**LEGAL STUDIES

Units 3 & 4 – Written examination**

# PES

# 2020 Trial Examination

**SOLUTIONS & MARKING GUIDE**

**SECTION A 40 marks**

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| --- |
| **Instructions for Section A**Answer **all** questions in the spaces provided. |

**Question 1** (6 marks)

Sudanese refugee Akon Guode killed her four-year old twins and 16-month-old son, driving her car into a lake in 2015. *O*riginally jailed for 26½ years, with a minimum of 20 years, that term was significantly reduced by the Victorian Court of Appeal, which imposed a new sentence of 18 years’ imprisonment with a non-parole period of 14 years.Victorian Director of Public Prosecutions Kerri Judd, QC, was on Friday granted leave to appeal that decision in the High Court.

1. Referring to this case, justify **one** reason for a court hierarchy.

(2 marks)

**Marking guide**

* 1 mark – for the explanation of appeals:
	+ Allows for the correction of errors
	+ Provided the appellant has grounds for appeal (question of law, question of fact or severity of the sanction)
* 1 mark – for the link to the scenario provided:

**Sample response**

Given the scenario presented a reason for a court hierarchy would be to allow for a system of appeals.

Initially it was the defence who suggested the sentence handed down was too severe and the result was to reduce the sentence on appeal. In turn, the State/prosecution appealed the new sentence suggesting it was too lenient – they were successful in the appeal.

In both cases, there was the opportunity to correct an error made in the sentence handed down.

*Note:* While specialisation is a valid reason, it would be difficult to link it to the scenario and therefore be awarded full marks.

1. Analyse how Victoria Legal Aid (VLA) and Community Legal Centres (CLCs) could have played a role in assisting Akon Guode in the above case.

 (4 marks)

**Marking guide**

* 2 marks – for the analysis of VLA in this scenario:
	+ How VLA would assist
	+ Link to the scenario
* 2 marks – for the analysis of CLC in this scenario:
	+ How CLC would assist
	+ Link to the scenario

**Sample response**

Both VLA and CLCs are in a position to assist Guode in this criminal case.

VLA has a role of providing people facing criminal charges improved access to justice and so can give Guode in this case advice in relation to the right to remain silent. Without such guidance it is possible the accused is not aware of this right. While VLA also can provide legal representation to an accused, they can only do so if the accused qualifies through a means test relating to the accused income/assets.

While CLCs also provide legal assistance through advice and representation, often they will focus on assisting a particular group of people in society. For example, given that Guode was a refugee, there is a specialist CLC for such people. However, the CLCs tend to not represent for more serious criminal matters. Thus the extent to which a CLC could assist would depend on the seriousness of the offence.

**Question 2** (3 marks)

*A man has pleaded guilty to manslaughter in the Melbourne Magistrate’s Court. His admission came after a plea negotiation downgraded from a charge of murder.*

Explain why a plea negotiation may not be appropriate in this case.

**Mark Guide**

* 1 mark - explanation of plea negotiations
* 2 marks – factors suggesting a plea negotiation may be inappropriate
* Lesser charge pled to so lighter sentence
* No victim/family involvement

*A number of points could be made to address this question, noting that the response required was to focus on why it would NOT be appropriate. Full marks could be earned through mentioning more than one point as to ‘why not appropriate’ in the response*

**Sample response**

The downgrading of the charge from murder to manslaughter will mean the offender receives a lighter sentence than was deserved. Both the community and the victim’s family may feel the offender is handed a sentence that does not reflect the crime committed.

Further, the fact that the plea takes place private between the two parties/prosecution and defence, means the community/victims family never know the reason for the decision to accept a plea negotiation

**Question 3** (9 marks)

Zachary commenced an action in defamation in the Supreme Court of Victoria against an online media company, News Unlimited, alleging that they published a defamatory article about him that has damaged his reputation in the community. The Supreme Court held that News Unlimited was not liable for defamation. Subsequently, Zachary applied to the Court of Appeal for leave to appeal, however, his application was refused, and the court ordered Zachary to pay News Unlimited’s costs. Zachary is considering taking the matter to the High Court of Australia.

