

Suggestions for Answers

The roles of the Upper House are:
- ✓ *The Senate acts as a States' House because each state is given equal representation (12 senators) so they can act in the best interests of their state, and smaller states are not overpowered every time by Victoria and New South Wales.*
- ✓ *The Senate acts as a House of Review because the Government usually initiates most of its bills in the House of Representatives, where it has a majority. The Senate views the bills second, and has more debate as the Government usually does not hold a majority.*

Comments on the effectiveness of each role may include:
- ✓ *The Government usually does not hold a majority of seats in the Senate, so must compromise with other parties and independents to pass the bill. It therefore is an effective House of Review.*
- ✓ *The Government usually does not hold a majority of seats in the Senate, so must be able to convince other parties and independents that the bill is good for the community so they will vote for it. It is therefore an effective House of Review.*
- ✓ *The Senate's committees are more numerous and more active than the committees in the lower house. It is therefore an effective House of Review.*
- ✓ *If the Senate is controlled by the Opposition it will not be an effective House of Review because it will be hostile and will simply block everything.*
- ✓ *If the Senate is controlled by the Government it will not be an effective House of Review because it will be a rubber stamp and will simply pass everything.*
- ✓ *The Senate cannot be an effective House of Review because the Howard Government cut the number of committees and changed it so that each one was chaired by a Government senator.*
- ✓ *Each senator is able to consider the interests of their state when voting on bills; they are not expected to only consider party policy. It is therefore an effective States' House.*
- ✓ *No matter what the population of each state is, the number of senators representing each will always be equal. The Senate is therefore an effective States' House because any legislation that affects states differently must be agreed to by a majority of states.*

- ✓ *If senators vote along party lines rather than in the best interests of their state, the Senate will not be an effective States' House.*

Question 7
Explain the role of the Victorian Law Reform Commission in assisting the Victorian Parliament to ensure the law remains in touch with the needs of the Victorian people. 3 marks

Advice: The Victorian Law Reform Commission is now directly examinable, as it is listed on the Study Design by name.

1 mark	Ways in which the VLRC will investigate an issue and gauge the views of the public. Reference to the public/community must be made, because of the wording of the question. Examples are conducting opinion polls and receiving submissions from members of the public.
1 mark	That the VLRC reports to the Government [Attorney-General], who can table the recommendations in parliament. Answers must reflect this issue of recommendations being made to parliament: the VLRC cannot change the law itself.
1 mark	An example of an issue the VLRC has investigated or is currently investigating; OR, information on the roles of the VLRC to engage in public education on the law, or monitor informal law reform activities across the state.

Suggestions for Answers

- ✓ *Example: The Commission looked into the issue of abortion, and provided a range of options for how abortion could be decriminalised.*
- ✓ *Example: The Commission looked into the issue of defences to homicide, and recommended that the defence of provocation be abolished. It was.*
- ✓ *Example: The Commission looked into the issue of bail, and recommended that victims of crimes against the person should be notified of the outcome of the accused's bail hearing.*
- ✓ *Example: The Commission looked into the issue of evidence, and recommended that judges not be allowed to warn the jury that evidence from a child is potentially unreliable, simply because the witness is a child.*

Question 8
Using detail from the jurisdiction of each to illustrate your answer, explain how criminal matters are spread across the Magistrate's Court, County Court and Supreme Court (Trial Division) so that each court specialises in different areas. 4 marks

Advice: In recent years questions on the jurisdiction of courts have been phrased as 'application' questions as well as 'memory' questions. In other words, students must be able to apply jurisdiction to scenarios, find errors relating to jurisdiction, or use jurisdiction as part of an argument.

1 mark	A response to the question. Essentially, the least serious matters, bail hearings and committal hearings are heard quickly in the Magistrate's, while the County and Supreme Courts hear appeals and the more serious, indictable offences.
1 mark	Relevant information on the jurisdiction of the Magistrate's Court.
1 mark	Relevant information on the jurisdiction of the County Court.
1 mark	Relevant information on the jurisdiction of the Supreme Court (Trial Division).

Suggestions for Answers

- ✓ *The Magistrate's Court hears summary offences (the least serious matters), and indictable offences that the accused has chosen to have heard summarily (without a jury). It also*

conducts committal hearings to see if there is enough evidence against the defendant to justify trial in a higher court, and hearings for bail and warrant applications. It hears no appeals.

- ✓ *The County Court hears indictable offences (with a jury), except for the most serious ones such as murder and conspiracies like terrorism. It hears appeals from the Magistrate's Court on questions/points of fact.*
- ✓ *The Supreme Court (Trial Division) hears the most serious indictable offences (with a jury), such as murder and conspiracies like terrorism. It hears appeals from the Magistrate's Court on questions/points of law.*

Question 9

a. Describe the process of a referendum. 3 marks

Advice:

- ✓ The section number, s128, for the referendum process is one of the few listed in the Study Design that students must recognise and remember.
- ✓ The phrase 'double majority' must be used and explained.

