COMMERCE PRESENTATIONS AND PUBLICATIONS

VCE LEGAL STUDIES 3/4

CPAP Practice Examination No 2 2016

SUGGESTED RESPONSES / ADVICE

Question 1
Outline <u>one</u> aim that is achieved by the sanction of imprisonment, and <u>one</u> aim that may not be achieved. 2 marks

Advice: In the 2014 Assessor's Report the Chief Assessor reminded students that the task word 'outline' requires more than simply one or two words – more than "simply stating or identifying something" – but that they should be able to succinctly outline the key information in one or two sentences. This applies to all further instances of the task word in this exam.

In 2015 the Chief Assessor reminded students that, if a specific number of responses is requested, their answers will be marked in the order in which they are given. In other words, the *first* ones will be marked: not the *best* ones. This applies to all other times a specific number of responses is requested in this exam, too.

1 mark The name of one aim and a brief description of it.

1 mark The name of a second aim and a brief description of it.

Note: The wording of the question does not require students to say anything about imprisonment. Technically students could receive full marks simply by outlining two aims. Better students will link these aims with imprisonment, however, and say why or why not imprisonment will be likely to achieve them. Teachers may choose to reserve full marks for these answers, and give 1 mark to answers that do not link to imprisonment. The VCAA examination may not have this requirement though.

The aims of sanctions given in the *Sentencing Act 1991* (Vic) are:

- Punishment,
- Rehabilitation.
- Denunciation.
- Deterrence (both specific and general).
- Protection.

Sample answers may include:

- ✓ *A term of imprisonment would punish the offender by making them suffer the hardship of being separated from friends and family.*

- ✓ *Imprisonment would protect the community because, for the time that the offender was locked away, they would be unable to harm it with further criminal acts.*

- ✓ *Imprisonment may not rehabilitate the offender because it is more negative in focus than helping them to reflect on their choices and start working for better things.*

- ✓ *Imprisonment has been shown to fail at specific deterrence because, at any given time, at least 50% of the jail population on average has been in jail before, so people are not sufficiently discouraged.*

Question 2
Using the Magistrate's Court and Supreme Court as examples, describe <u>two</u> reasons for arranging the courts into a vertical hierarchy. 4 marks

1 mark An outline of one reason for a vertical hierarchy. Merely naming it will not be enough.

1 mark One example or illustration from either court that demonstrates the reason.

2 marks Repeat for a second reason. Both courts must be used, each at some point in the answer.

Note: A flat hierarchy can also be referred to as a 'single-court system'. This does not mean, however, that all cases must go through a single court *room*. Arguments that delays would be rife with the use of only "one court" will likely be making this mistake.

Sample answers:

- ✓ *A vertical hierarchy allows a system of appeals to exist. If one party is dissatisfied with a decision made by a lower court, they can ask a higher court to scrutinise the decision and hopefully correct any mistakes. For instance, the Supreme Court Trial Division can hear appeals from the Magistrate's Court if one party believes the law has been interpreted or applied incorrectly.*

- ✓ *A vertical hierarchy allows for greater specialisation, allowing courts to develop expertise and be more efficient. Lower courts like the Magistrate's Court can develop expertise in small cases such as summary offences or civil claims with simple law and less than $100k in damages at stake, thereby processing them more quickly and avoiding delays.*

- ✓ *A vertical hierarchy allows for greater speed and efficiency because resources and timetables are allocated to courts based on what the cases they hear require. More serious cases can be timetabled across weeks or even months in the Supreme Court, allowing witnesses to be properly examined, whereas the Magistrate's Court hears hundreds more cases on a 'list' system.*

- ✓ *A vertical 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. For instance, the decision regarding the meaning of 'weapon' made in the Supreme Court in the Studded Belt Case is binding on the County and Magistrate's Courts.*

Question 3
Answer the questions below, in relation to the following hypothetical scenario:

The High Court is hearing an appeal where a woman has been found guilty of murder because she robbed a store with her friend, and during the robbery her friend killed someone. Her lawyer argues that the relevant common law (which says someone is guilty of murder in these situations) has just been overruled in the United Kingdom, and that we should also overrule it in Australia. The High Court criticises the common law, but chooses to apply it and affirms the conviction. A majority of the justices say in the judgment that the common law has been in Australia for decades, and that it is parliament's job to override it now. They do say, however, that they might reconsider their ruling if a case came before them that showed the law had led to a serious injustice – even though in this case it had not.

a. Is the precedent argued by the appellant's lawyer binding or persuasive on the High Court? Give a reason for your answer. 2 marks

1 mark Persuasive.

1 mark It is from a different court hierarchy.

Note: Students could argue that the High Court isn't bound by any precedent. This would also be correct – unless students suggest that the precedent argued *would* be binding in Australia if it were not for the superior status of the High Court.

b. The scenario says, "The High Court criticises the common law[…]." What name is given to this act by judges? 1 mark

1 mark Disapproving.

c. Define the term 'ratio decidendi'. What part of the above scenario would be regarded as the obiter dicta? 2 marks

Advice: In 2015 the task word 'define' was used for the first time in many years. Its meaning should be taken as being similar to 'outline'.

