LEGAL STUDIES
Written Examination

Practice Exam – A
2013

Solution Book

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Important Note:

- *Student responses must always be written in full or 'complete' sentences and paragraphs. Using point form runs the risk of incurring a marking penalty because students may not address the key task word/s in the question.*
- *Suggested mark allocations in this solution book are provided as a guide to assist students when correcting their responses. Students must understand that a range of factors influence mark allocation (for example the provision of incorrect information and poor expression can diminish a response).*
- *Responses provided in this solution book are not exhaustive and have not been endorsed by Victorian Curriculum and Assessment Authority (VCAA). While every care is taken, we accept no responsibility for the accuracy of information or advice contained in this solution book.*

Question 1

The following is an extract from the *Crimes Amendment (Gross Violence Offences) Act* 2013 which, after being passed by both houses of Victorian parliament, received royal assent on 26th February 2013.

a. Outline the structure of the Victorian state parliament.

The Victorian state parliament is based on a bi-cameral system and consists of a lower house, an upper house, and the Crown (or Queen's representative) [1]. More specifically, Victorian state parliament consists of the Legislative Assembly (lower house consisting of 88 members), the Legislative Council (upper house consisting of 40 members) and the Governor (Crown) [1]. The current governor, appointed in April 2011, is former judge Hon. Alex Chernov.

(One mark is allocated for stating basic structure (i.e. three components) of Victorian Parliament (e.g. lower house, upper house and Crown) and one mark is allocated for correctly naming each component. Although students are not required to state specific detail such as numbers or individuals, it adds to the detail and level of knowledge provided. Currently the Liberal-National party has a majority in both houses of the Victorian state parliament and forms the government.)

2 marks

b. Explain one main role of each house in the Victorian state parliament.

One main role of the lower house of Victorian state parliament (i.e. the Legislative Assembly) is to initiate, discuss and debate laws that reflect the views of the people of Victoria and scrutinise the working activities of the government. While all bills, other than appropriation bills may commence in either house, most bills are initiated in the Legislative Assembly. [1]

One main role of the upper house of Victorian state parliament (i.e. the Legislative Council) is to act as a 'house of review' that debates and scrutinises legislation passed in the lower house, because, while all bills other than financial bills may commence in either house, most bills are initiated in the Legislative Assembly [1]. The Legislative Council may also suggest amendments to the lower house.

(One mark is allocated for stating one role of the each house in the Victorian state parliament (e.g. lower house and upper house). Students should correctly name each house in the Victorian state parliament (e.g. the Legislative Assembly and Legislative Council) and explain a major or significant role of each house.

Alternative response: One main role of the Legislative Assembly is to form the government of the day. The party (or coalition of parties) with the majority of members in the Legislative Assembly forms the Victorian government (currently the Liberal-National party) and is responsible for revising existing, and implementing new legislation.
One role of the Legislative Council is to represent regional interests throughout Victoria because it consists of five counsellors elected from each of the eight regions throughout Victoria (consisting of a total of 40 representatives) - although in reality councillors generally vote in accordance with the policies of their political party.)

2 marks

c. Explain the term 'royal assent' and describe one other stage the *Crimes Amendment (Gross Violence Offences) Act 2013* would have passed through on its progression through the legislative process.

In Victorian state parliament 'royal assent' refers to the process where the Queen's representative, the Governor, signs and gives approval on behalf of the Queen for a proposed law (bill) to become an Act of parliament (legislation) or law [1]. The Governor can grant royal assent after a bill has successfully passed through both houses of parliament. [1]

One other stage the *Crimes Amendment (Gross Violence Offences) Act 2013* would have passed through on its progression through the legislative process is the 'second reading'. During the second reading stage the minister (or member of parliament) responsible for initiating the bill into the house makes a speech explaining general purpose and broad reasons for the bill. [1] Parliament is then adjourned to allow time for members to study bill and consider public reaction to the proposed law. Upon return the members of parliament debate the general principles of the bill and vote to decide whether it should proceed to the next stage. [1] This bill also is sent to the 'Scrutiny of Acts and Regulations Committee' for review (and in the Legislative Council, may be sent to one of three legislation committees).

(Two marks are allocated for explaining the term 'royal assent' and two marks for describing another stage the bill would pass through on its progression through the Victorian state parliament (because the stimulus material, that is, the Crimes Amendment (Gross Violence Offences) Act 2013, refers to Victorian legislation). Students should correctly identify the Governor as the Queen's representative in Victorian state parliament. Students must provide sufficient depth (to be awarded two marks) when describing one other stage the bill would pass through on its progression through the Victorian state parliament. A variety of responses would be acceptable for this question.