1. Analyse **two** factors Zachary should have considered in deciding to initiate civil action given the facts provided. (6 marks)

**Marking guide**

* 3 marks – for each factor to be considered
* 1 mark for description of the factor
* 1 mark for substantial links to the case study (names of parties is not enough)
* 1 mark for depth of analysis

*Given the number of marks allocated to the question, there is the need for depth in the response. While it is with the discretion of the teacher as to which of ‘relevant factors’ to analyse, given the information provided in the question, I would expect ‘costs’ and ‘limitation of actions’ analysed.*

**Sample response**

One factor that should have been considered is that should the matter proceed to court it will be a very costly process. There are a range of costs involved and one is the fact that legal representation is not cheap, which would be the case here where it has already gone through to an appeal and, in fact, the plaintiff, Zachary, is planning on a further appeal to the High Court. Each court will also have a range of its own fees.

Further still, the plaintiff, at this time, faces an adverse cost order, where, not only unsuccessful in the appeal, but also has been ordered by the Appeal court to pay the legal costs of the defendant. On the other hand, this may be overturned if it does go the High Court.

Given that the matter the man has initiated the action for is defamation, he would need to have made sure that his intention to commence the action was lodged with the court and the defendant within the time limits for defamation matters (1 year). Failure to do so would result in him not being eligible for any remedy eg compensation. It appears in this case that he has done so within he specified period, given the court did hear the matter.

1. Explain the purpose of **one** pre-trial procedure that may have taken place prior to the case being heard in the Supreme Court. (3 marks)

**Marking guide**

* 1 mark – description of a pre-trial procedure
* 1 mark – explanation of the purpose. Response requires depth rather than a ‘list’ of purposes.
* 1 mark – substantial link to the case study (not just names of the parties)

*Any one of the three pre-trial procedures included in the course could be used in this question:*

* *Pleadings*
* *Discovery of documents*
* *Exchange of evidence*

*However, the question requires a focus on the* ***purpose*** *of the one chosen.*

**Sample response (where the chosen pre-trial procedure is ‘pleadings’)**

One pre-trial procedure that would have been undertaken in this case is pleadings. Pleadings is a series of documents filed with the court and exchanged between the parties. For example, Zachary would have filed a Statement of Claim which would have outlined the nature of his claim (defamation), the facts upon which the claim was based (such as details regarding the publication of the article by News Unlimited) and the remedy sought (damages and an injunction).

One purpose of pleadings is to achieve procedural fairness by ensuring each party is made aware of the claims and defences raised by the other party. In doing so, the matters in dispute will become much clearer. One party may determine that their case is not as compelling as they initially believed which may lead to an out-of-court settlement being reached.

**Question 4** (3 marks)

Judicial independence is important to the concept of **separation of powers.**

Explain how the separation of powers provides a means by which the Australian Constitution acts as a check on parliament’s law-making powers

**Marking guide**

* 1`mark – an outline of separation of powers
* 2 marks – explanation and link between the Constitution and the High Court and how there is a check on law-making

**Sample response**

The Australian Constitution provides three distinct powers – legislative, executive and judicial powers. Each power is exercised by a different body so that no one body controls the legal and political system, thus preventing the abuse of power.

For example, Judicial power – the power to interpret and apply the law – is exercised by the courts. Judicial power can act as a check on law-making by parliament as the High Court of Australia has the power to decide if legislation made by Commonwealth Parliament is within its jurisdiction and, if it believes that to not be the case, the legislation can be declared to be invalid.

**Question 5** (9 marks)

Social media and various types of political pressure can be powerful influences as to whether there is a change to the law, especially when it comes to large scale campaigns for new legislation.

1. Outline **one** advantage of social media compared to traditional media in influencing law reform. (2 marks)

**Marking guide**

* 1 mark – explanation of how social media may be used and how traditional media may be used
* 1 mark – the advantage

*A number of points could be used in the response with the focus being on the fact that it gives a clear advantage of social media relative to traditional media.*

**Sample response**

The various platforms for social media including Youtube, Facebook Instagram and Twitter, provide the opportunity to communicate legal issues to a massive audience with great speed. This may come from specific interest groups or parliamentarians themselves, being able to very quickly express their views throughout the community through images/words etc. This is not able to be achieved at the same speed through the traditional media of newspapers, television and radio. By the time a person has a legal issue presented through these traditional forms, they may have already formed their view on the matter through social media.

