COMMERCE PRESENTATIONS AND PUBLICATIONS

VCE LEGAL STUDIES 3/4

CPAP Practice Examination No 4 2018

[2017 CPAP PRACTICE EXAMINATION NO. 2 BUT ADAPTED FOR 2018 STUDY DESIGN]

SUGGESTED RESPONSES / ADVICE

SECTION A

Question 1
Define what is meant by 'representative proceedings', also known as 'class actions'.
1 mark

1 mark A representative proceeding is a civil claim in which the party bringing the action belongs to a larger group of seven or more people, and litigates on behalf of the group.

Question 2
Rather than dividing one level of courts by area of law, Victoria has a vertical hierarchy.

a. Why could a system of appeals not operate effectively in a flat hierarchy of courts? Explain. 2 marks

Advice: In 2016, in relation to the question on reasons for a court hierarchy, the Chief Assessor said that, "To gain full marks, responses needed to refer back to the court hierarchy to demonstrate *how* that hierarchy enabled the existence of appeals [etc]." [emphasis added]

1 mark An understanding of appeals as having a decision or part of a decision reviewed.
1 mark An understanding that higher courts perform this review on lower courts, and that without higher courts there would be no court with the authority to do it.

Sample answer: *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. In a flat hierarchy there is no court with more authority than another, therefore no court would be able to reverse the mistakes of any other.*

b. Explain how the resolution of criminal cases benefits from one other reason for a vertical state court hierarchy. 3 marks

1 mark The identification of one reason other than appeals.
1 mark Further detail on that reason that must involve explaining it without simply repeating the name of it.
1 mark An appropriate link made to criminal cases.

Answers could resemble the following:

- ✓ *Because each court hears similar types of cases on a daily basis, the presiding officers and other personnel can develop specialisation: expertise in the relevant law and in the procedure for hearing those kinds of matters. The example, the Magistrate's Court has personnel more practised in applying road rules than homicide laws.*

- ✓ *Allocating matters across a vertical court hierarchy depending on the seriousness and complexity of the crime allows the courts to better allocate their resources and achieve efficient resolution – this is administrative convenience. Each court only needs the paperwork and physical facilities such as jury boxes that suit its types of disputes, and parties do not have to pay fees or participate in procedures that are not appropriate to them and the needs of their case.*

Question 3
Define the standard of proof and the burden of proof as they operate in the Victorian justice system. 4 marks

1 mark The standard of proof is the weight/strength/amount of evidence that is required to prove the case.
1 mark The standard is beyond reasonable doubt (criminal) or on the balance of probabilities (civil).
1 mark The burden of proof is the responsibility of one party to bring this evidence.
1 mark The responsibility is on the prosecution (criminal) or the plaintiff (civil).

Question 4
Outline <u>one</u> sanction that could be given by the judge or magistrate at the conclusion of a criminal case, and explain how it can be seen to achieve <u>one</u> aim of criminal sanctions but not <u>one</u> other aim. 5 marks

Advice: It is worth remembering that in January 2012 a range of sanctions such as home detention, intensive correction orders, community-based orders and combined custody and treatment orders were removed from Victorian law and replaced with a new sanction called a 'community correction order'. Students cannot receive marks for any outdated sanctions.

1 mark An outline of one sanction.
1 mark An explanation of how it achieves one of the aims of criminal sanctions. Merely defining the aim will not be sufficient: students must give a reason why it is achieved.
1 mark Further detail on the aim, on the ways in which it might be achieved, or an example to illustrate.
1 mark An explanation of how it fails to achieve one other aim of criminal sanctions. Merely defining the aim will not be sufficient: students must give a reason why it is not achieved.
1 mark Further detail on the aim, on the ways in which it might not be achieved, or an example to illustrate.

Note: The aims of criminal sanctions, as listed in the *Sentencing Act 1991* (Vic), are rehabilitation, deterrence, denunciation, protection and punishment.

Sample answers could resemble:

- ✓ *A community correction order is a sentence that is served in the community, but which may also include up to 3 months imprisonment. Conditions include orders such as unpaid community work or restricted movement. Rehabilitation could be achieved, as the judge is able to select conditions that are most appropriate to the offender's circumstances and crime, with the aim of integrating them back into society successfully. Rehabilitation involves positive motivations like this. However, protection of society may not be achieved because the restrictions on personal movement are much more flexible than imprisonment, and still allow the offender to live in society. They are still physically at liberty to harm others.*

- ✓ *Imprisonment is where an offender is detained in jail for a period of time, called a 'sentence'. They lose their liberty and other freedoms. Punishment may be achieved, as the offender suffers the hardship of being separated from friends and family and losing their liberty. Imprisonment is considered the most serious sanction and is called the 'sanction of last resort'. However, specific deterrence may not be achieved because, as of 30 June 2010, over half the prison population in Australia had been in prison before. This suggests that imprisonment does not achieve specific deterrence because people are willing to risk returning.*

Question 5
Apart from granting royal assent to bills that have passed parliament, outline <u>two</u> roles played by the Crown in the federal parliamentary system of law-making. 2 marks

1 mark An identification of one role other than granting royal assent.
1 mark Repeat for a second role.