Alternative response: Other stages the bill may have passed through on its progression through the legislative process include the:

- *'Initiation & first reading' where permission is given for the bill to be introduced into the house, the long title of the bill is read, the bill is placed on the parliamentary agenda and copies are circulated to members of the house. No debate takes place at this stage.*
- *'Consideration in detail' (referred to as the 'Committee of the Whole House' in the upper house, the Legislative Council) where the specific details of the bill are discussed and debated in great depth and amendments may be suggested and agreed too. During this stage the bill can be discussed by the whole house or sent to a smaller committee for investigation and scrutiny. By tradition, the speaker in the lower house (or president in upper house) leaves the house during the debate and returns when a vote is taken to determine whether the bill should proceed to the next stage; and*
- *'Third reading' where the long title of the bill is read once more and further debate on the bill may take place, although this is rare and the third reading stage usually only involves a formal vote to accept the bill.)*

4 marks

Question 2

Explain, using a contemporary example, one reason why our laws continually need to be altered.

One reason why our laws continually need to be altered is to ensure they keep pace with and reflect changing societal views and values because individuals are unlikely to adhere to laws that do not reflect their morals and standards. Community views and values change over time as members of society gain greater awareness and knowledge and become more or less accepting of particular behaviours. [1] For example, in response to the increasing awareness of the harmful effects of smoking and in an attempt to discourage smoking, the Commonwealth parliament passed the *Tobacco Plain Packaging Act 2011* making it illegal for cigarette companies to use logos, brand images and promotional text on their tobacco products and packaging. Under this legislation, from December 2012, all tobacco products sold in Australia must be presented in a plain package containing specific health warnings [1].

(One mark is allocated for explaining one reason why our laws continually need to be altered and one mark for providing a contemporary (i.e. recent) example to support the explanation. Examples should be contemporary or recent and while VCAA does not define the term 'contemporary', we would suggest students provide examples of law changes that have occurred within the last 3-4 years.

A variety of responses are acceptable for this question including the need to continually alter laws so the law:

- *keeps pace with advances and developments in technology (see 'Mr Wood's Legal Studies Exam B 2013 - Question 2 (b)' for another sample response); and*
- *provides greater protection to the individuals, specific groups within the community and the environment (see below).*

Alternative response: One reason why laws continually need to be altered is to provide greater protection to individuals, specific groups within the community and the environment. For example, circumstances within the community change (our population ages or crime levels increase) and knowledge and awareness of the harmful effects of certain behaviours increases, legislation is often passed to provide greater protection for the community at large and specific groups within the community such as children, workers, the aged, and

consumers. For example, in February 2013, the Victorian Liberal Government announced its intention to introduce new laws to improve the state's parole system to provide greater protection to the community. Under the new legislation those who reoffend while being released on parole will automatically have their parole cancelled or reassessed. In addition, individuals who have been convicted of violent or sex offences, that are convicted of the same type of offence while on parole, will automatically have their parole cancelled and be returned to custody (referred to as 'mandatory cancellation of parole').)

2 marks

Question 3

In August 2012, the Victorian Law Reform Commission was asked by the Victorian Attorney General Mr Robert Clark to review the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* and examine the law relating to persons who are not fit to stand trial, or are found not guilty due to mental impairment.

Explain the role of the Victorian Law Reform Commission with regard to legislative change after they have received a reference from the Attorney General.

The Victorian Law Reform Commission (VLRC) is an independent, government-funded organisation that has the main role of monitoring, developing and coordinating law reform in Victoria and so spends the majority of its time conducting 'inquires' (or 'references') and research into legal issues and areas of law reform referred to it by the Victorian Attorney General.