1 mark The reasons or rationale for the decision.

1 mark The statements regarding when they might reconsider their ruling. This may be quoted or paraphrased by the student, but must be clearly identified. If too much is quoted or paraphrased, there might be some confusion over whether they know the part that is *obiter*, or whether they are merely scattergun quoting.

d. Explain what the impact on the law would be if the High Court agreed to overrule the common law. 2 marks

1 mark The law (the common law principle regarding liability for murder) would cease to be valid in Australia. Students should not use the word 'abrogate' here, but may use override or extinguish or similar.

1 mark Additional explanation or detail.

Additional explanation or detail may include:

- *The law will be treated as though it never existed (invalidated ab initio), and the verdicts in many previous cases will be cast into doubt.*

- *The appellant will probably win their appeal.*
- *A new common law rule may be created in its place.*

e. Apart from the relationship referred to in the scenario, describe <u>one</u> other feature of the relationship between the courts and parliament as law-makers. 3 marks

1 mark An identification of a feature.

1 mark Detail on its operation.

1 mark Further detail or an example to illustrate.

Aspects of the relationship between courts and parliament may include:

- ✓ *Parliament can legislate to confirm the common law. For example, the negligence precedent of one's 'legal neighbour' set in the Donoghue v Stevenson case was confirmed in statute years later. This enables parliament to see how the law evolves in society before codifying it; after they have, the courts are unable to overrule or otherwise invalidate the law.*
- ✓ *Parliament passes acts to establish courts and give them jurisdiction. Without jurisdiction, the courts would not have the power to hear cases and make law in their own right. For example, the Constitution was passed by the UK Parliament, and gives the High Court the power to hear constitutional cases; this is why the High Court can set precedent on the Constitution.*
- ✓ *The High Court can declare any legislation invalid if it infringes rights contained in the Constitution, or if the parliament making it has acted outside its powers under the division of powers. For example, the High Court invalidated the Commonwealth laws prohibiting political advertising before a federal election in the ACTV case. The parliament had passed the law, but the courts were able to change the status of the law by deciding what was ultra vires the legitimate power held by the parliament.*

f. Analyse <u>one</u> strength of the courts as law-makers that might apply to the above scenario. 4 marks

Advice: The task phrase 'analyse' is an evaluative direction. Every year, including in 2015, the Chief Assessor reminds students that evaluating something means to provide an opinion, and examine reasons for and against that opinion: "consider both strengths and weaknesses, and come to an overall and well-informed conclusion." (2015) Here, it is a consideration of the strength, and whether that strength is outweighed by any weaknesses.

Students do not usually receive a mark for their opinion, but they cannot receive full marks without it. The marks come more from the arguments made in relation to that opinion.

1 mark An identification of one strength.

1 mark An identification of one weakness that relates to, or counterbalances, that strength.

2 marks Further detail on the strength and/or the weakness; further weaknesses that relate to the one strength; and/or examples to illustrate.

Note: The strength must conceivably be able to relate to the scenario. Better students will make this relationship clear, and this may make it easier for them to receive full marks.

Sample answers:

- ✓ *The courts value their independence and believe in the separation of powers. This protects the integrity of the courts by preventing them from becoming too political. They stay a neutral body, one with a focus on protecting the people against the power of the parliament and government and strengthening laws such as implied rights that parliament may not always respect.*

  However, courts therefore feel that it is parliament's role to make the law: not their role as courts. This is what has happened here. Sometimes this means they will not change the law, even when it is deemed necessary. For example, in Trigwell when Murphy J dissented, but rest of the High Court upheld the existing, persuasive common law that farmers were not responsible for harm caused by their straying animals. This conservative view led to outdated and inappropriate law that many people did not want, but it is uncommon for this to happen, so overall the courts shouldn't feel as reluctant as they do.

- ✓ *Courts make law free from political pressures because they are appointed rather than elected, and are therefore independent; they do not fear voter backlash as parliament does. Courts can therefore change the law on controversial issues objectively – issues that parliaments may avoid due to political pressure. For example, the High Court's recognition of native title in Mabo and the Victorian courts' development of Victoria's abortion laws before 2008. Both of these were controversial, and therefore less likely to be acted on quickly by parliament. The law relating to accessory murder convictions is already settled, so parliament may feel it is too controversial to change it; the courts may be needed here.*

  However, this may result in laws that are not consistent with society's values, and they may not be accepted or followed by the community. Consider, for example, the obiter dicta of Justice Dawson in Mabo regarding it being the place of the elected parliament to change and create law because MPs are the representatives of the people. Courts are older and fairer law-makers than parliament, however, so should feel free to do it more often.

- ✓ *Because judges are unelected and have independence of the judiciary and security of tenure, this means that courts are free from the short-term prejudices of the majority. They can therefore make decisions in favour of minority interests, and protect vulnerable groups such as children, future generations, asylum seekers and the environment. It may not be popular to do something that people can see as allowing 'murderers' to go free, but if it is in the interests of justice the courts have the ability to protect this unpopular minority.*

  However, this security of tenure means judges are not easily accountable for their actions, and cannot be made directly responsible for them by the people if they make a decision not in line with community values. The only accountability process is a time-consuming and expensive appeals process. Parliament is elected, so therefore can be made accountable for its decisions at the next election. It is more important to guard against tyranny of the majority, however, so courts should feel free to change law to protect minorities.