Note 1: Technically, the withholding of royal assent is different from the granting of royal assent. It is possible that students may be able to gain marks if this distinction is done well. Otherwise, any answer on royal assent must receive zero marks.

Note 1: Roles should nominally relate to the law-making process in order to receive marks.

Roles may include:

- ✓ The governor-general may exercise reserve powers without advice from the prime minister or parliament. These include dismissing a prime minister whose money bills have lost the support of the lower house.

- ✓ The governor-general will appoint ministers on advice of the prime minister, so the ministers can develop policy for future laws.

- ✓ The governor-general will approve delegated legislation made by subordinate authorities such as government departments.

Question 6
Using examples, discuss the need for and effectiveness of pre-trial procedures in the lead-up to trial. 4 marks

Advice 1: In past examinations (e.g. 2013) many students confused directions hearings with committal hearings; and many students did not understand committal hearings in enough detail to explain why they might be effective or ineffective. This question therefore focuses on pre-trial procedures to test whether students have improved on this problem area, and whether they can differentiate between criminal and civil procedures.

Advice 2: The task word attached to the reform is 'discuss' – not 'define', 'describe' or similar. Answers should not, therefore, provide lengthy definitions of the procedures; definitions do not need to be provided at all, as long as knowledge of the specifics of the procedures underpin the subjective arguments made. The 2017 Assessor's Report noted that: "It is not necessary to define legal terms before answering a question (unless the question specifically asks for this). In some instances it may be necessary to explain what a legal term means, but this is best done within the response."

Advice 3: The task word 'discuss' is a softer type of evaluative direction. In 2014 the Chief Assessor explained that the word 'discuss' does not require a definite final conclusion, but interacting with reasons for and against must still be present. In 2016 she said: "A full and comprehensive discussion that considered strengths and weaknesses, or advantages and disadvantages, was awarded full marks."

1 mark One argument in relation to the need for and/or effectiveness of pre-trial procedures. It is possible to address both with the same argument, given the potential overlap between them.
1 mark At least one more argument. Between them, arguments must engage with both parts of the question.
1 mark Detail from one pre-trial procedure being used in the discussion. Definitions that are unrelated to any subjective argument should not receive full marks.
1 mark Detail from at least one more pre-trial procedure being used in the discussion.

Note: Answers should address, to some extent, both the 'need for' and the 'effectiveness' of pre-trial procedures.

Sample arguments include the following:

- ✓ In discovery, parties are encouraged to agree on as many issues as possible by being able to see the strength of the supporting evidence. Any fact that the opposing party is willing to admit to does not have to be proved with evidence at trial, which makes the trial cheaper and faster.

- ✓ Throughout pre-trial procedures, the court is kept informed of the progress and details of the case. This better enables the trial judge to schedule the trial, as they can see how much evidence each side will be leading.

- ✓ Reviews of evidence in pre-trial, such as in civil discovery and in directions hearings, apply strict rules of evidence. Parties cannot use evidence that is tainted, evidence that is irrelevant to the dispute, or that is unreliable or illegally obtained.

- ✓ The element of surprise is reduced by procedures such as civil pleadings and criminal committal hearings, as both parties know exactly what evidence the other side will be leading. Parties can adequately prepare, and defendants are encouraged to settle or change their plea to guilty if the evidence against them is very strong.

- ✓ The interpretation of evidence often differs wildly between parties, and the same piece of evidence can be used by each party differently according to what they want to achieve with it. Discovery therefore does not achieve significant agreement, and committals using the hand-up brief do not do much to inform the accused of how the prosecution will effectively argue that evidence in court.

- ✓ Every document filed with the court attracts a filing fee that must be paid, and will usually be drafted by a solicitor who is paid hundreds of dollars an hour. All pre-trial procedures involve paperwork and filings, and so are expensive for the parties – before the trial has even begun.

- ✓ The rules regarding evidence and the drafting of court documents are very complicated. They are confusing for parties and require expensive lawyers to navigate. If statements of claim are prepared incorrectly, for instance, the plaintiff may be barred from amending their claim later.

Question 7
Over the past century, significant change has been made to constitutional law without any changes being made to the wording of the Constitution itself.

a. Explain the only process by which changes can be made to the wording of the Commonwealth Constitution. 3 marks

Advice: The section number for the referendum process is one of the few listed in the Study Design that students must recognise and remember, and often they are required to include it in their responses. In a prior exam (2012) it was used as the basis of a question without any explanatory content that linked it to referenda.

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.