After receiving a reference from the Attorney General, the VLRC conducts an inquiry into the designated area of law reform by undertaking various processes. Firstly, VLRC staff undertake preliminary research of the area of law reform which can include: examining related laws and initiatives from interstate and overseas; discussing the key issues surrounding the area of law reform with individuals, groups and experts who may be affected by or have a particular interest in the area being examined; and preparing a 'consultation paper' which is used as a basis for community discussion. [1]

After the consultation paper has been prepared, the members of the community (e.g. individuals, groups and interested parties including experts (e.g. police, magistrates, community welfare workers and medical practitioners) are invited to make submissions (via public meetings, surveys, forums, written submissions etc) in an effort to gather a wide range of views and suggestions regarding possible changes to the law. [1]

Finally after consultations, the VLRC will prepare a report for the Attorney General that includes recommendations for amending existing legislation and/or implementing new legislation. [1] The Attorney General then 'tables' or presents the final report to the Victorian parliament so members can consider whether to implement some or all of the VLRCs recommendations. The VLRC also has a role to consult with and educate the community (by undertaking education programs) on areas of law relevant to the Commission's work. [1]

(Better responses would give a brief description general role of the VLRC in an introductory sentence and then describe the Commission's role, with regard to legislative change, after a reference has been received from the Attorney General in greater detail. Students must provide sufficient depth (i.e. at least four points)

in their explanation to be awarded four marks. If students wish to abbreviate 'Victorian Law Reform Commission' to VLRC they must write 'Victorian Law Reform Commission' full when first mentioned with the abbreviation followed in brackets (as shown in the response above).

Additional information: The VLRC is one of a number of organisations in Victoria that examine the need for law reform. Other organisations such as the Parliamentary Law Reform Committee and the Sentencing Advisory Council also examine the need for law reform in Victoria and make recommendations to the parliament. The use of an example, although not directly requested, would enhance this response. Current and recent inquires (or references) conducted by the VRLC include inquires into:

- *Jury empanelment (final report due March 2014)*
- *The laws of succession (final report due Sept 2013)*
- *Crimes (Mental Impairment and Unfitness to be Tried) (final report due March 2014)*
- *Guardianship and administration laws (final report tabled in Parliament in April 2012)*

Excellent information on the role VLRC and the above inquires is available on their website at www.lawreform.vic.gov.au)

4 marks

Question 4

With reference to the Commonwealth Constitution, distinguish between 'specific' and 'residual' areas of law-making power. Provide examples to support your response.

With reference to the Commonwealth Constitution, 'specific powers' refer to those areas of law-making power that are stated in the Constitution as areas in which the Commonwealth Parliament has the power to make law. [1] Specific law-making powers may be either concurrent or exclusive.

'Exclusive powers' refer to those specific areas of law-making power that only the Commonwealth Parliament can legislate in, for example, currency, defence and customs and excise duties [1] whereas 'concurrent powers' refer to those specific areas of law-making power that are shared by both the Commonwealth and state parliaments, for example, making laws in the areas of taxation and census and statistics. [1] If both the state and Commonwealth parliaments pass legislation in an area of concurrent power that is inconsistent, under S109 of the Constitution, the Commonwealth law will prevail to the extent of the inconsistency and the inconsistent sections of the state legislation will be considered invalid.

By contrast, 'residual powers' are those areas of law-making power not stated in the Constitution as specific powers of the Commonwealth and therefore remain with the states as areas in which only the states may legislate. Examples of residual powers include public transport, electricity and education etc. [1]

(One mark is allocated for distinguishing between each of the four following powers: specific, exclusive, concurrent and residual and one mark for providing examples of each. Better response would include reference to S109 when describing concurrent powers (as above).)

5 marks

Question 5

a. With reference to the 'separation of powers' as outlined in the Commonwealth Constitution, distinguish between the 'legislative' and 'judicial' power and explain to what extent these two powers are separate within the Australian Parliamentary system.

With reference to the principle of the 'separation of powers', the legislative power refers to the power to make and amend the law and is held by the parliament (referred to as the legislature), which at federal level consists of the House of Representatives, the Senate and the Queen's representative. [1] By contrast judicial power refers to the power to apply and interpret the law and is held by the courts and tribunals. [1]

The legislative and judicial powers are held by separate bodies so the judiciary can provide an independent and impartial check to ensure parliament do not make laws beyond their power (for example, members of the parliament cannot serve on the judicial bench and vice versa). [1] The Legislative branch within our parliamentary system does however overlap with the executive branch because the executive power, to administer and implement the law, is held by the Governor General who in reality acts on the advice of the Prime Minister and various senior ministers - who are also members of the legislature.

(One mark is allocated for distinguishing between the 'legislative' and 'judicial' powers within our parliamentary system and one mark is allocated for explaining the extent or degree to which these two powers are separate within the Australian Parliamentary system. Better responses will directly answer the question being asked (i.e. distinguish between legislative and judicial powers) rather than provide a memorised description of the 'separation of powers'.)