1 mark A referendum bill must pass through both houses of federal parliament. Better students will note that if it passes through one house twice, and is rejected by the other house twice, it can be put to the people anyway.

1 mark It is voted on by all people enrolled to vote for the House of Representatives, and must receive a 'double majority': a majority of votes Australia-wide, plus a majority of votes in a majority of states (4/6). Better students will note that any state directly affected by the proposal must be one of the ones in favour.

1 mark After these two stages have been successfully passed, the Governor-General will give Royal Assent, and sign the bill for it to become law. The wording of the Constitution will be changed.

b. Outline two factors that might influence the success of a referendum proposal. 2 marks

Advice:

- ✓ The task word 'outline' requires more than simply naming the factors, but extensive discussion and examples are not required.
- ✓ Factors may be worded in terms of what will help the proposal succeed, or in terms of what often contributes to failure.

1 mark An outline of one reason.

1 mark An outline of the second reason.

Suggestions for Answers

- ✓ *Bipartisan agreement is usually necessary for the success of referenda because many people vote along party lines.*
- ✓ *Because of the double majority required, smaller states can stand in the way of changes that the majority of people are in favour of. Attention must be paid to getting the support of states, as well as just a majority of the Australian people.*
- ✓ *If the proposal is complicated or 'legal' and most regular people don't understand it, they will vote 'no' as a reflex to the confusion rather than because they truly disagree with the change.*

- ✓ *The public relies on advertising and pamphlets to educate them about the issue, which means they can be confused by too much conflicting information: leading to a 'no' vote if the information is not streamlined and easy to understand.*
- ✓ *When referenda are held on the day of a federal election the people have often paid more attention to election issues and do not want to vote in favour of a proposal they do not understand.*
- ✓ *When referenda are held on the day of a federal election the people may vote against the proposal if they are unhappy with the Government, as they see the 'no' vote as a protest vote against the Government.*
- ✓ *When a proposal is seen as a grab for power by the Commonwealth, the states will urge the people to vote against it.*

c. ***Some amendments to the Constitution change only the administration of government: such as when Senate terms begin. Other amendments, however, alter the way in which legislative power is divided between state and Commonwealth parliaments in our federal structure.***

Explain how this could occur, using one example of a successful referendum to illustrate your answer. 2 marks

Advice:

- ✓ Since the question asks that the example be used to "illustrate" the answer, the example must be more than simply named. It must be linked to the answer.
- ✓ 'The way in which one successful referendum changed the division of legislative power' is new content on the 2011 Study Design, whereas in previous years it was optional extra teaching.
- ✓ Out of the eight successful proposals since federation, only two have had an impact on the division of power.

1 mark An explanation of how referenda can affect the division of power.
1 mark An explanation of the impact of one relevant referendum in terms of how it changed the division of powers. Explanations must show which parliament gained/lost power, and *how*.

Suggestions for Answers:

- ✓ A referendum changes the words in the Constitution. This change could give the Commonwealth Parliament another head of power; put a new restriction on either the Commonwealth or the state parliaments; or remove an existing restriction on either the Commonwealth or the state parliaments.
- ✓ Example: The 1967 referendum allowing the Commonwealth to legislate specifically regarding the "Aboriginal race", which was previously a Commonwealth restriction and therefore a residual power. It became concurrent.
- ✓ Example: The 1946 referendum allowing the Commonwealth to legislate regarding unemployment, student and widows' benefits, among other benefits. This was previously a residual power, but became concurrent.

Question 10
Outline the three ways in which rights are protected by the Commonwealth Constitution. Explain one case in which the High Court of Australia has been called on to decide a rights issue and the impact that case had on the rights of the Australian people.
3 + 3 = 6 marks

Advice:

- ✓ The task word 'outline' requires more than simply naming the types of rights, but extensive detail and examples are not required.
- ✓ The structural protection of rights under the Commonwealth Constitution is new material on the 2011 Study Design; it includes the idea of a 'right to vote', which is *not* yet a full implied right that is recognised by a majority of the High Court.
- ✓ 'The significance of one High Court case concerning constitutional rights protection in Australia' is new content on the 2011 Study Design.
- ✓ In the 2010 VCAA Assessor's Report students were reminded to focus on the impact of High Court cases: not just the facts.
- ✓ In a 'protection of rights' question on the 2010 VCAA exam students went outside the scope of the Study Design and discussed rights protected outside the Constitution. This will not be relevant in a question like this one that specifies entrenched or constitutional rights.

1 mark A definition of express rights. An example may be given, but is not necessary.
1 mark A definition of implied rights. An example may be given, but is not necessary.
1 mark A definition of structural protections. An example may be given, but is not necessary.

1 mark An outline of the facts of the case, or an identification of the main issues concerned.
1 mark An explanation of the right that was created.
1 mark An explanation of the impact of the case in terms of rights protection.