Note: The phrase 'double majority' must be both used and explained to achieve full marks.

b. Using a case example to illustrate your response, explain how the division of power has been changed without needing to go through this process. 6 marks

1 mark An explanation of how the High Court can alter the division of power or constitutional rights through interpretation of the Constitution.
1 mark An explanation of how the referral of residual powers from one or more states to the Commonwealth can alter the division of powers.
2 marks A minimum of two examples that illustrate one or both of the above processes.
2 marks Further relevant detail on either of the two processes, further examples, and/or further ways in which the division of powers can be altered, such as the use of tied grants.

Note 1: The Federal Court cannot be used in the response to this question. The Federal Court has the power to apply the Constitution to challenges involving the validity of legislation, but in these cases it is not reinterpreting the meaning of the specific powers or of any restrictions. Therefore, the underlying constitutional division is not changing.

Note 2: There are ways other than High Court interpretation in which the division of powers can be changed without referenda (ways such as the referral of powers), but these are not listed on the Study Design. However, they would be accurate and relevant if they are mentioned in student responses.

Points made in response could resemble the following:

- ✓ *The High Court can change the division of power by interpreting the scope and meaning of specific powers or restrictions when cases come before it. A narrow interpretation of specific powers leaves more power over for the states, while a broad interpretation gives more power to the Commonwealth. The scope given to the restriction will affect the division of power based on the parliament affected by the restriction.*

- ✓ *For example, in the Tasmanian Dams Case the High Court found that the federal "external affairs" power allowed the Commonwealth to legislate to implement the terms of any treaty, even if that treaty covered areas of residual power. The Commonwealth gained power at the expense of the states because any residual power could be used, as long as implementing a treaty was the basis of the legislation. This changed the division of power significantly from what was written in the Constitution at federation because the Commonwealth gained the ability to use virtually any residual power as long as it could be shown that the issue was one of 'international concern'.*

- ✓ *For example, in the Roads Case the High Court found that the Commonwealth tied grants power in s96 could be used to compel the states to legislate in residual areas by tying the legislation to grants of money as compulsory conditions. The Commonwealth gained power at the expense of the states because they could indirectly affect the way in which residual powers were used. This changed the division of power from what was originally written because it was not envisaged that the Commonwealth would tell the states how to legislate using their residual powers.*

- ✓ *An implied right is a protection that the High Court finds is suggested within the Constitution, without it being explicitly stated in one section. The Court finds the right to be implied by reading two or more sections together and deriving meaning from them, and these rights then*

have the power to restrict the federal parliament but not the states – giving the states effectively more power than the Commonwealth in the area.

- ✓ *For example, in the ACTV Case the Commonwealth banned 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 set up a system of representative government, but this decision did not bind the states equally at the time.*

Question 8
Courts can make law in partnership with parliament.

Explain this statement, and discuss the extent to which you think courts should contribute to law-making. 10 marks

Advice 1: It is important to remember that extended response questions do not need comprehensive introductions and conclusions, but they do need points to be arranged into logical paragraphs with topic sentences.

Advice 2: In the 2016 Assessor's Report the Chief Assessor reminded students that rote-learned material will not, by itself, usually satisfy questions. She said, "Many students [provided material] without any reference back to the stimulus material. This was not a high-scoring response, and students are strongly discouraged from providing responses of this type." This is an example of a question that needs to have the wording of the answer tailored to respond to it, mostly because of the idea of 'partnership' that has been introduced.

Advice 3: 'The extent to which' is an evaluative direction, but in some circumstances students can say either 100% entirely or 0% not at all: both sides do not need to be given. In 2011, for example, the Chief Assessor noted that 'not at all' was an appropriate opinion in response to a question on the extent to which civil pre-trial procedures achieved access to the legal system. Both answers are possible appropriate responses here, although students may feel that a more balanced opinion is a 'safer' option. No marks are allocated to the opinion by itself, but it must be clear in order to have a chance at full marks.

1 mark	An explanation of how court-made law relates to parliament that references statutory interpretation.
1 mark	An explanation of how court-made law relates to parliament that references court decisions influencing parliament to legislate in some way.
1 mark	At least one subjective argument about courts acting as law-makers. This argument should work with whatever opinion is given, which includes considering the 'other side'.
5 marks	These marks should be awarded globally for overall quality and quantity in arguments and detail. Some of this may come through examples. It would be difficult to achieve full marks without at least another three arguments being advanced, however.
2 marks	These marks should also be awarded globally, but they may be given for additional explanation on the way in which the courts and parliament make law together – and/or for further discussion arguments.

Note 1: Popular cases to use as examples include: the Studded Belt Case, interpreting the meaning of 'weapon'; the Kevin and Jennifer Case, interpreting the meaning of 'marriage' and prompting parliament to amend the *Marriage Act 1961* (Cth), including the attempted codification of the definition of 'man' and 'woman' that failed; Brislan's Case, interpreting the meaning of 'other like services'; and the Tasmanian Dams Case, interpreting the meaning of 'external affairs'.