3 marks

b. Outline one restriction imposed by the Commonwealth Constitution on the legislative powers of the State parliament.

The Commonwealth Constitution includes various specific prohibitions that restrict the law-making powers of the State parliaments for example, section 114 of the Constitution bans or prohibits the states from raising or maintaining any naval or military force, which in reality prohibits the states from making laws in the area of defence thereby making defence an exclusive power of the Commonwealth parliament. [1]

(One mark is allocated for describing one restriction imposed by the Constitution on the law-making powers of the State parliaments. A common error is for students to describe a restriction imposed by the Constitution on the Commonwealth's law-making powers such as the section 116, which prohibits the Commonwealth from making laws that impose or restrict religious practices.

Additional response: Other specific prohibitions that restrict the law-making powers of the State parliaments include:

- *Section 115, which prohibits the states from coining money thereby making laws on currency an exclusive power of the Commonwealth Parliament.*
- *Section 90, which makes the imposition of customs and excise duties an exclusive power of the Commonwealth and therefore prohibits the states from making laws in this area.)*

1 mark

Question 6

The following scenario contains several errors in the way this trial has been conducted.

> David, aged 38, was charged with serious assault. His case was heard in the Supreme Court before a judge and a jury. During the trial the court heard that David had been convicted of similar crimes on two previous occasions. After 6 hours deliberations the jury found David guilty, on the balance of probabilities, and sentenced him to three years imprisonment, with a non-parole period of 18 months.

a. Identify **three** errors in the above scenario **and** explain the correct process or procedure that should have occurred.

The first error in the above scenario is that David's armed robbery trial was heard at the Victorian Supreme Court. [1] To be correct the County Court would most likely hear this case as armed robbery is an indictable offence and the County Court hears all indictable offences except murder and attempted murder. [1] (The Supreme Court can hear all indictable offences but mainly hears most serious cases such as murder and attempted murder).

The second error is that the court heard David's two previous convictions. [1] To be correct, under the adversary system of trial, the strict rules of evidence and procedure generally do not permit the prosecution to outline the prior convictions of the accused because this may bias the jury. [1]

The third error in the scenario is that the standard of proof required for a guilty verdict was 'on the balance of probabilities'. [1] To be correct the standard of proof required to convict an accused in all criminal trials is 'beyond reasonable doubt'. [1]

9One mark is allocated for identifying each error in the scenario (total 3 marks) and one mark is allocated for explaining the correct process (total 3 marks). A common error is for students not to state each error in the scenario but simply explain the correct process.

Alternative response: Another error in the scenario is that the jury determined David's sentence. The correct procedure would be for the judge to determine the sentence because juries do not determine the sentence in a criminal case. Determining the sentence is a role of the judge.)

6 marks

b. Explain the nature and purpose of one pre-trial procedure that would have taken place prior to David standing trial.

One pre-trial procedure that would have taken place prior to David's trial is a bail hearing. A bail hearing is held to determine whether or not an accused (in this case David) should be released from custody upon a written undertaking they will appear in courts at a later date (e.g. for a committal hearing or trial). [1] Conditions are usually attached to the granting of bail such as the accused regularly attending a police station and the provision of a surety and/or monetary deposit.

The purpose of granting bail is to uphold 'presumption of innocence' and treat an accused as though they are innocent until they are proven (or plead) guilty by allowing them the freedom to remain within the community with family and friends. Bail also allows the accused the time and freedom to prepare for their forthcoming hearing or trial. [1]

(One mark is allocated for identifying and explaining either the pre-trial procedures of a bail or committal hearing and one mark is allocated for explaining the purpose of the selected procedure.

Alternative response: Another pre-trial procedure that would have taken place prior to David's trial is a committal hearing. A committal hearing is held in the Magistrates' Court to determine whether the prosecution has sufficient evidence against a person accused of committing an indictable offence to secure a conviction (i.e. that a jury could find the accused 'guilty') in a higher court (i.e. the County or Supreme Courts). [1]
The purpose of a committal hearing is to determine or test the strength of the prosecution's case against the accused thereby saving the time and expense (for the court and the parties) associated with undertaking a trial that is unlikely to succeed. A committal hearing may also save time, and costs, at trial by clarifying some of the key issues in the case prior to trial (e.g. the accused may decide to enter an early guilty plea to some or all of the charges and parties have the opportunity to discuss and clarify certain evidence and legal issues). [1])

2 marks

c. Explain two factors that would have affected the composition of the jury in this case.