Suggestions for Answers

The three types of rights are:

- ✓ *An express right is one written clearly into the wording of one section of the Constitution (and can only be changed by referenda).*
- ✓ *An implied right is one not stated explicitly in the Constitution, but that the High Court has found to be implied by the wording of two or more sections being read together.*
- ✓ *Structural protections are safeguards for the public as a whole or for our democratic system, based on the structure of the legal system that is set up by the Constitution. They are not personal rights held individually by each person.*

The recognised express rights are:

- ✓ *The s80 right to trial by jury for federal indictable offences.*
- ✓ *The s51 right to being paid 'just terms' for compulsory Commonwealth acquisition of private property.*
- ✓ *The s92 right to 'free intercourse among the states', which involves being allowed to trade interstate without border taxes.*
- ✓ *The s117 freedom from Commonwealth discrimination on the basis of state residence.*
- ✓ *The s116 freedom of religion, giving freedom from Commonwealth legislation establishing a state religion, banning a religion, telling people how to follow a religion, setting a religious test for a Commonwealth Government job, or preventing people from choosing to have no religion.*

The implied right is:

- ✓ *The ss7 and 24 freedom of political communication, giving a freedom from legislation stopping members of the public from communicating and developing public opinion on political or social issues.*

Structural protections include:

- ✓ *Representative government (as confirmed in the Roache Case), which gives the community as a whole the right to a democratically elected parliament, by preventing the Commonwealth from stopping large sections of the population from voting, without a significant reason for doing so.*
- ✓ *The separation of powers, which gives the community as a whole the right to a fair judicial process and an independent judiciary.*

High Court cases relating to rights protection include:

- ✓ *The ACTV Case involved the Commonwealth banning most political advertising in the lead-up to an election. The High Court had to decide whether this infringed an implied freedom to speech, or perhaps a more limited freedom of political communication. They found that it did, because ss7 and 24 of the Constitution sets up a system of representative government, so a freedom of political communication is needed to make an informed vote.*
- ✓ *The Rabelais Case involved a student newspaper publishing a manual on shoplifting, which they said was protected by the implied right to freedom of political communication because the manual was commenting on the divide between rich and poor. The High Court found that the implied right does not extend to this, because the right only covers speech helping the "development of public opinion on the whole range of issues which an intelligent citizen should think about": manuals on crime do not come within this definition.*
- ✓ *In the Roache Case the parliament passed a law preventing anyone who was in jail from voting, no matter how short their sentence was. The High Court had to decide whether this infringed an implied right to vote. They found that there was no individual right to vote – because people serving 3 years or more could be prevented, for example – but that the structure of the Constitution establishes a representative government in which large sections of the public cannot be prevented from voting without a very good reason. Roache was therefore successful because of this structural protection.*

Question 11
Explain one civil remedy that could be given at the end of a civil trial, and compare the purposes of awarding remedies with the aims of giving sanctions. 4 marks

Advice:

- ✓ The task word 'compare' indicates that similarities, differences or both must be addressed. It is not sufficient to merely identify the purposes of each without linking them in any way.
- ✓ The aims of sanctions given in the *Sentencing Act 1991* (Vic) are:
  - Punishment.
  - Rehabilitation.
  - Denunciation.
  - Deterrence (both specific and general).
  - Protection.

1 mark A brief identification of one remedy.
1 mark Further detail on that remedy.
1 mark Identifying the purpose of either that remedy, or of remedies in general.
1 mark A comparison with the main aim or aims of sanctions.

Suggestions for Answers

- ✓ *Damages are a sum of money payable by the defendant directly to the successful plaintiff. The most common type is compensatory damages, however other types such as punitive, exemplary and nominal can also be awarded.*
- ✓ *Injunctions are court orders that tell the defendant to either perform an action, or refrain from performing an action. A mandatory injunction is one that tells them to do something, while a restrictive injunction is one that tells them not to.*

- ✓ *The main aim of remedies is to return the plaintiff to the position they were in before their rights were infringed.*
- ✓ *The main aims of criminal sanctions are not to protect or restore the rights of the victim, but instead to punish the offender and protect society from further criminal harm.*
- ✓ *The main aim of remedies is to compensate the plaintiff for the infringement of their rights, however some remedies also aim to prevent the harm (such as injunctions) or punish the defendant (such as punitive damages).*
- ✓ *In this respect the aims of some remedies are similar to the aims of some sanctions. Some sanctions aim to prevent further harm, and others aim to punish the defendant.*

Question 12

a. Explain two factors, up to and during empanelment, that could prevent a member of the public from sitting on a civil jury. 4 marks

Advice:

- ✓ Factors influencing the composition of the jury was taught by many teachers before, however it is expressly required teaching on the new Study Design.
- ✓ The task word 'explain' requires more than simply naming or outlining each factor.
- ✓ The word 'factor' is broader than the word 'example'. This question asks for two processes or rules that affect who sits on the jury: not simply for two examples of people who could not sit on a jury.

1 mark An outline of one factor.
1 mark Further detail on the factor, or examples of it in practice.