1. Describe **one** type of political pressure that may prevent a change in the law from occurring. (3 marks)

**Marking guide**

* 2 marks – description of political pressure selected
* 1 mark link to preventing change in the law

**Sample solution**

Political pressures can be of different types/sources -- ‘domestic’, ‘internal’ or ‘international’ and **one** of these needs to be addressed in this question.

*A response may focus on ‘internal’ political pressures –*

While government is better able to change the law through their policies being introduced to the lower house, where they hold the majority of seats, there will nevertheless be different factions within government, where some members may take a different view on a particular party policy and the pressure applied may inhibit the ability for the law to change.

While this may be most common on matters involving a ‘conscience’ vote, it can also restrict parliament in lawmaking on other matters where the factions come into play.

1. A government considering new legislation may choose to establish a parliamentary committee or Royal Commission.

Discuss the ability of **either** oneparliamentary committee **or** oneRoyal Commission to influence law reform. (4 marks)

**Marking guide**

* Responses should be marked globally
* Students must provide one strength/advantage or weakness/disadvantage of the selected body to influence law reform
* Students must provide at least one counter-argument

*While there is the need for students to draw on the strengths & weaknesses of either one parliamentary committee or one Royal Commissions to influence law reform, there is no requirement to use a ‘recent example of a recommendation for law reform by the body.*

**Sample solution (Parliamentary Committee)**

Parliamentary committees are able to investigate wide ranging issues, subsequently reporting back to parliament as to whether law reform on the issue is needed. Further to this, they are able to do their investigations into the matter in a more efficient manner, as it is not the entire parliament investigating the matter, but rather a select group across various parties. Also, the final report prepared by the committee and presented to parliament is likely to provide a true indication as to whether the proposed law reform should be supported, ensuring parliament as a whole is confident in the recommendations.

Nevertheless, while they have been given the role of investigating the matter, there is no requirement on parliament to accept the recommendations of the committee. They are only and advisory body and the matter must still go before both houses as with any other bill. Further, while it can deal with the matter more efficiency than the entire house, committee investigations can be both time consuming and costly in gathering the information that allows them to make their final recommendations.

For example, one parliamentary committee is the Victorian Standing Committee on Legal and Social Issues. This is an ongoing committee that inquiries into and reports on any proposal or matter concerned with community services, gaming, health, law and justice, and the coordination of government.

*The above ‘sample solution’ probably covers more than required, however for a response to gain high marks it must consider both strengths and weaknesses.*

**Question 6** (10 marks)

‘*Unaffordable and out of reach: the problem of Access to the Australian Legal System’* was the title of a report by Community Law Australia, that led to a bill going before the lower house of the Victorian parliament.

Describe **one** factor hindering the ability of the Victorian civil justice system to achieve **two** of the principles of justice. Discuss the extent to which **one** recommended reform to the Victorian civil justice system may help achieve justice. In your answer, outline **one** reason for law reform.

**Marking guide**

* Responses should be marked globally

*It is important that all parts of the course needing to be addressed in this question are covered. Much of the question has as its focus the final two dot points of the Unit 3 Area of Study 2.*

*One of ‘Cost’, ‘Time’ and ‘Accessibility’ must be described and given the words ‘unaffordable’ and ‘out of reach’, this may make the factor of ‘Cost’ the one to link back to in the response. In doing so, this part of the response requires students to link to two principles that may not be present in the civil justice system. Then there is the need to consider a recommended reform, linking it to the fact it may/may not enhance justice. It would be important when addressing this part of the question to ensure that the reform being suggested is going to assist with the factor chosen earlier in the question.*

*Finally, the response requires knowledge of Unit 4 in terms of one reason for law reform.*

**Sample response**

There is no doubt that not all those who feel they have had their rights infringed or may be required to respond to a plaintiff's claims, are in a financial position to pursue the matter due to the high costs of doing so. Further, whether it be due to these high costs or a range of other reasons, accessibility for some to the civil justice system is restricted. Nevertheless, there are a range of reforms that could be put in place to overcome these limiting factors.

While there are some ways of avoiding the high costs, in many cases they remain, both where the matter may proceed before a court and also in some matters that go to VCAT.

Legal representation is certainly a dominant cost with civil disputes. While all are entitled to legal representation, it is not free with Legal Aid rarely accessible to those involved in a civil dispute. Further, some VCAT matters still require legal representation, significantly adding to the cost of taking such a matter to VCAT, making it out of reach for some.