One factor that would have affected the composition of the jury in this case would have been the 'selection process' because not all individuals who are randomly selected from the electoral rolls are eligible for jury service. During the selection process prospective jurors are sent a 'Jury eligibility questionnaire' to determine their eligibility for jury service. [1] Categories of individuals who are exempt from jury service include those who may be disqualified (e.g. unsuitable for jury service because they have committed an unlawful action); ineligible due to their occupation, which might detract from their impartiality (e.g. police or lawyers) or inability to understand the nature of the task [1]; and those who are excused for a good reason (e.g. suffer a temporary or permanent illness which might make serving on a jury an undue hardship).

A second factor that would have affected the composition of the jury in this case would have been the 'empanelment process' (which begins once potential jurors form a jury panel enter the courtroom to be selected for a trial). For example, during the empanelment process members of the jury panel are given an

opportunity to be excused from serving on the case for a legitimate reason (e.g. they know one of the parties or key witnesses in the case and would have difficulty remaining impartial). [1] Similarly, in an attempt to have an impartial jury, each party to the case is given the opportunity to challenge potential jurors to eliminate individuals whom they feel might be unsuitable. [1] In this criminal trial the accused and prosecution can challenge (or 'stand aside' in the case of the prosecution) six potential jury members without cause (called peremptory challenges).

(Two main factors that affect the composition of a jury are the 'selection process' and the 'empanelment process'. Two marks are allocated for explaining each of these two factors (total 4 marks). A common error is for students to confuse 'factors that influence the composition of a jury' with 'categories of individuals who are exempt from jury service'. Students should not be awarded any marks for simply explaining two categories of individuals who are exempt from jury service (e.g. those who are ineligible, disqualified or excused for a good reason). Better responses would make reference to the stimulus material (for example, given the scenario is a criminal trial, when discussing the empanelment process students should refer to the parties as the prosecution and defence.)

4 marks

Question 7

Using examples, explain the means by which the Commonwealth Constitution protects the rights of the Australian people.

The Commonwealth Constitution protects the rights of the Australian people in three main ways: it offers structural protection of rights; includes express rights and provides for the existence of implied rights.

Firstly, the Constitution offers 'structural protection' of rights by outlining various structures, systems and parliamentary principles (upon which the Australian parliamentary system are based) that indirectly protect various rights of the Australian people. [1] For example, the Constitution outlines the parliamentary principle of 'representative government', which ensures the House of Representatives and the Senate are elected by a direct vote of the people (sections 7 and 24), thereby protecting the right of the people to elect the Commonwealth parliament. [1] Similarly, the Constitution upholds the parliamentary principle of the 'separation of powers' which, by ensuring that no one body can hold the legislative, executive and judicial power within our parliamentary system, indirectly protects the Australian people by minimising the likelihood of the parliament or government misusing its power (for example, an independent judiciary can help ensure the Commonwealth parliament does not make laws beyond its legislative power).

The Constitution also protects a limited number of rights of the Australian people by containing five express (or entrenched) rights that can only be removed or altered by changing the wording of the Constitution via a referendum. [1] For example, the Constitution expressly protects the right of the Australian people to have a 'freedom of religion' to a limited extent in that the Commonwealth parliament cannot impose a state religion or prohibit religious practice (section 116). [1] Similarly, the Constitution protects the right of Australian citizens to have a trial by jury for an indictable Commonwealth offence (section 80).

The Commonwealth Constitution also protects the rights of the Australian people through the ability of the High Court to interpret the constitution and confirm the existence of implied rights. For example, over the years in a variety of cases, the High Court has determined that the constitution implies the right to freedom of political communication. [1] For example, in *Australian Capital Television Pty Ltd V Commonwealth (1992)* the High Court found that a Commonwealth law restricting political broadcasts on radio and television during election campaigns was unconstitutional and invalid because it breached the constitutional principle of 'representative government' that implies a right to 'freedom of political communication'. [1]

All express and implied rights protected by the Australian Constitution are fully enforceable by the High Court and any legislation that infringes these rights can be declared invalid.

(One mark is allocated for explaining each of the three key means by which the Commonwealth Constitution protects rights (that is, through the provision of structural protection and the inclusion of express and implied rights) and one mark is allocated for providing an example to illustrate each means of protection. Students must provide at least two examples to illustrate the means by which the Commonwealth Constitution protects rights. Better responses would provide one example of each of the three means by which the Commonwealth Constitution protects rights rather than providing two or three examples of express rights only.