Suggestions for Answers

- ✓ Parties may exclude potential jurors by making a peremptory challenge against them. They do not need to give their reasons, and the challenge must be accepted by the judge. Parties can each make three peremptory challenges.
- ✓ Parties may ask to exclude potential jurors by making a challenge for cause. A legitimate reason for exclusion must be given to the judge, who may decide whether or not to accept it. Parties can make unlimited challenges for cause.
- ✓ Potential jurors may ask the judge to be excused from sitting on that trial only. A reason might be that the length of the trial would cause undue hardship, or that they know a key witness and so would be unable to hear their evidence impartially.
- ✓ Potential jurors could be disqualified from service entirely if they met criteria such as being an undischarged bankrupt or having a criminal record.
- ✓ Potential jurors could be ineligible for service if they met criteria such as having a job too closely connected with the justice system, or not having a strong enough grasp of the English language.
- ✓ Potential jurors could ask the Juries Commissioner to be excused from service if they could show that service would cause severe hardship; for example, missing Year 12 examinations.

b. Outline, and critically examine the desirability of, one possible reform and one alternative to the current system of trial by jury. 6 marks

Advice

- ✓ The task word 'outline' requires more than simply naming the reforms, but extensive detail is not required.
- ✓ The task phrase 'critically examine' requires an assessment of both the strengths and weaknesses of the change.
- ✓ One or more elements of an effective legal system do not need to be used in the answer, however they may be useful as benchmarks against which 'desirability' of changes can be judged. The elements of an effective legal system are:
  - Access to mechanisms for the resolution of disputes.
  - Timely resolution of disputes.
  - Entitlement to a fair and unbiased hearing.

1 mark An outline of one possible future change.
1 mark An advantage of that change.
1 mark A drawback of that change.

1 mark An outline of one alternative.
1 mark An advantage of that alternative.
1 mark A drawback of that alternative.

Suggestions for Answers

Changes to the current system of trial by jury may include:

- ✓ *Requiring that juries provide written reasons for their decisions. This could be a summary given by the foreperson, or a collection of individual reasons given by each member of the jury.*
- ✓ *Requiring that jurors complete a questionnaire, showing that they understood key evidence and law. This is similar to what is done in several states in America.*
- ✓ *Appointing a specialist foreperson who has experience in the area, when the jury is hearing complex cases such as medical negligence or tax fraud.*
- ✓ *Reducing the number of peremptory challenges allowed to both parties, so that the composition of the jury becomes truly more random/inclusive.*

Alternatives to the current system of trial by jury may include:

- ✓ *Removing trial by jury altogether, considering that they are only used in 0.5% of cases in Australia as it is.*
- ✓ *Removing trial by one's peers, and replacing the jury with a panel of professional lawyers and/or judges.*

Examples of 'critical examinations' may include:

- ✓ *If juries were required to provide written reasons for their decisions, parties would be able to get the satisfaction of knowing why they won or lost, and could also appeal to request a review of any errors made concerning evidence or law. Jurors are not legally trained, however, so it might be unfair to require them to provide written reasons that are expressed legally enough to stand up in a court of appeal. This could put unnecessary pressure on people providing what is a community service.*
- ✓ *A specialist foreperson could ensure that the jury understands complicated evidence that could be crucial to the outcome of the trial. If the jury did not understand this evidence they*

may become confused, and either 'tune out' or make a decision based on factors that were not as important, such as the appearance of the witness or accused. A specialist foreperson may have too much influence during deliberations, however. The jury verdict might end up simply being their verdict, if the other eleven people trust their judgment and go along with them rather than making an independent decision.

- ✓ *Removing juries would increase the speed of trials on indictment, and would also cost parties and the government less money. People in the community would not be taken away from their jobs, and they would not be put through the stress of having to make such an important decision when they are not trained for it. Removing juries would deny people the important right of trial by their peers, however, and there would be no independent body to bring contemporary values into the courtroom and check the power of the government.*

Question 13

Identify two problems faced by people in the community when trying to access the legal system to resolve their disputes, and comment on one past change and one recommendation for change that aim to improve access. 4 marks

Advice:

- ✓ All problems and changes must relate to 'access'. Re-using material from Question 12 on juries would therefore be difficult, as well as undesirable.
- ✓ The task word 'outline' requires more than simply naming the problem, however extensive discussion is not required.
- ✓ The 2009 VCAA Assessor's Report reminded students that the task word 'evaluate' requires a consideration of both its strengths and weaknesses, while in the 2009 examination many students gave only strengths. 'Comment' is the task word that allows students to cover only one side of the argument.
- ✓ The changes do not need to be explained in detail, as the focus is 'commenting' on them.
- ✓ There is no strict time limit for 'recent' changes in the Legal Studies course, but students are **strongly** encouraged to use examples from the past five years, to show that they are keeping abreast of contemporary issues and recent developments.
- ✓ In the 2007 examination a similar question was handled poorly by many students because they focused on a change to a specific law, rather than a change to the legal system as a whole.

1 mark An outline of one problem.
1 mark An outline of a second problem.
1 mark One strength, one weakness, or one of each, relating to a past change.
1 mark One strength, one weakness, or one of each, relating to a recommendation for change.