- ✓ *The independence of the judiciary means judges are impartial to the two parties so are never stakeholders. Independence allows judges to balance many competing interests and, because they are independent of all of them, decide what is most fair and appropriate for all parties. Judges are not beholden to just one interest group, like political parties can be. The decision in this case was made on the balance of justice and not because of interest groups.*

  This independence results in some inaccessibility, however. Individuals and groups have little ability to become involved in the law-making of courts. Courts do not hear petitions from parties not involved with the case, and ordinary citizens cannot become judges without extensive qualifications and experience. Individuals and groups have more of an ability to be

involved in law-making by parliament. It is perhaps overall more damaging to have a court that is out-of-touch, and this outweighs their independence.

Question 4
A trial is due to commence in the Supreme Court (Trial Division). Alex is suing Kris for defamation after Kris made a number of racist statements online. Explain <u>one</u> factor that might influence the composition of the jury. 2 marks

1 mark An outline of one factor. If there is an accepted name or label for this factor (such as 'peremptory challenge'), this must be given. The name by itself will not be sufficient, however.

1 mark Further detail on either the factor or the purpose of it, or an example to illustrate.

Sample 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 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.*

Other factors, written without the required detail, include:

- ✓ *Whether either party requests a jury.*

- ✓ *Whether someone is on the electoral roll.*

- ✓ *Whether someone has recently served on a jury and isn't eligible again yet.*

- ✓ *Whether someone's name is chosen randomly from the roll.*

- ✓ *Whether someone has a right to be excused from service.*

- ✓ *Whether someone asks to be excused from service.*

- ✓ *Whether someone asks the judge to be excused once they have been give details about the case.*

Question 5
Compare the roles played by the upper house in parliament with the roles played by the lower house. 6 marks

Advice: The task word 'compare' requires at least one similarity and at least one difference. The request to explain similarities and differences means to demonstrate the connections between two things. This means that the similarities and differences do not count if they are merely implied or suggested by two independent definitions. The connection must be made express.

In 2013 and 2012 a number of questions required comparisons and students lost marks if they did not make the similarities and differences clear. The Chief Assessor has said that marks will not be awarded for definitions or descriptions that are not connected, and where the examiners have to work out the similarities and differences themselves.

This advice should also be applied to other questions in this examination that require similarities and/or differences.

1 mark An identification of one similarity between the roles.

1 mark An identification of one difference between the roles.

4 marks The remainder of the answer should be marked globally, balancing the number of arguments made against the quality and detail of them. Students cannot receive full marks without giving at least one more argument and without covering the 'main' roles of each house somewhere in the answer. The 'main' roles of the upper house are considered to be the States' house (assuming federal parliament), and the house of review; the 'main' roles of the lower house are considered to be introducing new bills (*or* democratically representing the interests of the majority of people), and forming government. It would be difficult to achieve full marks without these.

Similarities include:

- ✓ *Both houses debate proposed legislation.*
- ✓ *Both houses are elected and represent the people.*
- ✓ *Both houses can introduce new bills.*
- ✓ *Both houses participate in responsible government and holding the government accountable.*
- ✓ *Both houses can amend proposed legislation.*

Differences include:

- ✓ *Most bills are introduced in the lower house, whereas the upper house generally considers them second. The upper house reviews and scrutinises bills introduced in the lower house.*
- ✓ *The lower house can engage in less review and debate than the upper house. The upper house can amend bills passed by the government party in the lower house – particularly as the upper house is often controlled by minor parties and has a more active committee system.*
- ✓ *The lower house can initiate and amend money bills, while the upper house cannot. The upper house cannot amend money bills passed by the lower house, but can reject them until the lower house makes amendments.*

- ✓ *The lower house is always controlled by the government party because it is the seat of government, whereas the upper house does not necessarily have a government majority.*

- ✓ *The lower house is the "people's house" because of its democratic 'one vote one value' electoral system, whereas the upper house is less democratic due to each state having equal numbers of representatives.*

- ✓ *The lower house has the responsibility of determining government and the ability to change government between elections, whereas the upper house does not. The upper house has no say in which party forms government, and the only thing it can do to change government is to reject the budget (or other important bills) and perhaps trigger a dismissal or double dissolution.*

Question 6
Explain <u>one</u> difference and <u>one</u> similarity between the way in which Australia tries to protect constitutional rights and the approach taken by one other jurisdiction.

You may choose one of the following countries for your comparison: Canada; New Zealand; South Africa; or the United States of America. 4 marks

1 mark An outline of one similarity between Australia and the chosen jurisdiction.

1 mark A small amount of detail on the operation in each country OR an example to illustrate.

1 mark An outline of one difference between Australia and the chosen jurisdiction.

1 mark A small amount of detail on the operation in each country OR an example to illustrate.

Note: Any points focusing on individual rights rather than broad approaches should not receive marks.