When providing an example of an express right it is vital that students are precise. For example, it is incorrect to simply state that the Constitution protects the right of the Australian people to 'freedom of religion'. This statement is too broad as the Constitution only protects 'freedom of religion' to a limited extent in that the Commonwealth parliament cannot impose or prohibit religious practice (s116). Similarly the Constitution does not protect the general right to 'trial by jury' because section 80 only protects the right to trial by jury 'for an indictable Commonwealth offence'.

Other examples of 'structural protection' provided within the Constitution include the provision of the parliamentary principle of 'responsible government' (where ministers and the Government must be answerable to the parliament and act with integrity or resign), which indirectly protects the right of the people to be administered by a government that has the confidence of the parliament.

The five express rights that are explicitly stated and entrenched in the Constitution are the right:

- *to freedom of religion in that Commonwealth Parlt cannot establish and impose or prohibit religion (s116)*
- *of residents to not to be discriminated against based on their state of residence (s117).*
- *to fair and just compensation for property acquired by the Commonwealth (s51)*
- *to a 'trial by jury' for indictable Commonwealth offences (s80)*
- *to free trade and commerce between states (s92))*

6 marks

Question 8

In *Karatjas v Deakin University,* the Victorian Supreme Court (Court of Appeal) ruled that Deakin University owed a duty of care to Ms Karatjas, an employee of a catering company that operated a campus café at the university, after she was assaulted by a third party while walking from the café to the campus car park. The court found the university had a duty to consider the possibility of risk of injury to employees, including contracted employees.
Source: Karatjas v Deakin University [2012] VSCA 53

a. Describe the jurisdiction of the Victorian Supreme Court of Appeal.

The Victorian Supreme Court of Appeal has appellate civil jurisdiction to hear appeals from the County Court and Supreme Court (Trial Division) on a point of law (or error in law), on questions of fact (or against the verdict) or against the amount of damages awarded. [1] The Victorian Supreme Court of Appeal has appellate criminal jurisdiction to hear appeals from the County Court and Supreme Court (Trial Division) on a point of law (or error in law), on questions of fact (or against the verdict) or against the leniency or severity of the sentence. [1]

(Despite the stimulus material referring to a civil case, the question requires students to describe the general jurisdiction of the Victorian Supreme Court of Appeal. One mark is allocated for describing the civil jurisdiction of the Victorian Supreme Court (Court of Appeal) and one mark is allocated for describing the criminal jurisdiction.

Additional information: The Victorian Supreme Court of Appeal consists of and is presided over by three justices. It has no original jurisdiction and can only hear criminal and civil appeals from the County Court and Supreme Court (Trial Division) and civil appeals from VCAT (in the situation where the VCAT hearing was presided over by the president or a vice-president).)

2 marks

b. Explain whether or not the precedent set by the Victorian Supreme Court of Appeal in this case can ever be changed.

Being the highest court in the Victorian hierarchy, the High Court of Australia can alter the precedent set by Victorian Supreme Court of Appeal in this case. The High Court of Australia could either reverse the existing precedent on appeal or overrule the existing precedent in a different and later case. [1] The precedent set by Victorian Supreme Court of Appeal could also be overridden by parliament because parliament is the supreme law making body and can override court decisions (with the exception of decisions in constitutional cases). [1]

(One mark is allocated for explaining that higher courts within the same hierarchy can alter precedents set by lower courts by either reversing or overruling the existing precedent. One mark is allocated for explaining that court decisions can generally be overridden by parliament. Better responses would consider the stimulus material and specifically refer to the High Court of Australia as being able to alter precedents set by the Victorian Supreme Court of Appeal.

According to the doctrine of precedent, all lower courts must follow precedents set by higher courts in cases determined in the same court hierarchy where the material facts are similar. In this case the Victorian Magistrates', County and Supreme Court (Trial Division) must follow the precedent set in the Victorian Supreme Court of Appeal in cases where the material facts are similar. Courts of the same standing are not strictly bound to follow their own previously set precedents, but by tradition judges in courts of the same standing rarely overrule their colleagues decisions and so precedents set in these courts are considered highly persuasive.)

2 marks

c. Evaluate two strengths of judges making law.