Suggestions for Answers

Problems may include:

- ✓ *Wealthy people have a greater access because barristers regularly cost up to $5000 per day, expert witnesses can charge thousands of dollars for reports, and filing fees can run into the thousands.*
- ✓ *The complicated rules of evidence and complicated legal language of legislation and precedent make it almost impossible for people to make educated decisions about how to handle their case.*
- ✓ *A strict 'means' test as a requirement for Legal Aid means that people earning only a few hundred dollars a week are ineligible for assistance, even though a trial can cost tens of thousands of dollars.*

- ✓ *Free interpreters were removed from the County and Supreme Courts in the 1990s.*
- ✓ *Increasing media reporting on trials and in the courtroom can unfairly influence jurors, preventing the parties from receiving a fair trial based on the evidence they present in court.*
- ✓ *The Supreme Court and the Broadmeadows Magistrate's Court have recently introduced compulsory mediation before most trials, but the decision reached is not binding. If one party fails to follow the agreement, the time taken in mediation is added to the time in court.*

Past changes may include:

- ✓ *The Magistrate's Court's civil jurisdiction was raised from $40,000 to $100,000. This means that simple claims can be heard in the Magistrate's Court, which is faster and cheaper, even if they are worth a fairly significant amount of money.*
- ✓ *The Supreme Court now refers almost all civil matters to compulsory mediation before, or in the early stages of, the trial. The Chief Justice said the challenge was to identify the "sweet spot" in proceedings when the parties might be able to compromise. This referral has reduced the number of cases going to trial by over 60%, meaning cheaper and faster access.*
- ✓ *The Supreme Court compulsory mediation program reduces access to judicial determination for people who would prefer to argue their cases at trial. At the least, it adds time and cost.*
- ✓ *The Family Court has had a number of inquisitorial elements brought into it, such as the judge taking a crucial and active role in the conduct of the proceedings, rather than the parties exercising complete control. Unrepresented parties will not be put at such a strong disadvantage, because they can speak to the judge one-on-one, and then the judge can make many decisions about the way the hearing proceeds.*
- ✓ *The Victorian Civil and Administrative Tribunal has been given increased jurisdiction, as it can resolve cases in as little as four weeks. This gives more people faster and cheaper access to justice.*
- ✓ *Directions hearings have been instituted in both civil and criminal proceedings. They set down an efficient timetable for trial and encourage out-of-court settlement where appropriate in a civil case.*

Future changes may include:

- ✓ *Free interpreters could be reintroduced in the County and Supreme Courts, as they were removed in the 1990s. A free interpreter recognises the right of all parties to understand their own legal proceedings, even if they do not have the money to engage one by themselves.*
- ✓ *Simple trials could be conducted on the basis of documentary evidence rather than requiring all evidence to come out through the oral examination of witnesses. This could result in faster and cheaper access to justice.*
- ✓ *The civil jurisdiction of the Magistrate's Court could be further increased to include matters that involve very large sums of money, but that concern very simple law and evidence. This would give more people cheaper and faster hearings.*
- ✓ *The Victorian Civil and Administrative Tribunal could broaden its use of 'VCAT Online' as a dispute resolution tool to include matters other than tenancy disputes. This would give people greater access to justice from their home or work.*
- ✓ *Committal hearings could be abolished, as they prolong the resolution of criminal disputes and the vast majority of cases easily pass the hearing anyway.*
- ✓ *The adversary judge could be allowed to take a more investigate role. This could be done by allowing them to ask their own questions of the witnesses and parties, using their experience to help parties ensure that all relevant matters of law and evidence are brought into court.*

Question 14
"Courts and the Victorian Civil and Administrative Tribunal are similar in that they employ the same range of dispute resolution methods, but the experience of resolving a legal issue can be very different depending on which venue is used."

Discuss the above statement, and comment on which you believe would be the preferred venue. In your answer, outline two methods of dispute resolution used by the courts and VCAT. 8 marks

Advice:

- ✓ The task word 'outline' requires more than simply naming the methods, but extensive detail is not required. Students lost marks in the 2009 and 2010 examinations because they said that tribunals were "quicker, cheaper and more informal" than courts, without providing any evidence or discussion for this.
- ✓ The 2010 VCAA Assessor's Report reminded students that, when asked in the question, they must provide a clear opinion or response: preferably at the start of their answer.
- ✓ The 2010 VCAA Assessor's Report also reminded students that extended answer questions do not need comprehensive introductions and conclusions, but they do need points to be arranged into logical paragraphs with topic sentences.
- ✓ A question in the 2010 exam that required students to compare two dispute resolution methods was answered poorly by some, as they failed to connect the two: show why and how they were different. Instead, students merely described each method. In this question, students must compare courts and VCAT to show how they are different; it is not sufficient to merely describe each venue.
- ✓ The methods of dispute resolution used by these venues are:
  - Judicial determination (used primarily in hearings and trials).
  - Mediation (used primarily before and outside hearings and trials).
  - Conciliation (used primarily before and outside hearings and trials).