Sample similarities include, depending on the country chosen for comparison:

- ✓ *Canada's rights are enforceable by the Supreme Court of Canada, the same as Australia's rights are enforceable by the High Court. This means that the courts can declare legislation invalid or suspended when it has infringed a protected right.*

- ✓ *Both constitutions, in Australia and Canada, contain express rights that are entrenched in their wording, meaning the rights can only be removed or amended by changing the Constitution. Their rights are not contained in statutory bills of rights.*

- ✓ *Rights protection in New Zealand only applies vertically; in other words, the rights protect people from the power of government, but not from the power of other citizens. This is the same as Australia. In Australia, the constitutional rights only protect the people from the power of the government, and not from other individuals or companies.*

- ✓ *South Africa's rights protect people from the government policy as well as legislation. Australia's constitutional rights also apply to the application of policy, and cannot be infringed by the executive either. This is a similarity, because in both countries the rights protect the people from the executive government and government departments as well as the parliament.*

- ✓ *Rights are entrenched in the constitutions of both South Africa and Australia. In other words, the national parliament cannot change or remove rights whenever it wants, simply by passing a normal bill. There is a special process set out, which is intended to make the rights more difficult to change or remove.*

- ✓ *The South African Constitutional Court can declare laws unconstitutional if they infringe rights, and parliament must comply with this decision: in other words, the rights are fully enforceable, the same as they are in Australia. It is a similarity because in neither country can the parliament ignore or overrule the decision of the court.*

- ✓ *The United States of America has an entrenched bill of rights in its constitution; Australia has five express rights entrenched in its constitution. In both countries the rights are constitutionally entrenched. This means that the rights cannot be changed or removed by parliament acting alone: the people must vote as well, making the rights specially protected by a democratic process.*

- ✓ *The United States and Australia are similar because both allow protection through implied rights. Both constitutions have an implied right found and recognised by the highest court (although they are different rights), the High Court in Australia and the Supreme Court in the USA.*

- ✓ *Canada's rights are fully enforceable by the Supreme Court of Canada; Australia's rights are fully enforceable by the High Court. This means that the parliament cannot override the court's decision if the court finds that legislation has infringed protected rights.*

Sample differences include:

- ✓ *New Zealand has a statutory bill of rights, whereas Australia has five express rights entrenched in its constitution. This means that Australia's rights cannot be changed or removed by the parliament acting alone (a referendum is required), whereas New Zealand's rights can be changed by the parliament passing a normal bill.*

- ✓ *New Zealand's rights are not fully enforceable, and courts cannot invalidate legislation that infringes them, whereas Australia's rights are fully enforceable. Australia's constitutional rights are fully enforceable by the High Court and the High Court can invalidate any legislation that infringes them. Parliament cannot ignore or overrule that finding.*

- ✓ *All New Zealand courts must interpret statutes in a manner that is consistent with the rights contained in the BORA. In Australia the situation is different, as only the High Court is concerned with constitutional matters and the Court only refers to constitutional rights when constitutional arguments are made in a case before it.*

- ✓ *The United States of America has an entrenched bill of rights in its constitution, which takes the form of ten amendments added, whereas Australia has five express rights entrenched in its constitution that are not organised into a bill of rights. Instead, Australia's rights are scattered throughout the constitution. This makes them more difficult to locate than America's, which are organised into a list.*

- ✓ *Australia and Canada take different approaches in terms of advisory opinions. The Supreme Court of Canada can issue an 'advisory opinion' on whether a particular law or action would infringe the Charter of Rights if it were done, and this opinion can be given without an actual case being taken to court. An example is if a state proposed a bill to legalise gay marriage. The Australian High Court could not give advisory opinions; the legal action must be taken in relation to an act or executive policy that has been made into law, and then the matter must be challenged by a party with standing.*

- ✓ *Australia and Canada differ in terms of the full enforceability of rights. The Canadian Parliament can validly pass laws that breach express rights, even after the Canadian Supreme Court has declared that the law breaches rights in the Charter, because there is a constitutional clause allowing this. The Australian Parliament, on the other hand, cannot ever*

enact legislation that breaches constitutional rights once the High Court has found that the law does so.

- ✓ *Australia and South Africa differ in the existence of horizontal protection of rights. In South Africa the constitutional rights apply both vertically and horizontally. In other words, they protect South Africans from the power of the government as well as from the power of individuals and companies. In Australia, constitutional rights only apply vertically: they only protect people from the power of government, and not from other individuals or companies.*

- ✓ *The South African Constitutional Court can award damages at the conclusion of a constitutional rights case to compensate the plaintiff for the infringement of their rights. This differs from Australia, as the Australian High Court does not have the power to award damages in a rights case: it may only declare the law valid or invalid.*

- ✓ *Some rights in South Africa are able to be limited by an act of parliament, either in a state of emergency or where parliament can show the infringement is necessary for some greater purpose, for example. This is not possible in the Australian system, as we have no 'limitations clause'. Constitutional rights in Australia must always be protected to the full extent of the definition given to them by the High Court.*

Question 7
Outline the role of the Victorian Law Reform Commission and discuss <u>two</u> weaknesses of its function or performance. 6 marks

1 mark Ways in which the VLRC will investigate an issue and gauge the views of the public must be included. Examples are conducting opinion polls and receiving submissions from members of the public.