One strength associated with judges or courts making law is that the law is consistent and predictable because the doctrine of precedent ensures similar cases are decided in a similar manner. More specifically this means by looking at past cases parties to a case can, to a certain extent, predict how the law will apply to their situation. [1] One difficulty with this, however, is that due to the large volume of common law, and the fact that judges often give more than one reason for their decision, it can be time consuming and costly for parties to locate relevant precedents. [1]

Another strength associated with judges making law is that, to a certain extent laws made by judges are flexible and can be changed over time because the operation of precedent allows judges to avoid following a binding precedent if they can distinguish between the facts of the case at hand and the case in which the precedent was set. Similarly, judges in higher courts can reverse an existing precedent on appeal or overrule an existing precedent in a later and different case. [1] This also allows for the law to develop over time, particularly in areas where there is no existing legislation. It can, however, be argued that the doctrine of precedent may lead to rigidity if courts are unable or unwilling to distinguish, reverse or overrule an existing precedent. For example, judges can be reluctant to overrule or reverse earlier precedents, preferring to leave the law making to parliament. [1]

(Evaluate means to explain the strengths and weaknesses (i.e. examine 'both sides' of a point or feature). When evaluating, students must outline and explain the strength of the particular point or feature be examined and then explain any weaknesses associated with the chosen strength.

Alternative response: Another strength associated with judges making law is that judges are independent and impartial. The judiciary is an independent body and is not subject to the same political pressures as the legislature (parliament) and the executive (government) when determining cases. As judges are appointed, rather than elected by the people, they can apply and interpret the law without bias and are not subject to the pressure of satisfying the electorate to enhance the chance of re-election. It can, however, be argued that the process of parliament appointing judges can result in the judiciary being unresponsive to the views of the people and making decisions that do not necessarily represent community values.)

4 marks

Question 9

In late 2012, over 600 local residents of Tecoma, a suburb in Melbourne's Dandenong Ranges, gathered together to demonstrate against a decision made by the Victorian Civil and Administrative Tribunal granting fast food chain McDonalds a 24 hour a day, seven days a week licence to operate the first McDonalds store in the area. In addition to their protest, residents took a petition, containing over 2000 signatures and over 1500 letters of protest to the tribunal. The local Yarra Ranges Council also supported the residents fight against a McDonald's store being operated in the area claiming the operations would conflict with the local environment and the suburb's 'cultural identity'.

a. Evaluate the effectiveness of one method individuals or groups can use to pressure for legislative change referred to in the case study (above).

One method used by the Tecoma residents to agitate for a change in the law is a demonstration or protest.

A demonstration can be an effective method of pressuring for change in the law because they can draw attention to a cause and often attract free positive media coverage to help raise awareness of a need to change the law (or in this case dissatisfaction with a legal decision) and gather public support. [1] The more people who support a change in the law, the more likely it is to succeed because members of parliament aim to represent the views of the majority and, as such, are more likely to be influenced by the majority. [1]

Demonstrations, however, will be less effective if they become violent, lead to breaches of the law, result in protesters being arrested or cause significant public inconvenience (e.g. road closures etc) as such actions can detract from the credibility of the demonstration and attract negative media coverage, which will decrease public support and the likelihood of a law change. [1]

(Three marks are allocated for evaluating (i.e. provide strengths and weaknesses) of either demonstrations or petitions as a method to influence change in the law (as these are the two methods referred to in the case study. Students must provide sufficient depth or to be awarded three marks and so better responses would highlight at least two strengths associated with demonstrations and one weakness (or one strength and two weaknesses). Better responses would also refer to the stimulus material.

The VCAA study design requires students to be able to explain and evaluate three means by which individuals and groups influence legislative change, including demonstrations, petitions and use of the media. Some students incorrectly assume they only need to learn one of these means of influencing change. This is incorrect; students must learn all three methods.

Alternative responses: A petition is a statement of a proposed change in the law signed by individuals (name and address) to show support for the change. The petition is then presented to a member of parliament who presents the issue in parliament (although in this case study the petition was presented to VCAT as a form of informal protest against their decision). Petitions can be an effective way to pressure for change in the law because they are a relatively simply and inexpensive means of expressing dissatisfaction with the existing law and/or the need for legislative change. [1] Petitions are more likely to be effective if they contain many signatures and generate large community and/or media support because, in their aim to be 'representative', members of parliament are more likely to support law change that reflects the views and

values of the majority. [1] Although, limitations on the effectiveness of petitions include: individuals signing a petition more than once can compromise its integrity; some members of the community find petitions an imposition and can be reluctant to sign their name and address; and there is no guarantee that Parliament will respond to petition.[1])

3 marks

b. Discuss to what extent VCAT is able to improve the ability of individuals to use the legal system to resolve minor civil disputes.