Fairness as a principle is likely to not be present as the cost of legal representation prevents a party availing themselves of a person who has the training to understand what is required in the courtroom. The plaintiff or defendant themselves is normally not going to understand the legal processes and terminology that confronts them.

Equality as a principle is also likely to not be present. It states that all people should have an equal opportunity to present their case, with no person being treated either favourably or unfavourably. The fact that the civil justice system is not available to all due to the cost of legal representation means equality is not present.

One recommended to the civil justice system was made in 2018 by the Law Council of Australia’s ‘The Justice Project’ which recommended a $390 million per year increase in legal aid funding across Australia. Greater access to legal aid funding for civil disputes is a recommended reform that would address the problem of cost for those wanting to pursue a civil dispute, but who do not do so due to the expense of accessing a legal representative. While the money available to provide legal advice and assistance cannot be unlimited, an increase in available funding is certainly going to result in more of those unable to pursue their rights, being able to do so.

One reason for law reform would be due to changing conditions in society. As society changes so is there the need for the law to keep up with these changes. Over time, if access to the civil justice system is more restrictive to many in society there need to be laws put in place to ensure this does not continue.

*Note that there a wide range of responses that would be appropriate in this question, with the key being that all parts of the question asked are addressed.*

**SECTION B 40 marks**

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| --- |
| **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** (15 marks)

**Source 1**

**High Court rules Aboriginal Australians are not ‘aliens’ under the constitution and cannot be deported.**

The Australian government has released an Aboriginal man from immigration detention after a landmark high court case decided Aboriginal Australians are not aliens for the purpose of the constitution and cannot be deported. …..

In a four-to-three split decision the high court ruled that Aboriginal people with sufficient connection to traditional societies cannot be aliens, giving them a special status in Australian constitutional law [likely to have ramifications far beyond existing native title law](https://www.theguardian.com/law/2019/dec/05/indigenous-citizenship-test-lawyers-argue-up-to-a-third-of-australians-at-risk-of-deportation).

The majority of the high court ruled that New Zealand-born Brendan Thoms was not an alien and the [commonwealth therefore did not have power to order his deportation](https://www.theguardian.com/australia-news/2019/dec/04/citizenship-test-court-to-decide-whether-indigenous-people-can-be-deported-from-australia).

Source: Paul Karp

‘High Court rules Aboriginal Australians are not ‘aliens’ under the constitution and cannot be deported’

The Guardian, February 11th 2020

**Source 2**

**Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3**

Today, the High Court, by majority, answered a question in two special cases to the effect that Aboriginal Australians (understood according to the tripartite test in *Mabo v Queensland [No.2]* (1992) 175 CLR 1) are not within the reach of the power to make laws with respect to aliens, conferred on the Commonwealth Parliament by s51(xix) of the *Constitution* (“the aliens power”). That is the case even if the Aboriginal Australian holds foreign citizenship and is not an Australian citizen under the *Australian Citizenship Act 2007 (Cth).* ….

In their separate reasons, the Justices forming the majority held that it is not open to Parliament to treat an Aboriginal Australian as an “alien” because the constitutional term does not extend to a person who could not possibly answer the description of “alien” according to the ordinary understanding of the word. ….

The plaintiffs, Mr Thoms and Mr Love, were both born outside Australia and are not Australian citizens. …. The plaintiffs were sentenced for separate and unrelated offences against the *Criminal Code* (Qld). After the convictions, the visas of both men were cancelled by the delegates of the Minister for Home Affairs (Mr Peter Dutton) under s501(3A) of the *Migration Act 1958* (Cth). They were taken into immigration detention, under s189 of that Act, on suspicion of being “unlawful non-citizens” and were liable to deportation. …..

Source: High Court of Australia Judgement Summaries

‘Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3’

hcourt.gov.au, February 11th 2020

**Source 3**

***High Court ruling on indigenous deportation ‘will lead to racial division and strife’***

Speaking today, Attorney General, Christian Porter said while the ruling applied to a very specific group of people, the government was carefully looking at the “broader implications”.