Note 2: Some arguments about courts as law-makers may involve comparisons with parliament. This is entirely acceptable as long as the focus is still on the question asked.

Aspects of the relationship between courts and parliament that may be used in answers 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.*

- ✓ *Parliament can legislate to abrogate the common law if they disagree with it and are motivated to legislate because of a court decision. For example, the common law allowing rape within marriage was overridden by parliament ten days after the decision was handed down.*

- ✓ *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.*

- ✓ *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. This clarifies the validity of legislation and the bounds of parliament's law-making ability.*

Arguments that could be used might include:

- ✓ *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. 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. Law-makers in parliament are elected, therefore parliament may make short-term decisions to attract votes, rather than making the best decisions for the long-term. This means they are accountable to the people for the law that they make, however, and are likely to make laws that the people want and need.

- ✓ *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.*

  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.

- ✓ *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.*

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 therefore more likely to listen to what the majority of people want. Electing parliament can mean that laws pander to majority interests rather than protecting minority interests, children, the future or the environment, and can lead to tyranny of the majority. However, this may also mean that laws are more likely to reflect majority values and needs, because each MP needs a majority in their electorate.

- ✓ *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.*

  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. They can lobby, petition and protest, send submissions to bodies like the VLRC, and ordinary citizens can run for parliamentary office.

SECTION B

Instructions for Section B

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

Answer all questions in the spaces provided.

Question 1 (22 marks)

Source 1

"Queensland's Ipswich City Council says it plans to reverse its decision to send residents' recycling to landfill.

The council, west of Brisbane, came under fire this week after announcing it ditched its yellow-top bin recycling program and has been sending recyclable waste to landfill for a month."

Natasha Christian for SBS News

20 April 2018

a. Around the dinner table one night you discover that much of the material put out for recycling is actually sent to landfill and decide that state parliament needs to take action on recycling standards in the different suburbs. Your mother asks how you plan to influence this change, suggesting you start a petition, organise a protest or alert the media.

Critically examine which method would be the best option for you to choose.

6 marks

Advice: It is important to remember that task phrases such as 'critically examine' mean to provide an opinion, and examine reasons for and against that opinion: it involves some consideration of strengths and weaknesses, as well as making an overall judgment about its worth or value. Both strengths and weaknesses must therefore be addressed, but they do not need to have equal time spent on them. If students do not offer an opinion, however, they cannot receive full marks.

1 mark	One strength in favour of the chosen method.
1 mark	One weakness of one or both of the other two methods.
4 marks	Two or more additional strengths and/or weaknesses, spread in a flexible way across methods depending on how the student has chosen to approach the question.

Strengths may include:

- ✓ *If a protest attracts well-known supporters or speakers it may have a good chance of persuading other members of the public that this is a cause they should consider. A celebrity may also simply influence other people to turn up.*
- ✓ *Protests have greater visual and audio impact than something like a petition. This means it is harder for parliament to ignore; or, at the very least, it has a better chance of being noticed.*
- ✓ *Demonstrations can show mass public support for an issue. This is effective because MPs are generally influenced by votes, and protests can show the sheer number of votes being swayed by the issue.*

- ✓ *Protests are free to join and do not require a significant time commitment. This makes it much easier for the 'average' person to get involved in the issue and have their say.*

- ✓ *A petition is relatively easy to organise, and the rules about how a petition must be written and submitted are published on the Victorian and Commonwealth Parliaments' websites.*

- ✓ *A petition with a very large number of signatures may put more pressure on parliament as it indicates widespread support for a change in the law, and parliament wants to ensure it makes laws that are representative of the community's beliefs and expectations.*

- ✓ *A petition provides direct contact between the individuals or groups seeking change in the law and those responsible for making the law.*

- ✓ *Petitions will be tabled in parliament by a member who has personally signed the petition as well, which gives the petition more weight than a protest might, that has not been endorsed by anyone involved in the parliamentary process. The petition to the Victorian Parliament requesting the decriminalisation for abortion, for example, was signed by two members of parliament.*

- ✓ *Media can inform and persuade a very large number of people about need to change the law, connecting with many thousands of people simultaneously - especially via social networking and talk-back radio. This can create enough support for change throughout the community for parliament to feel compelled to act.*

- ✓ *Using social media to inform and persuade others of the need to change the law, to organise protests and petitions and coordinate lobbying of members of parliament is relatively inexpensive and therefore accessible to individuals and non-profit organisations attempting to influence a change in the law.*

- ✓ *Individuals and groups can use the media to demonstrate to parliament existing support for a change in the law, such as launching websites and writing newspaper articles showing the responses to online surveys, or by funding advertisements on radio and television that show groups of people in support of a change.*

- ✓ *Even 'non-media' methods of influencing change in the law rely to an extent on the media for their success. For example, a protest is much more effective if covered by radio or TV news because it then reaches a larger group, and social media outlets such as Twitter and Facebook are often used to promote demonstrations and encourage individuals to lobby their local member of parliament.*