1 mark That the VLRC reports back to the government, who can table the recommendations in parliament. Answers must reflect this feature of recommendations being made to parliament: the VLRC cannot change the law itself.

1 mark An explanation of one weakness.

1 mark An explanation of a second weakness.

2 marks 'Discussion' in relation to these weaknesses. This may take the form of balancing the weaknesses against corresponding strengths, illustrating with examples, and/or reflecting on why and how these aspects are negative. In order to meet the task word, this component must have a flavour of opinion and argument.

Sample discussions, leaving off the final opinion (as that is open to the student):

- ✓ *The VLRC investigative processes are much more time-consuming than the average protest, petition or media report. The average report takes between 6 and 24 months to complete, with many taking longer – for example, the report into IVF was produced after four years research and consultation. This longer and more detailed process does give the organisation more opportunity to consider a proposed law in detail, however; it does not make reflexive decisions as some protesters might do.*

- ✓ *The public does not contribute any money to the running of the VLRC, nor does private business. This keeps it independent, but it does mean that its expensive work must all be paid for out of its annual government funding; this limits the number of issues it can address. If the VLRC was willing to take money from private interests, it might be able to investigate a far greater number of matters. It is difficult, though, to know when an organisation is influenced by people who control its funding.*

- ✓ *The VLRC does not have the power to make any changes itself. This means that years of time and tens of thousands of dollars can be spent on comprehensive investigation and reporting, and parliament may shelve or discard the findings. For example, the report into jury directions took the VLRC two years to prepare, however instead of acting on it the government sent the issue to the Department of Justice for a further three years. Rather than being a weakness of the VLRC, this is possibly more a weakness of the government – its willingness sometimes to waste time and money because it is marketing itself and its policy in a particular way.*

- ✓ *The public have limited access to the VLRC and may not feel as though it gives them a big enough role to play in the democratic system. The VLRC will call for submissions, however submissions will be summarised and grouped together in most cases in the final report. Also, the public cannot demand that the VLRC research an issue simply because it is a matter of community concern. They can, however, ask the VLRC to consider smaller community matters of concern, and the VLRC sometimes looks into more of these than matters referred by the attorney-general.*

Question 8
The courts are still the most important institution for the resolution of legal disputes.

a. Explain <u>two</u> weaknesses of civil and/or criminal pre-trial procedures, using detail from one or more procedures to illustrate your answer. 4 marks

1 mark An outline of one weakness. This may be highly specific, relating to the detail of one procedure, or quite general – for instance, cost, time, complexity or formality.

1 mark Detail from one or more procedures in illustration.

2 marks Repeat for a second weakness.

Note: The weakness itself must be clear. If a student starts with the procedure, then rattles off a list of weaknesses (perhaps including all of cost, time, complexity and formality), this will not have answered the wording of the question.

***Sample answers**, demonstrating the way in which general weaknesses can be made more specific through the use of details on procedures:*

- ✓ *Procedures aim to save time, but can fail to be effective at this. Parties are encouraged to agree on as many issues as possible during pleadings, but cooperation is limited in a practical sense, as parties are exchanging documents drafted by their lawyers rather than sitting down and working through their differences.*

- ✓ *Procedures aim to save time, but can fail to be effective at this. Parties are encouraged to plead guilty at the committal hearing, because they are shown the strength of the prosecution's case against them, but this can sometimes be used as an opportunity to learn where the holes in the case are so the defendant can prepare a more thorough counter-attack. The focus is not on working towards a mutual agreement, unless the prosecutor is willing to plea bargain.*

- ✓ *Procedures aim to save time, but can fail to be effective at this. Parties are encouraged to plead guilty at the committal hearing, because they are shown the strength of the prosecution's case against them, but the act of showing this evidence can in itself take weeks – for instance, the Snowtown murders committal was longer than many trials.*

- ✓ *Procedures aim to reduce costs by using non-judicial methods where possible, for instance, but the costs that cannot be avoided still run to the tens of thousands (or more) for the average mid-range or small dispute. Every document filed with the court attracts a filing fee that must be paid, for example, and will usually be drafted by a solicitor who is paid hundreds of dollars an hour.*

- ✓ *Procedures aim to reduce costs by helping parties to prepare as thoroughly as possible before trial starts, and encouraging agreement – any fact that the opposing party is willing to admit to does not have to be proved with evidence at trial. Discovery helps with this by showing each side the evidence the other side has against them. Some parties (usually wealthier defendants) can deliberately increase costs by requesting every piece of evidence, though – even evidence they already have. Courts only have limited powers to stop this.*

- ✓ *Procedures aim to reduce cost and time by clarifying any issues with evidence before the start of trial – in both criminal and civil cases this can be done through the directions hearings – but they can still create significant costs. Strict rules of evidence apply so that parties cannot use evidence that is tainted: evidence that is irrelevant to the dispute, unreliable or illegally obtained. The rules regarding evidence and the drafting of court documents are very complicated, however. They are confusing for parties and require expensive lawyers to navigate.*

b. To what extent do strengths of the courts, as avenues for the resolution of disputes, overcome or balance these weaknesses? 4 marks

1 mark An identification of one strength.