He indicated the government would not back down from its policy of deporting non-citizens who commit crimes. “(The decision) has a clear impact for that group of people and that policy for deporting people who’ve committed serious offences while on a visa and who are non-citizens,” he said. “We’ll be looking for ways in which we might be able to effect that policy without reliance on the power we were previously relying on, but we’ll look into that.”

The government could take its lead from Justice Stephen Gageler, who wrote in his minority opinion that the “complications and uncertainties” the decision would create “for the maintenance of an orderly national immigration program … might perhaps be addressed by the Commonwealth parliament reverting to the approach of relying on the power conferred by section 51(xxvii) to make laws with respect to ‘immigration …

Source: Frank Chung;

‘High Court ruling on indigenous deportation will lead to racial division and strife’

news.com.au, February 12th 2020

**Source 4**

***Indigenous ‘aliens’ case sets dangerous precedent: Morrison***

Scott Morrison has flagged new laws which could overturn a landmark High Court decision on Indigenous “aliens”, warning Australia’s laws should remain “blind to race”. ….

Mr Morrison said on Monday the decision risked “setting up a pretty dangerous precedent”.

“I respect the High Court and their judgements, they’re entitled to make the decisions, but equally the government and the Parliament can make laws about these matters and I think it’s important that we carefully consider the implications of that judgement.”

Source: Tom McIlroy;

‘Indigenous ‘aliens’ case set dangerous precedent: Morrison’

afr.com, February 17th 2020

1. Explain the role of the High Court in this case.

 (3 marks)

**Marking guide**

* 1 mark – Role of the High Court in interpreting the meaning of the words in the Constitution
* 2 marks – link to the case – These include:
	+ The specific section in the Constitution that the court was required to interpret – i.e. s51(xix) – the ‘aliens power’
	+ The issue to be decided by the HCA – could indigenous people be classified as ‘aliens’ under s51(xix) of the Constitution
	+ The legislation that was in question – The *Migration Act 1958* (Cth) and in particular s501(3A) and s189

**Sample response**

The High Court of Australia, created through the Constitution, was given the power to interpret the words of the Constitution wherever there was uncertainty as to their meaning – it acts as the guardian of the Constitution.

While it is one thing for the Commonwealth parliament to make a law in an area under which it has been given that power within S51, the High Court, by giving its interpretation, has to power to override parliament’s legislation, or at least clarify its meaning.

The High Court was required to interpret the meaning of the word ‘alien’ in s51(xix) of the Constitution. This section gives the Commonwealth power to make laws with respect to aliens. In this case the High Court decided that the s51(xix) did not include Indigenous people, and therefore any legislation passed under this head of power could not affect Indigenous people.

Hence, while Commonwealth parliament intended the Migration Act to include those of indigenous descent, the majority of High Court judges held that the legislation did not apply to indigenous people - i.e. they could not be viewed as ‘aliens’.

1. Explain why ‘the requirement for standing’ was not a barrier to the High Court in this case. (3 marks)

**Marking guide**

* 2 marks – explanation of the concept of standing
* 1 mark – link to the scenario and the High Court

**Sample response**

While courts have a role to play in lawmaking, they cannot pro-actively take on that role. There is the need for a person of standing who is able to pursue the case.

In this case the plaintiff, Brendan Thom, is a person directly affected by the Commonwealth legislation and thus has the right to commence legal proceedings. Had the legislation not been challenged he would have been deported to New Zealand. Clearly he was a party with a special interest in the case.

1. Discuss the supremacy of parliament in law-making in this case. (5 marks)

**Marking guide**

* Mark globally, however, a possible guide is:
* 1 mark – explanation of supremacy of parliament
* 1 mark – point(s) to support the concept of supremacy of parliament
* 1 mark – counter-argument:
* 2 marks – links to the stimulus material

**Sample response**

As the body who is elected by the people to make laws on their behalf, parliament is the supreme authority when it comes to lawmaking.

For example, in this case, legislation in relation to deportation powers (The Migration Act) was put into place by Commonwealth parliament in its role as supreme lawmaker.

However, the law-making power is not unlimited. Parliament can only pass legislation that is within their law-making powers, which are specifically listed in the Constitution and include heads of power such as the power to make laws with respect to aliens and immigration.

In this case the constitutional validity of certain sections of the Migration Act were challenged in the High Court. In particular, the power given to the Minster for Home Affairs (Mr Peter Dutton) to classify Indigenous people as “unlawful non-citizens” (ie aliens) and thus have them deported. The High Court held that this aspect of the Migration Act was ultra vires (beyond parliament’s power) and thus constitutionally invalid.