1 mark An outline of one method of dispute resolution. Students must include by whom the decision is made.
1 mark An outline of a second method of dispute resolution. Students must include by whom the decision is made.

The following can be adjusted slightly depending on the answer, but this gives an approximate breakdown:

3 marks Similarities and differences of court resolution versus VCAT resolution.
3 marks Strengths and weaknesses of court resolution versus VCAT resolution.

Suggestions for Answers

- ✓ *Mediation is where a trained mediator supports parties, ensuring that each gets a chance to explain their power of view and keeps focused on solutions. Parties are encouraged to come to a non-binding (without a contract) agreement.*
- ✓ *Conciliation is where a conciliator manages discussion between parties and assists them to come to a fair agreement, which is non-binding (without a contract). Conciliators are generally experts in the area of the dispute, so can offer useful advice.*
- ✓ *Arbitration is where the parties agree on a third party to listen to and discuss both sides of the disputes in a relatively informal manner, and make an award that is binding on the parties.*

- ✓ *Judicial determination is a process in which parties explain their sides of the dispute to a third party, who asks questions or looks at evidence. The third party then makes a binding decision for them.*

Similarities between VCAT and court may include:

- ✓ *Both VCAT and court utilise judicial determination, where an independent third party makes a decision on behalf of the parties.*
- ✓ *The decisions made through judicial determination in each are binding on the parties.*
- ✓ *The decisions made through judicial determination in each can be appealed to a higher court if one party believes that an error has been made.*
- ✓ *The third party in each has legal training and/or experience, and conducts the hearing/trial in a way that gives each party natural justice and the right to argue their case.*
- ✓ *Hearings and trials both use an adversarial process of resolution, in which the parties argue against each other, and a win/lose outcome is sought.*
- ✓ *Both VCAT and courts use non-judicial methods of dispute resolution such as mediation and conciliation to encourage the parties to work together.*

Differences may include:

- ✓ *Parties have a limited right of appeal from VCAT decisions compared with court ones. VCAT decisions can only be appealed on a question/point of law.*
- ✓ *VCAT tends to be a cheaper process than court. There is a one-off filing fee that is generally lower than court, and fewer expert witnesses and barristers are used, for example.*
- ✓ *VCAT judicial determination uses a less adversarial process than court. There is less reliance on legal argument and cross-examination; the VCAT member may ask their own questions, and conversations can be held with witnesses.*
- ✓ *Court trial are frequently thought to be unjust if one party does not have legal representation (see the Dietrich case), whereas in VCAT barristers are frequently barred from representing parties.*
- ✓ *VCAT has more flexible rules of evidence and procedure than court does. Written evidence is more readily allowed, for example.*
- ✓ *Juries are used in the County and Supreme Courts to decide cases, whereas VCAT never uses juries.*

Comparative strengths and weaknesses could include:

- ✓ *Resolution through court is time-consuming, and so incidental costs such as childcare and time off work add up. VCAT conducts faster hearings, and some can be resolved over the Internet.*
- ✓ *Parties have a right of appeal from court decision, which can lengthen the time taken to reach a final resolution. VCAT hearings limit the right of appeal.*
- ✓ *The limited right of appeal from VCAT hearings may mean parties are less confident that justice has been achieved. Appeals are not limited from court decisions.*
- ✓ *A formal environment with wigs, gowns, raised platforms and special witness boxes can be very intimidating. VCAT hearings have a less formal environment.*
- ✓ *VCAT has one low filing fee to initiate a dispute, usually around $35, and then there are no further fees to pay. This contrasts with courts, which have filing fees that are much higher – starting from over $100 in the Magistrate's Court. Fees are also ongoing, and must be paid each time any document is filed.*
- ✓ *The use of barristers to represent parties is discouraged in VCAT, and is usually prohibited if the amount claimed is under $10 000. Barristers are strongly encouraged in all court hearings.*
- ✓ *If parties are prevented from using barristers to represent them in a VCAT hearing, they may feel unable to adequately present their case by themselves. They may not understand the law, or simply may not be confident. In court, parties can always be represented.*

- ✓ *The tribunal member takes a more active role in proceedings than a judge does, because they conduct proceedings, and can ask questions of parties and witnesses.*
- ✓ *Since the judge in court does not get involved they can ensure that both parties respect the rules, and that neither gains an unfair advantage. They also cannot be accused of bias or corruption in the way that a VCAT member could, if they took more control over the conduct of the case.*
- ✓ *VCAT hearings can be made more flexible in terms of location and time, to work around the lives of the parties. In some cases, hearings can even be conducted without the parties present.*
- ✓ *Rules of witness examination are flexible in VCAT. They can give evidence via written statements and can also make uninterrupted statements in the hearing. In court hearings all witnesses must generally be there in person, and they respond only to questions.*
- ✓ *The more flexible rules of evidence and procedure in VCAT can mean the experience is less stressful for parties and witnesses, and can see a wider range of evidence being brought into consideration than in court, which has very strict rules.*
- ✓ *The stricter rules of evidence and procedure in court than VCAT can ensure that only relevant and reliable evidence is taken into account, so the decision-maker is not swayed by anything unreliable or unfairly prejudicial.*
- ✓ *Matters resolved in court can be heard by jury, giving parties a trial by their peers. VCAT does not use juries.*
- ✓ *The third party in court is generally more qualified and experienced than the third party in VCAT. Judges and magistrates are trained in the law, while VCAT members often only have practical experience working in the area themselves.*
- ✓ *Unlike winning a case in the Victorian Civil and Administrative Tribunal, the winner in court usually has their costs awarded to them, which means the losing party has to pay them.*