Weaknesses may include:

- ✓ *Even a very large protest is still unlikely to constitute the majority in any one electorate, so individual MPs may not feel like they need to listen.*

- ✓ *Demonstrations can disrupt the flow of traffic or public movement and so force people to take notice of the issues (such as the taxi drivers protesting in Flinders Street did). If there is too much disruption, however, the public may choose not to support the issue because they have been inconvenienced.*

- ✓ *Protests only show a narrow self-selected percentage of the population: they in no way represent 'average' or a cross-section of community opinion. Only the people who strongly agree will attend, so parliament cannot see the number of people who do not agree.*

- ✓ *A petition with very few signatures is unlikely to influence law-making. Parliament will not change the law if very few people support the change, as it tends to prefer to make laws reflecting the views of the majority.*

- ✓ *The Victorian and Commonwealth Parliaments receive many petitions, sometimes showing conflicting views on the same topic. For instance, between the 2006 and 2010 elections, the Legislative Assembly received over 1,100 petitions with a total of 611,000 signatures! Parliaments simply cannot respond to, or act upon, all petitions submitted.*

- ✓ *There is no guarantee that parliament will discuss or respond to a petition after it is presented. The appropriate minister may respond to a petition presented that is relevant to their portfolio, but they are not required to.*

- ✓ *Gathering signatures and submitting petitions is not very visible (unlike a protest or the use of the media). This process of preparing and submitting a petition is unlikely to generate further public support on the issue on a large scale. A person standing on the street asking passing individuals to sign a petition is unlikely to make the 6pm news!*

- ✓ *Traditional media may not publish the views of all groups, especially unpopular minority groups who want laws changed or calls for action in an area that is dry or fails to make entertaining coverage. Alternatively, the media can sometimes publish the views of groups that do not necessarily deserve equal coverage, thereby drowning out or confusing the majority viewpoint. For instance, in 2012 Media Watch on the ABC accused many news outlets of giving inappropriate attention to 'climate sceptic' scientists whose views against climate change do not have respected support within the scientific community.*

- ✓ *Buying advertisements in the traditional media of television and radio is expensive and may therefore be dominated by well-resourced organisations such as large businesses and trade unions. Such organisations can use television and radio to very effectively inform and persuade a large proportion of society about a proposed change in the law, but small businesses, community groups and individuals may not be able to afford this effective method of communication.*

- ✓ *Media may show such a diversity of opinions on an issue that there is no clear direction for change to the law. Parliament often fears backlash from vocal minorities in society when law-making on controversial issues, so if the media show a wide range of conflicting views on a particular issue, the government may be less likely to act due to this fear. It is impossible for law-makers to please all groups, so the media holds a lot of sway when it gives publicity to disagree over what the law should be.*

- ✓ *The media can become so saturated by letters, opinionated phone calls to talk-back radio and sensationalist advertisements that viewers and readers become confused about the issues or facts, or disengaged from the issue altogether. This can result in no broad consensus in society about whether the law should change or not.*

b. Describe <u>two</u> factors that could affect the ability of parliament to implement this change, and comment on how each might prevent reform. 6 marks

1 mark The identification of one appropriate factor.
1 mark Further detail on this factor, which might be brought out through the use of an example.
1 mark A subjective argument about how this factor might prevent parliament from legislating. This may also be brought out through an example.
3 marks Repeat for a second factor.

Note: The phrase 'factors that affect the ability of parliament to make law' is new on the current Study Design and it specifies a list of four precise factors - the wording of the question doesn't demand it, but it would be ideal if students focused on the factors listed. It is possible, however, to provide a valid response using other material.

Sample response could resemble the following:

- ✓ *The lower houses in parliaments are often called the "people's houses" because they are usually the most democratically-elected, on the basis of 'one vote one value', and their role is to reflect the will of the people. Because the lower house is popularly elected, the fear of voter backlash from vocal minorities or selfish and short-sighted majorities can prevent necessary law-reform. Law-making around issues such as abortion, euthanasia, gun control, environmental protection and equal civil rights often meets opposition, and politicians' fear of outcry may prevent change in the law.*

- ✓ *The Government is responsible for developing the major policy direction for the state or country, and therefore for introducing almost all new laws. The prime minister and most Government ministers will sit in the lower house, and this makes it the best house in which to initiate Government bills. Parliament's primary role is to legislate, but only 45% (approx) of its sitting time is devoted to legislation; its sitting time averages 625 hours per year (or, less than 16 weeks of full-time work). The lower house cannot introduce and debate unlimited new bills.*