However, the supremacy of parliament in lawmaking is evident in that the Prime Minister Scott Morrison has indicated legislation on the matter will be revised and introduced as a bill, that will override the High Court interpretation. Furthermore, the Attorney General, Christian Porter has indicated that the government could introduced legislation under the Immigration head of power – s51(xxvii) in accordance with the view expressed by one of the dissenting High Court judges, Justice Gageler.

1. *A precedent may be either binding or persuasive.*

Distinguish between the terms ‘binding’ and ‘persuasive’ precedents (4 marks)

**Marking guide**

* 2 marks – differences between the two types of precedent:
* 1 mark – link to the stimulus material
* 1 mark – depth of response

*There is the need to show an understanding of the fact that it is through precedent that courts make law, then distinguishing between those that are binding and persuasive.*

**Sample response**

While the main role of any court is to settle disputes when hearing cases brought before them, superior courts are also able to make law in the course of settling a dispute. They do this by way of precedent.

A precedent is where the reasoning behind a decision – the ratio decidendi - made by a superior court is followed in future cases.

A binding precedent is one where a court lower, in the same hierarchy as the precedent case where the material facts are the same, must follow the precedent set. However, a persuasive precedent is one set that may be followed in a future case heard in a different hierarchy or in the same hierarchy as the precedent case by a court of the same level or higher where material facts are the same.

For example, the High Court decision of Love v Cth; Thoms v Cth sets a binding precedent on all lower courts in Australia. However, as the High Court is not bound by its previous decisions the decision is only persuasive on the High Court.

**Question 2** (10 marks)

*An accused person’s right to remain silent and thus choose not to give evidence when facing court charged with a crime is contained in the common law. However, where a guilty plea is given, the law should compel an offender to disclose all relevant facts (in relation to the crime they have admitted to), otherwise be hit with an aggravated sentence.*

1. Identify **one** further right of an accused. (1 mark)

**Marking guide**

* 1 mark – for stating ‘The right to a trial by jury’.
1. Describe **two** responsibilities of the legal practitioners in this case. (4 marks)

**Marking guide**

* 2 marks – for the description of each responsibility selected
* Explanation of the responsibility
* Link to the scenario

*Here we are considering their role in a criminal matter, so it is important that there is no reference to civil in the response. Also, the fact that in this scenario there has been a guilty plea, does mean students need to be more careful with what they present in the answer eg cannot mention legal practitioners addressing a jury*

*Any two of the following could be included in the response:*

* *Be ready to proceed*
* *Comply with the overarching responsibilities to the court*
* *Present the case in the best light*

**Sample response**

Both the legal practitioner representing the State and the one representing the offender/accused owe a duty to the court. They must act in accordance with the law – they cannot simply follow what the client instructs regardless. Also, the legal practitioners must act respectfully to each other.

They must each present their client’s case in the best possible light (while acting in accordance with the law), acting in the best interests of their client whether it be the offender in this case, or the State. Given that in this case there has been a guilty plea, each legal practitioner will make an address to the judge as to what they feel is an appropriate sentence.

1. With reference to the relationship between parliament and the courts, explain how each could be involved in law-making, given the statement *‘the law should compel an offender to disclose all relevant facts (in relation to the crime they have admitted to), otherwise be hit with an aggravated sentence’*.

 (5 marks)

**Marking guide**

* Mark globally
* Must link to the scenario
* Must show a relationship

**Sample response**

While parliament is the primary law-maker, courts nevertheless, have a secondary role to play in lawmaking.

As the supreme lawmaker, parliament is in a position to pass a bill through parliament where the statute that results states that where a person pleads guilty to a crime they lose the forego the right to remain silent and must disclose ‘all relevant information’. Adding, that if they do not ‘disclose’, they face a harsher sanction.

Alternatively, within the final sentencing the judge could indicate that as a matter of course the offender should be obliged to disclose ‘all relevant information’, otherwise face a harsher sanction. This may set a precedent that would be read in conjunction with any legislation on the matter in future cases.

Further to this, parliament could take on the responsibility for codifying that common law principle set down by the courts in this case.