Question 15

One of the primary ways in which judges make law is through their interpretation of statute. There are many reasons why they may need to do this, and the effect of it on the state of the law can be significant. Unfortunately, it is not their role to make law: this job should really be left to parliament, as it is the better law-maker.

Discuss the above statement, and the extent to which you agree. 10 marks

Advice:

- ✓ The 2010 VCAA Assessor's Report reminded students that 'parliament' and 'precedent' are legal words that are often misspelled.
- ✓ In the 2008 examination students were able to identify reasons for statutory interpretation, but were frequently unable to explain **why** they meant the judge would need to interpret the act.
- ✓ The 2010 VCAA Assessor's Report reminded students that, when asked in the question, they must provide a clear opinion or response: preferably at the start of their answer.
- ✓ The 2010 VCAA Assessor's Report also reminded students that extended answer questions do not need comprehensive introductions and conclusions, but they do need points to be arranged into logical paragraphs with topic sentences.
- ✓ 'Compound' questions like this should be carefully broken down by the student before they start writing. They should work out how many sections there are, and how many marks to allocate each section.

1 mark An outline of one reason for statutory interpretation.
1 mark An outline of a second reason for statutory interpretation. This is necessary, as the question refers to the plural "reasons".
1 mark An outline of one effect of statutory interpretation.

1 mark A second effect may be outlined, or the student may allocate this mark to the final section.

An opinion must be given as to what extent judges should be able to, or are able to, make law; versus how much should be "left to" parliament. This will often not receive marks by itself, however, as it must be supported by the arguments that follow.

6 marks Strength and weaknesses of courts as law-makers versus parliament as law-makers.

Suggestions for Answers

Reasons for statutory interpretation may include:

- ✓ *The wording was vague or general and needed a specific meaning to apply to the circumstances. For example, the word 'weapon' was too general in the Studded Belt Case, as it could have included anything that could be used as a weapon.*
- ✓ *The wording was ambiguous, with more than one possible meaning, and the judge needed to decide which meaning was the appropriate one. For example, 'boots must be worn' could equally mean that boots must be worn on the feet, or that boots must be weathered and old.*
- ✓ *The act did not refer to new forms of technology, and the judge needed to decide whether they ought to be included within the meaning of the act. For example, in Brislan's Case the High Court needed to decide whether the phrase "telegraphic, telephonic and other like services" included radio.*
- ✓ *A mistake had been made during the drafting of the act, making it unworkable or the outcome inappropriate, and the judge needed to interpret the act in order for it to work properly. For example, legislation that stated that allegations of sex offences being committed on someone with intellectual disabilities needed to be corroborated by an independent witness was impractical, as these offences were usually committed in private.*
- ✓ *Gaps may have been left in the legislation, so it was not clear whether a situation was included or not. For example, surrogacy legislation said that it was unlawful to advertise for a surrogate, but not whether a mother could ask friends or family to carry the baby.*
- ✓ *A word or phrase may have not been defined within the act, so the judge needed to decide which definition was most appropriate. For example, the word 'marriage' was not originally defined in the Marriage Act of 1961.*

Effects of statutory interpretation may include:

- ✓ *A more specific meaning may be given to words in the act so that they can be more easily applied to cases in the future.*
- ✓ *Ambiguity or lack of clarity may be cleared up for the public, so the community can feel more confident about what the law is.*
- ✓ *An interpretation that is too creative or conservative may influence parliament to pass amendments to the legislation, clarifying and possibly changing the meaning of the words.*
- ✓ *Precedent may be set on the meaning of the words, which all courts lower in the same hierarchy must follow any time they judge a case with similar material facts.*
- ✓ *Giving a more specific meaning to the words allows them to be applied to the facts of the case. This allows a verdict to be reached, as the actions can be seen as falling either inside or outside the meaning of the law.*

Students may outline the process of statutory interpretation. Such descriptions may include:

- ✓ *When a case comes before a court and the legislation is unclear, the judge will give a more specific meaning to the words in the statute. Better students will refer to methods such as the purposive approach, or to intrinsic and extrinsic materials.*
- ✓ *This meaning will form precedent for other courts to follow, and must be read together with the act in the future to determine the law in the area.*

Strengths and weaknesses of parliament may include:

- ✓ *Lawmakers in parliament are elected, therefore are accountable to the people for the law that they make; because of this accountability, however, parliament may make short-term decisions to attract votes, rather than making the best decisions for the long-term.*
- ✓ *Electing parliament means that laws are more likely to reflect majority values and needs, because each MP needs a majority in their electorate; this can lead to tyranny of the majority, however, and can mean that laws pander to majority interests rather than protecting those who need assistance.*
- ✓ *The passage of a bill involves debate and scrutiny, to ensure that flaws in proposed legislation are fixed; this debate can slow the process down, however, or alternatively can be cut short by the Government using its majority to 'guillotine' debate and push the bill through.*
- ✓ *Parliament is more accessible to the public through lobbying, interest groups, campaign funding, and making submissions to law reform bodies; this means that it has little independence, however, and can make law to please the interest groups that gave the party in power the most money, which may not be in the best interests of the community.*
- ✓ *Parliament can delegate the power to make laws to subordinate authorities such as local councils, who have more expertise and time to make specific, detailed and relevant laws; apart from local councils, many of these bodies are unelected, however, and parliament does not have the necessary time to review every regulation they make. This is undemocratic lawmaking.*
- ✓ *Lawmakers in parliament are elected, therefore are accountable to the people for the law that they make; because of this accountability, however, parliament may make short-term decisions to attract votes, rather than making the best decisions for the long-term.*
- ✓ *Electing parliament means that laws are more likely to reflect majority values and needs, because each MP needs a majority in their electorate; this can lead to tyranny of the majority, however, and can mean that laws pander to majority interests rather than protecting those who need assistance.*

Strengths and weaknesses of courts as law-makers may include:

- ✓ *Courts make law through their decisions on cases, therefore they must wait for an appropriate case to come before them before they can change the law. This means, however, that the common law will always be needed in society and relevant to something that actually happened.*
- ✓ *Judges usually recognise that it is not their role under the separation of powers to make law, and so prefer to leave large changes in the law to parliament. This means they are reluctant lawmakers, but it also means that they respect the separation of powers.*
- ✓ *Judges in courts lower than the High Court may frequently be bound by precedent, and so cannot make changes to legal principle. The doctrine of precedent, however, ensures that the common law remains consistent, fair and predictable.*
- ✓ *Reversing can only be done if parties have the time, money and grounds to appeal, and overruling can only be done by a higher court. The methods of departing from precedent do, however, ensure that judges have the flexibility to adapt the common law when society or cases change.*
- ✓ *Judges are unelected and therefore unaccountable for the law that they make. Courts do not bow to the whims of the majority, however. They can make law that protects the environment, minorities or future generations because they do not need to win elections.*

Arguments that compare the strengths and weaknesses of courts with the strengths and weaknesses of parliament may include:

- ✓ *Courts make law through hearing cases, so the law they make is specific to real-life situations. Parliament's on the other hand, can be vague and have gaps left in it.*

- ✓ *Courts can use their powers of statutory interpretation to make parliament's statutes more relevant and up-to-date: this creates a cooperative relationship between them, because courts stop legislation from needing constant amendment.*
- ✓ *Judges are unelected and hold security of their position, so they are not accountable for the law that they make. This means there is no way the people can make the courts respond to changes that are wanted by the majority. Parliament, on the other hand, is held accountable through regular elections.*
- ✓ *Courts can only make or change the law when a case comes before them; it must come before a superior court of record, or be an entirely novel case. This can take a long time. Parliament, meanwhile, can make law on any area within its jurisdiction whenever it feels that change is required.*
- ✓ *Parliament can legislate to confirm or abrogate the common law. For example, the precedent set in the Kevin and Jennifer Case was largely incorporated into the Marriage Act the year after, but the parliament did discuss overriding part of it. The courts can make precedent that best suits the circumstances of the case before them, but it is up to parliament whether that precedent will remain law.*
- ✓ *Courts can only set precedent when a case comes before them. This means that the law they make will always be relevant to real life situations. Parliament, on the other hand, makes law in future. It must therefore be broad and vague enough to hopefully cover a range of future circumstances, but have enough foresight not to leave too many gaps.*
- ✓ *Having to wait for an appropriate case to come before a court high enough to make or change precedent can take a long time, and the holes in the law may be exploited in the meantime. Parliament does not have to wait for a complaint to come before it, however; it can legislate to stop an emerging threat before it becomes a problem.*
- ✓ *The role of the judiciary is not to make law, so courts are often reluctant to make significant changes. This keeps the law consistent and predictable for the public. Parliament does not feel reluctant to change the law, however, which can mean great changes in legal expectations over a short period of time – especially when the party in power changes after an election.*
- ✓ *Parliament can be unwilling to make unpopular law, no matter how necessary it is. This is because the members of parliament want to keep the majority vote. Judges are not elected, however, so are free to displease the majority if it is for the greater or long term good of the people.*
- ✓ *Because members of parliament are elected, they are more likely to listen to what the people want, and can be held accountable at election-time for bad law. Judges have security of tenure, however, so cannot be held accountable as easily. They are also supposed to set precedent based solely on the case before them, and do not generally have recourse to things like opinion polls.*