- ✓ *The upper house spends more time debating, researching and amending these bills – this is known as being a 'house of review'. Parliament may not achieve sufficient review if the upper house is controlled by the Government, like the Senate was under former prime minister John Howard from 2005. Inappropriate laws may be rushed through parliament because the upper house acts as a rubber stamp for Government policy and does not make necessary amendments or engage in proper scrutiny. The stages set out for the passage of a well-considered bill may not be fully utilised.*

- ✓ *The upper houses are elected using proportional voting systems, which allow a number of people to be elected from the same region or state. Electing equal numbers of members from geographical regions also allows regional interests to be more effectively represented, because representation is not dominated by population. Regional interests are often sidelined in favour of party policy, though, which is often influenced by the larger states because they have more members in the party. The parliament may fail to legislate to protect them; or, alternatively, may be stopped from passing more national majority-friendly legislation because the Senate may vote to protect the states.*

- ✓ *Giving royal assent to a bill involves the Queen's representative signing the bill on the Queen's behalf to signify her approval. This must occur in order for the bill to become law. Royal assent is the final stage in a bill becoming law during which errors can be caught and the parliament can be prevented from acting outside its powers.*

- ✓ *A representative government is one where the people elect representatives to govern in parliament on their behalf. The representative nature of parliament can stop parliament from legislating sometimes. For instance, the fear of voter backlash from vocal minorities or selfish*

and short-sighted majorities can prevent necessary law-reform on controversial matters. Law-making around issues such as abortion, euthanasia, gun control, environmental protection and civil rights often inspires extreme public reactions, and politicians' fear of outcry – even if it comes from a very small proportion of society – may prevent change in the law.

- ✓ *Political pressures will be different depending on whether the MP is a member of the governing party or the opposition party, or whether they are a crossbencher. Pressures on members of the Government will relate to maintaining power and serving the Government's policies and election mandates; and pressures on the crossbenchers will relate to negotiating with the major parties and trying to extract compromises in exchange for their support. But, if the Government has to gain permission from crossbenchers for every move, they may be hamstrung by people who received just a fraction of the vote.*

- ✓ *Political pressures mean there will be pressure on MPs to support their party's policies, to project a favourable image in the media, and the need to maintain power in parliament – especially for members of the executive government. The demands of maintaining a positive public presence can lead parliamentarians to focus more on self-marketing than on developing strong policies and laws. The 24-hour news cycle can turn every day into election campaigning, even when the election is several years away, and can discourage the passing of long-term laws that require years to develop and show results.*

- ✓ *Because parliament is limited in its sitting days, and because it works with a finite amount of funding, it will be limited by the logistics of making every law the community needs, updating every law when it goes out-of-date, and finding the money to pay for all of these changes. Because there is not time to consider and debate everything, or even to introduce every bill requested by a private member, many matters will be delayed and some bills will expire without being considered. For instance the Government can use the limited sitting time to only consider its own priorities and refuse to put other issues on the agenda.*

c. The next day you get into a fight with your neighbour because they have put waste materials into their recycling bin. You have been having regular conflict with them for years, over matters such as the location of the dividing fence and the noise of their music at night.

Explain <u>two</u> similarities and <u>two</u> differences you might find between using courts to resolve your disagreement and using the Victorian Civil and Administrative Tribunal ('VCAT'). 8 marks

Advice 1: In a previous exam (2015), many students lost marks on a question about VCAT because they confused the venue VCAT with methods of dispute resolution such as mediation and conciliation (and therefore made many errors about the operation of VCAT). This is a regular problem. This question therefore tests student understanding of the difference between avenues and methods.

Advice 2: On a question regarding an evaluation of mediation in the 2016 exam, the Chief Assessor noted some common misconceptions. The extent to which mediation is binding, the types of disputes it is used for, and a number of matters about other methods such as arbitration, should all be checked for accuracy of understanding.

Advice 3: 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. Students should note that full marks are unlikely to be awarded for definitions or descriptions that are not connected, and where the examiners have to work out the similarities and differences themselves.

1 mark One similarity between the operation of courts and VCAT.

1 mark Illustrative detail on the similarity, which may involve use of an example.
2 marks Repeat for a second similarity.
1 mark One difference between the operation of courts and VCAT.
1 mark Illustrative detail on the similarity, which may involve use of an example.
2 marks Repeat for a second similarity.

Note: 'Avenues' for dispute resolution are courts and VCAT; methods for dispute resolution include processes such as mediation, conciliation, arbitration and judicial determination (each of which sometimes go by different names, depending on the venue). Each of the four methods is used in both of the two venues.

Similarities between courts and VCAT may include:

- ✓ *Both VCAT and court utilise methods resembling judicial determination and arbitration, where an independent third party makes a decision on behalf of the parties.*
- ✓ *The decisions made through each venue are legally binding on the parties.*
- ✓ *The decisions made through each venue can be appealed to a superior court if one party believes that an error has been made.*
- ✓ *The third party in each venue 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.*

d. What would be your preferred mode of dispute resolution for the dispute between you and your neighbour? Justify your decision. 2 marks

Advice 1: The word 'mode' has been used deliberately to open up the field of choice for students. The word 'mode' is not used on the Study Design, and there is therefore no Study Design-based argument to limiting it to either venues for dispute resolution or methods/processes of dispute resolution. As long as the answer selects a clear way in which the dispute might be resolved and provides at least one valid reason for this choice, the response should be accepted.