1 mark An identification of at least one more strength, as the question is worded in the plural.

2 marks Effectively using detail about those strengths to relate them to whichever weaknesses were identified in the previous question. This means that a failure to relate the strengths back can result in a maximum of 2 out of 4 marks.

Note: The strengths will need to relate to the chosen weaknesses, so it is impossible to canvas all options here. Below are a number of examples of how aspects of the legal system can be related to common 'general' weaknesses, however there are many more – and each aspect can be argued in relation to multiple points (eg an argument for time can easily be adapted to suit cost, and often formality, as well).

Students who chose very specific weaknesses may possibly find this section more difficult to answer. This is why planning ahead is important.

Strengths that could be argued in relation to 'time' as a weakness include:

- ✓ *A court hierarchy. Using a vertical hierarchy allows simple cases to be heard more quickly in lower courts such as the Magistrate's Court.*

- ✓ *The use of tribunals – specifically, VCAT. The establishment and ever-increasing jurisdiction of VCAT allows appropriate civil cases to be heard in the most time-efficient manner possible – and it still results in a binding outcome.*

- ✓ *Pre-trial procedures. The use, in higher courts, of compulsory pre-trial procedures such as directions hearings and often-compulsory mediation aim to reduce overall resolution time. The ways in which procedures save time may rebut criticisms of them costing time.*

- ✓ *Judicial case management. Judicial supervision of timelines and the preparation for cases is being increasingly used in higher courts.*

- ✓ *Strict rules of procedure. Consistent and rigid trial procedures aim to encourage a thorough and fair examination of evidence, not rushed – but also without significant delays.*

Strengths that could be argued in relation to 'cost' as a weakness include:

- ✓ *A hierarchy of courts. Parties have access to experts in the area under dispute, and can more cheaply go to lower courts for less serious matters.*

- ✓ *The use of tribunals – specifically, VCAT. The establishment and ever-increasing jurisdiction of VCAT allows appropriate civil cases to be heard with lower filing fees than all courts and often without expensive barristers.*

- ✓ *The opening of the Neighbourhood Justice Centres. The NJCs aim to improve the justice system by addressing social disadvantage and improving access to justice services.*

- ✓ *The increased usage of non-judicial methods of dispute resolution. These are often quicker and cheaper than judicial methods, and also are less complicated and intimidating for parties.*

Question 9
Outline the role of the Victorian Civil and Administrative Tribunal, and explain the differences between the methods of dispute resolution used by it to resolve legal matters. 6 marks

1 mark An outline of VCAT's role in hearing generally smaller and less complex civil disputes.

1 marks Further detail about VCAT's role or operation.

1 mark Material on mediation that differentiates it from the others.

1 mark Material on conciliation that differentiates it from the others.

1 mark Material on arbitration that differentiates it from the others.

1 mark Material on judicial determination that differentiates it from the others.

Note: Methods of dispute resolution listed in the Study Design are judicial determination, arbitration, conciliation and mediation. These are different from the avenues – locations – of VCAT and courts. Students frequently become confused over the difference between methods and avenues, but each of the four methods is used in VCAT. The Chief Assessor pointed out this common misconception most recently in 2015.

Additional information that could be used on VCAT's role includes:

- ✓ *VCAT makes significant use of non-adversarial methods of dispute resolution, such as mediation and conciliation. Its primary method of arbitration is also less adversarial than traditional court hearings.*

- ✓ *VCAT decisions are binding, in that they can be enforced by the Magistrate's Court.*

- ✓ *VCAT's structure includes a president, who is a Supreme Court justice; vice-presidents, who are County Court judges; and senior and ordinary members, who are generally specialists in their field rather than lawyers.*

- ✓ *VCAT hearings use arbitration as a method, when the hearings are conducted by the senior or ordinary members, and they use judicial determination when the hearings are conducted by the president or one of the vice-presidents.*

- ✓ *VCAT can hear some reviews to its own decisions internally, however appeals generally go to the Supreme Court or Court of Appeal.*

- ✓ *VCAT usually does not provide extensive written reasons for its decisions, as this speeds up resolution.*

Differences that may be outlined for the methods include:

- ✓ *Arbitration is inquisitorial in nature, whereas judicial determination is adversarial. Mediation and conciliation are different from both, in that they are cooperative.*

- ✓ *Arbitration and judicial determination both involve the third party making the final decision on behalf of the parties, whereas mediation and conciliation involve the parties arriving at their own agreement.*

- ✓ *Arbitration and judicial determination are both automatically binding, whereas mediation and conciliation need their agreements ratified, or drawn up into a deed of settlement, to be legally binding.*

- ✓ *Judicial determination can almost always be appealed, whereas that is not true with the others. There is limited appeal from arbitration hearings conducted in VCAT, and generally no appeal from arbitration through courts; mediation and conciliation are not able to be appealed.*

- ✓ *Mediation and judicial determination have the least participatory third parties; the third parties in conciliation and arbitration are more actively involved in the discussion and dispute resolution.*

Question 10
Protecting the integrity of the Constitution through public referenda is the most effective way to allocate powers between parliaments and protect the rights of the people.