**Question 3** (15 marks)

***‘Record fine for dive death: Shelley Hodgson, Herald Sun, May 3, 2007 (extract)***

A DIVING company has been fined $200,000 over the death of an inexperienced diver who drowned near Portsea. It is believed to be the largest fine for an offence of its kind handed in Victoria. But Judge Lance Pilgrim of the County Court acknowledged that Melbourne Diving Services has gone into liquidation and will simply never pay the $200,000.

Robert David Grant, 32, died on January 17, 2004, while on a diving trip with the company. Melbourne Diving Services pleaded not guilty to one count of failing to ensure the safety of people other than employees. The company was found guilty by a jury.

The court heard that Mr Grant had not dived for 18 months but staff with Melbourne Diving Services did not properly inquire about his experience. It was hoped the fine would send a message to the diving industry.

1. Discuss whether the sanction imposed is appropriate in this case. Refer to sanction purposes in your response. (6 marks)

**Marking guide**

Mark globally

Response must refer to how the sanction referred to in the scenario meets one (or more) purpose and how it may not achieve that purpose

*The question does not place any restrictions on which and how many of the five purposes should be included in the response. However, students should make an attempt to choose purposes that better link back to the case.*

**Sample response**

In this case the sanction imposed was a fine which is where the offender, Melbourne Diving Services, has been fined $200 000, being found guilty of the death of an inexperienced diver.

One sanction purpose is to punish the offender by ordering they pay money to the state. While it will depend on the wealth of the person or organisation having this sanction imposed as to whether the purpose of punishment is achieved, $200 000 is a significant amount for most people. However, the fact that the business has gone into liquidation and the judge himself acknowledges they will therefore never be in a position to pay the fine, does suggest a fine is not achieving its intended purpose of punishing the business.

Deterrence is another purpose and the significance of the fine in dollar terms is likely to achieve general deterrence where other organisation in the same field are likely to ensure they take all the appropriate measures to ensure that people they train to dive are thoroughly briefed before commencing the course and they will check very carefully as to the level of previous experience of the people that attend their courses. It was mentioned by the judge that the fine would ‘send a message to the diving industry’. While specific deterrence may be less relevant given that Melbourne Diving Services no longer operates, should they ever re-commence in business they would no doubt take greater care for the safety of their clients.

1. Explain the possibility for the case to involve the civil justice system.

 (3 marks)

**Marking guide**

* 1 mark – how criminal acts can lead to civil disputes
* 2 marks – referencing the case study to examine the possibility of a civil case arising

**Sample response**

The case in this question was a criminal matter to determine whether the diving company was guilty.

Now that the criminal matter is concluded, it is possible that Melbourne Diving Services will have civil action commenced against them by family of Robert David Grant, alleging negligence and seeking compensation.

However, given that the business has gone into liquidation, there may be no point in commencing this civil action.

*To earn full marks, there would be the need to bring out the fact that the business went into liquidation.*

Section 108 of the Commonwealth of Australia Constitution Act 1900 (UK) states (in part):

*Every law in force in a colony which has become or becomes a State …… shall, subject to this Constitution, continue in force in the State …… the Parliament of the State shall have such powers of alteration and of repeal of any such law …*

1. Explain how Section 108 applies when legislation is written in relation to sanctions.

 (3 marks)

**Marking guide**

* 2 marks – explanation of residual powers
* 1 mark – identifying sanctions as a residual power

The focus of the question is requiring students to draw on knowledge of residual powers.

**Sample response**

Residual powers are those that were held by the States prior to federation;

These powers continue to be under the jurisdiction of the States after federation;

S 108 ensures that such powers are protected and this is the case with matters related to the criminal law, in this case, any legislation relating to sanctions will be determined by each State and thus may vary from state to state.

*For legislation in relation to criminal sanctions to be enacted by the Victorian parliament, the Crown has a role to play.*

**d**. Explain why the above statement is correct? (3 marks)

**Marking guide**

* 2 marks – response to why statement is correct
* 1 mark – role of the Crown in this scenario:

**Sample Response**

For any new legislation to be passed in relation to criminal sanctions, The Crown must sign off on the change.

In the case of Victoria, the Governor must give his/her approval of the bill that has passed through the two houses (Legislative Council and Legislative Assembly).

This is done by granting royal assent.

**END OF MARKING GUIDE**