Advice 2: A clear choice of dispute resolution must be made in student responses. In response to a similar-style question in 2017, the Chief Assessor said: "To gain full marks, students were required to elect whether a court or VCAT should hear Sam's case. Both choices were acceptable and could gain full marks, depending on the points raised. Some students did not choose either body and discussed courts and VCAT generally. As a consequence, these students were unable to get full marks."

1 mark One argument in justification of the choice.
1 mark Further detail on that argument, which may include an example; or, one or more additional arguments.

Note 1: The marks are allocated to the justification given for the choice rather than the choice itself.

Note 2: Justifications must relate to the scenario in order to be accepted.

Justifications might resemble:

- ✓ *Mediation, because it is generally more cost effective than other options such as trial. Mediation at the Dispute Settlement Centre of Victoria is free, for example; however, other mediation processes charge parties for use of conference rooms and the mediator fees, and many mediators charge $2,500 per day or more. There are, though, fewer court fees and legal representation costs.*

- ✓ *Conciliation, because it will usually result in resolution in a shorter space of time than a court or VCAT hearing, if the parties are able to compromise. Generally, conciliation conferences last from a few hours to a few days, and the lack of appeals gives a faster process.*

- ✓ *Pre-trial mediation in the Magistrate's Court before the hearing, because at this stage it has no rules of evidence and the rules of procedure are supportive rather than intimidating; parties are encouraged to 'tell their story', and the procedures are in place to ensure each party receives a fair and equal opportunity to speak their point of view.*

- ✓ *Conciliation at a non-government assistance organisation, because it has an improved chance of success and satisfaction, as we would contribute to the outcome by only making a decision we are happy with. The outcome is also more likely to be 'legally fair' as the conciliation will give their opinion on appropriate outcomes.*

- ✓ *VCAT, if the dispute can be filed under its jurisdiction, because the order handed down by the member is automatically legally binding and enforceable. We will therefore have closure as well as a more timely resolution than at court.*

- ✓ *VCAT, if the dispute can be filed under its jurisdiction, because during the hearing parties are encouraged to resolve the dispute themselves. The member will allow them to discuss the issues, and will be guided by whatever they agree between themselves.*

- ✓ *Court, because the third party will make a decision if the parties can't agree, which means a result is not reliant on compromise between two disputing parties. Hearings are also open to the public and proceedings are publicly recorded for fairness.*

- ✓ *A judicial determination, because detailed reasons are given by a judicial professional – particularly when used through court – and courtroom judicial determination is the only method where the outcome is bound by precedent and can set precedent.*

Question 2

Source 1

> *Legislative powers of the Parliament*
>
> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> (i) trade and commerce with other countries, and among the States;
>
> [etc]
>
> *Commonwealth of Australia Constitution Act 1901* (UK)
>
> Section 51

a. 'The Commonwealth Parliament is the only legislature with the power to make laws in all areas of power in the Commonwealth Constitution.'

To what extent do you agree? Give reasons for your answer. 4 marks

Advice 1: In the 2016 Assessor's Report the Chief Assessor reminded students that rote-learned material will not, by itself, usually satisfy questions. She said, "Many students [provided material] without any reference back to the stimulus material. This was not a high-scoring response, and students are strongly discouraged from providing responses of this type." This is an example of a question that needs to have the wording of the answer tailored to respond to it.

Advice 2: In 2016 the Chief Assessor made a special point in relation to the operation of s109: it affects the enforceability of law, and not law-making powers in the first place.

1 mark	A clear opinion in response.
3 marks	A minimum of two reasons in support of this opinion. One or more reasons may argue *against* the opinion, however at least one reason must be given that agrees with it. Additional marks may be gained by the appropriate use of examples.

Note: This answer should be marked globally. Students cannot receive full marks without a clear opinion and a minimum of two arguments, however the detail of the arguments should be weighed against the number of different arguments presented to determine the overall quality.

Appropriate opinions include:

- ✓ No, because states can also make laws in areas of concurrent power.
- ✓ Yes, because s109 gives Commonwealth law precedence in areas of concurrent power.