To what extent do you agree? Illustrate your answer with one instance in which referenda was used to alter the Constitution. 8 marks

Advice: The 2010 VCAA Assessor's Report 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.

1 mark An outline of one referendum change to the Constitution. This change must be linked with a least one argument or point made in the answer (see the task word 'illustrate'), however it does not need to have altered the division of powers, as this is not required by the wording of the question.

1-2 marks Up to 2 additional marks may be awarded for an excellent case example that is used well to illustrate arguments, however 3 marks total is the maximum that can be allowed, given the example is only an illustration.

Alternatively, these additional 1-2 marks can be allocated to the evaluative discussion component of the answer.

1 mark One argument in favour of referenda.

1 mark One argument in criticism of referenda.

3 marks These marks should be awarded globally for overall quality, based on the number of arguments made combined with the quality and detail of those arguments. Further examples may be used to illustrate arguments, and arguments may relate individually to allocating power between parliaments and protecting rights, or to both generally at the same time.

Note: A summary of the above mark allocation is as follows: 1 mark for the case example and 7 marks for the discussion; or 2 marks case and 6 marks discussion; or 3 marks case and 5 marks discussion.

Case examples include the following *– although they have not been linked to specific arguments:*

- ✓ *The 1967 Aboriginal Advancement referendum allowed the Commonwealth to legislate specifically regarding Aborigines by deleting the phrase "other than the Aboriginal race" in the s51 power to make laws regarding "the people of any race, other than the Aboriginal race". The original wording of the Constitution made Aboriginal people a restriction on the Commonwealth and thus a residual power. The referendum change made it a concurrent power instead.*

- ✓ *The Social Services referendum changed the division of power by giving additional specific powers to the Commonwealth. The 1946 amendment increased Commonwealth law-making power by inserting new words into the Constitution. The referendum inserted s51(xxiiiA), an additional item into the heads of specific power, giving the Commonwealth the power to make laws with respect to a range of welfare payments such as widows' pensions and unemployment benefits.*

- ✓ *In 1910 a referendum was held to give the Commonwealth the power to take over any debts held by the States, so the Commonwealth could repay them instead of the State governments. Prior to 1910 the Commonwealth could only take on State debts that existed before federation. In theory this increased the power of the Commonwealth (ie to pay off money owed by the states), but in practice it didn't have a marked effect on the ability of the states to legislate or govern their populations. It did not affect the balance between specific and residual powers.*

- ✓ *In 1977 a proposal was put to have federal judges retire at the age of 70. There was no significant public confusion and the proposal succeeded.*

Arguments in favour *may include points such as the following:*

- ✓ *A referendum is the main example of direct democracy in the country, because it gets most people involved and voting on how powers should be divided between our parliaments. The governance of the country is not simply left to elected representatives.*

- ✓ *A referendum forces people in the country to find out about certain fundamental legal issues, instead of simply letting parliament decide for us. This contributes to public education and hopefully encourages the community to care more about important legal issues, such as Aboriginal rights and the protection of political freedom such as communist beliefs.*

- ✓ *The double majority requirement means that the change in parliamentary powers must not only be acceptable to the majority of voters, but it must also not unfairly advantage larger States at the expense of smaller ones.*

- ✓ *Referenda ensure that the government stays 'by the people' (even though that is a phrase from the American political tradition!) and stops the parliament from taking away or limiting our rights without our consent.*

Arguments against *referenda may include:*

- ✓ *Bipartisan agreement is usually necessary for the success of referenda because so many people need to vote in favour of them from both sides of politics in order to achieve the difficult double majority, but parties can be reluctant to cooperate with each other.*

- ✓ *Because of the double majority, smaller States can stand in the way of changes that the majority of Australian voters are in favour of. This occurred, for instance, in 1937 when the proposal to give the Commonwealth the power over aircraft received a nationwide majority and a majority in Victoria and Queensland, but failed significantly in South Australia and Tasmania.*

- ✓ *Many people don't understand referendum proposals, so will vote 'no' as a reflex to the confusion rather than because they truly disagree with the change. This can cause important changes to fail, because the decision is not being made by people with good legal knowledge or an understanding of the Constitution.*

- ✓ *The fact that the public relies on advertising and pamphlets to educate them about the issue gives pressure groups more of an ability to sway people through sensationalist advertising. This occurred, for example, in 1937 when the proposal to give the Commonwealth power over aircraft failed because of a negative marketing campaign that threatened the ruination of State railway systems and an increase in the price of food. In 1988 it was advertised that including human rights and freedoms in the Constitution would allow corporal punishment in schools to be protected by the Constitution.*

- ✓ *The State parliaments get less say in which powers they want to retain and which powers they are willing to give up. Referenda are not as cooperative as the referral of powers.*

Question 11
In recent years Australia has moved closer to the inquisitorial system of trial in many of its courts and procedures.

Compare the operation of the traditional adversary system of trial with the inquisitorial system, and critically examine which system might be likely to achieve a more effective system of dispute resolution. 10 marks

Advice: The task phrase 'critically examine' has not been used since 2010, but at the time students were reminded that it is an evaluative direction. Every year, including in 2015, the Chief Assessor reminds students that evaluating something means to provide an opinion, and examine reasons for and against that opinion: "consider both strengths and weaknesses, and come to an overall and well-informed conclusion." (2015)

Students do not usually receive a mark for their opinion, but they cannot receive full marks without it. The marks come more from the arguments made in relation to that opinion.

The 2010 VCAA Assessor's Report 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.

In 2013 the Chief Assessor commented that students were still using the jury as one feature of the adversary system, when it is not. Any answers on the jury in relation to the adversary system receive zero marks.

4 marks Similarities and differences between the systems – students may focus on differences, but there must be at least one similarity. At least three features must be addressed to some extent, but all five do not need to be.

4 marks Arguments in relation to the adversary system being more and less effective – both sides of the argument need to be addressed in some way.

2 marks These marks should be awarded globally, balancing the number of points made against the quality and detail of those points. Comparison and evaluative arguments can be mixed, or students may focus more on one than the other.

Note: This answer must have a clear opinion argued in order to receive full marks.

Features that may be chosen are:

- ✓ The role of the judge.
- ✓ The role of the parties.
- ✓ The rules of evidence and procedure.
- ✓ The burden and standard of proof.
- ✓ The role of legal representation.

It will often be appropriate for students to put comparison and evaluation together in logical paragraphs. ***Sample approaches*** *for doing this are as follows:*

- ✓ *Adversary parties take an active role in trial and are responsible for organising and presenting their evidence and legal submissions. This can be very stressful and too difficult for many parties to do effectively. The inquisitorial system gives a less active role to parties, which reduces the stress, time and expense of trial for them. Parties mainly assist the investigating and trial judges.*

- ✓ *The adversary judge's impartiality and lack of bias protects the public perception of the court and the respect they have for its decisions. The judge is not personally involved, so the verdict will be based on the strength of evidence and arguments rather than on personal prejudice. The adversary judge takes a passive role in trial, as they do not collect evidence, decide legal submissions or question witnesses. This means that their expertise is largely wasted, though, and they cannot assist unrepresented parties. In the inquisitorial system the judge takes a far more active role, which utilises their knowledge. The investigating judge is in charge of collecting evidence, and the trial judge will lead questioning and direct the parties as to the arguments they want to hear more regarding in court. This can help uncover the truth. On the other hand, inquisitorial judges lose some of their impartiality by becoming involved in the investigation and contest; or, at the very least, they may appear to be less impartial.*

- ✓ *Strict rules of evidence in the adversary system ensure that all evidence presented in court is relevant, reliable and legally obtained. Also, that each party has a fair and equal opportunity to present their case. This is natural justice, and one element of an effective legal system is the entitlement to a fair and unbiased hearing. The adversary rules of evidence and procedure are very complicated, however; witnesses must be examined orally and in person, and much evidence such as prior convictions is inadmissible. This means that witnesses can feel intimidated, and a complete picture of the facts may not emerge. In the inquisitorial system the flexible rules of evidence and procedure ensure that a complete picture emerges, but some evidence may be unfairly prejudicial to the defendant. The flexible inquisitorial rules mean that documentary evidence can give a one-sided and misleading picture of events, because the author cannot always be asked to explain statements or consider areas in which they might be mistaken. The judge is expected to weigh the relevance and reliability of the evidence presented, however. All relevant evidence can be taken into account, to get a fuller picture of events, because the rules on admissibility are not as strict.*

- ✓ *The adversary burden of proof is on the party bringing the action: the plaintiff or prosecution. They have a heavy burden to prove their case, as well: the prosecution must prove the claim beyond reasonable doubt, while the plaintiff must prove it on the balance of probabilities. This means that weak cases should not succeed, and it protects the presumption of innocence by not forcing the defendant to prove their innocence before evidence has been presented against them. The inquisitorial system also has a standard of proof in that the defendant is deemed innocent until significant evidence proves their guilt, but there is no formal burden of proof so they defendant may not feel as much benefit from the presumption of innocence. The defence's evidence and arguments will be examined before it has even been established that they did something wrong.*

- ✓ *In the adversary system parties give instructions to their lawyers, and so can feel like they are exercising control over their own case. Parties are also able to choose the lawyer they feel will best represent their interests. A qualified and experienced professional can put your case as efficiently and persuasively as possible. In the inquisitorial system, however, legal representation does not run the trial because parties do not control proceedings. Lawyers can only make requests of the judge and suggest avenues of exploration, but they do support the parties, explain proceedings to them and can make requests of the judge. They cannot exercise the same level of control in favour of their clients, however. In the adversary system lawyers control most aspects of the case, and are necessary to ensure that witnesses are found and examined correctly, and that all rules of evidence and procedure are followed. This means, however, that any party who cannot afford quality representation will be at a severe disadvantage.*