Arguments may include:

- ✓ *The specific powers listed in the Commonwealth Constitution are given expressly to the federal parliament to legislate on.*
- ✓ *The specific powers that are made exclusive to the Commonwealth can only be legislated on by the Commonwealth Parliament and no other.*

- ✓ *The specific powers that remain concurrently with the states can be legislated on by the Commonwealth, and any conflicting state laws can be overridden by the Commonwealth by virtue of the inconsistency rule in s109.*

- ✓ *The states have equal power to the Commonwealth in all areas of concurrent power. Just because the Commonwealth can override in situations of conflict it doesn't mean the states can't make laws in the first place.*

b. Using an example to illustrate your response, explain how the external affairs power in s51 of the Australian Constitution has been used to give the Commonwealth legislative powers beyond what might be read from the literal text of s51. 4 marks

1 mark The High Court has found that the meaning and scope of the Commonwealth's specific power over 'external affairs', in s51(xxix) of the Australian Constitution, can be affected by what international instruments Australia is a signatory to.
1 mark These instruments can give the Commonwealth legislative power over matters that aren't listed in the Constitution, because they demonstrate the existence of a matter of international concern.
1 mark Effective use of the basic details of one appropriate example.
1 mark Further detail on either the explanation or the example.

Note 1: The first two marks will need to be allocated with judgment, because the same basic information may be communicated in different ways.

Note 2: The question does not specify whether the 'example' needs to be an example of a court case or an example of an international instrument. It is possible for students to answer the question using either or both.

Use of examples may resemble the following:

- ✓ Burgess*, relating to aviation laws enacted pursuant to the 1919 Paris Convention on International Transport, established a precedent that the Commonwealth could legislate to implement the terms of an international agreement, even if the subject was usually a matter of residual power.*

- ✓ *In* Koowarta*, in relation to racial discrimination, three of the majority justices found that the existence of a treaty demonstrated the international and 'external' character of the subject matter. The fourth majority justice, Ninian Stephen, had a different* ratio*: he determined that the external affairs power only extended to the subject matter of treaties where the topic was international in character independent of the existence of the agreement – so the precedent did not automatically add treaty matters to the Commonwealth's powers.*

c. One of the powers omitted from the Constitution is the power over criminal law.

Explain the distinction between summary and indictable offences that has been established in Victorian law, and describe the extent to which the right to trial by jury exists in criminal disputes in Victorian courts. 6 marks

1 mark Summary offences are less serious offences, whereas indictable offences are more serious offences.
1 mark Further detail on the distinction: this may include the courts that have the power to hear each type of offence, or the sanctions that can be given for each.
1 mark The *Criminal Procedure Act 2009* provides that the trial for an indictable offence commences when the accused formally pleads not guilty in the presence of the jury panel. There is no alternative procedure for the trial of an indictable offence.
1 mark There is otherwise no formal 'right' to trial by jury in Victoria.
2 marks Further points on either the differences between summary and indictable offences, examples that illustrate the difference, the nature of the 'right' to trial by jury in Victoria, or examples that illustrate the meaning of 'right to trial by jury' in Victoria.

Further points could resemble the following:

- ✓ *Summary offences are prosecuted by the arresting police officer, and are heard by a single magistrate sitting without a jury. The court proceedings used in summary offences are called 'hearings'. Indictable offences are prosecuted by the Office of Public Prosecutions, and are heard by a single judge or justice sitting with a jury.*

- ✓ *Section 25 of the Victorian Charter protects the rights of the accused in criminal proceedings, but it does not list the right to trial by jury.*

- ✓ *Section 24 protects the right to a fair hearing, but it only refers to a "competent, independent and impartial court or tribunal" – it does not specify a jury.*

- ✓ *The right to trial by jury is far less protected in Victoria than it is federally, because of s80 of the Australian Constitution: it applies to federal indictable offences only.*

d. Chapter III of the Australian Constitution establishes an independent judiciary that applies to at least some extent to the states, as well.

Outline the role that the judge plays in the resolution of criminal disputes in Victoria, and comment on one strength of this role other than its independence.
4 marks

Advice: Students should be sure to limit their responses to a single strength: it is easy to list two or more different strengths in the one sentence, like a list. However, only the very first one mentioned is assessed.

1 mark	A brief description of the role of the judge that addresses the primary role of presiding over the case and reaching a verdict in the absence of a jury.
1 mark	The identification of one strength of the judge's role.
2 marks	These marks should be awarded globally, based on a combination of the number of points made and the quality and detail of them. Further information could be provided on the role of the judge, and/or further detail could be provided on the strength of the role. Either topic could be brought out by the use of an appropriate example used well.

Note 1: No marks can be awarded for strengths that seem, even ambiguously, to be focused on the independence of the judge.

Sample answer: *The judge must act as an independent umpire, overseeing proceedings impartially and ensuring that neither party has the appearance of being favoured over the other by applying the rules of evidence and procedure equally and fairly. When sitting without a jury, the judge's primary task is to reach a verdict of guilty or not guilty in the case. The case management powers of the judge can be used to promote a more efficient and effective resolution to the case, giving both parties better access and ensuring that neither party uses bad faith strategy designed to unfairly disadvantage its opposition. For instance, the judge will determine whether a contested committal mention hearing is necessary for the defendant to have proper access to the quality of the prosecution's evidence.*