The Victorian Civil and Administrative Tribunal (VCAT) has been able to improve the ability of individuals to use the legal system when resolving minor civil disputes by providing a specialised, more flexible, informal and cost efficient dispute resolution service, although there are some limitations associated with certain processes and procedures within VCAT.

The Victorian Civil and Administrative Tribunal (VCAT), specialises in resolving minor civil disputes and aims to increase access to the legal system by providing an alternative avenue of dispute settlement for individuals who do not wish to take their dispute to court. One way VCAT aims to improve the ability of individuals to use the legal system is by resolving disputes an informal manner (for example, the physical environment at VCAT is less formal than within the court system and VCAT does not adhere to the strict rules of evidence and procedure that exist in court trials), in the hope that parties will feel more comfortable and confident to pursue an action and present their own case at the tribunal. [1] The informal nature of proceedings at VCAT may, however, allow a more self-assured party to dominate proceedings and/or contribute to a less confident party compromising too easily (especially in cases resolved via mediation and conciliation where legal representatives are generally not present). [1] Court hearings and trials, by contrast, take place in a formal environment (e.g. the courtroom setting is formal and legal representatives and judges usually wear wigs and gowns) where proceedings are governed by strict rules of evidence and procedure that ensure each party has an equal opportunity to present their case – although these strict rules of evidence and procedure can be confusing for the parties and may discourage individuals from pursuing legal action.

Another way VCAT aims to improve the ability of individuals to use the legal system to resolve minor civil disputes is by encouraging parties to resolve their dispute using alternative (or appropriate) methods of dispute resolution such as mediation and conciliation. In fact, the preferred method of dispute settlement at VCAT is mediation. Mediation and conciliation are methods of dispute settlement the parties engage in discussions, with the assistance of an independent third party who facilitates communication between the parties (and, in the case of conciliation, may offer advice regarding possible resolutions to the dispute), in the hope that they can negotiate a mutually agreed resolution to their dispute. By resolving the dispute between them, it is hoped that parties will be more satisfied with the outcome (in contrast to having the outcome imposed upon them by a magistrate or judge at court) and increase the likelihood of parties adhering to the decision. [1] Resolving disputes through mediation and conciliation can also be particularly beneficial in cases where parties have an ongoing relationship such as in disputes between family members, neighbours or employees and employers. [1] Although, as mentioned, the effectiveness of parties reaching a decision between themselves can be limited if one party dominates or if one party compromises too much because they are trying to cooperate as much as possible. Also decisions made under mediation and conciliation are not legally binding [1] and if parties do not adhere to their agreement

the matter may end up going to the courts for adjudication (which obviously would increase the time and cost associated with resolution).

VCAT has also been able to improve the ability of individuals to access the legal system, particularly for those who are engaged in a minor civil dispute, because it is more cost effective than taking a case to court as legal representation (which can be very expensive) is often unnecessary, discouraged or not allowed and application fees at VCAT are much cheaper than court fees. [1] However, the cost of resolving a dispute at VCAT can be more expensive and lengthy if parties are required to attend mediation and pre-hearings prior to resolution. Similarly, over recent years there has been an increasing use of legal representatives at VCAT that has increased the costs associated with dispute resolution in many cases, although in more complex cases the option to use legal representatives can ensure parties have their case prepared and presented in the best possible manner. [1]

VCAT also aims to keep costs low, and improve access, by introducing more flexible processes and procedures that enable applications to be dealt with more efficiently. For example, in 2011, VCAT introduced Smart Queue, so individuals can lodge application forms and make payments online. [1] During the same year, VCAT also became the first justice institution in Victoria to introduce an online case management system (VCAT Case Portal) to assist with management of cases and allow parties to store, upload and exchange documents electronically with 24 hour, 7 day access, and obtain information regarding their case, such as hearing dates. Case Portal has reduced delays and costs associated with management of documents and cases and may encourage access. [1] Implementing more flexible operating hours (e.g. by offering twilight sessions sitting until 7 pm and Saturday morning hearings) and providing services at a range of regional and metropolitan locations in unconventional settings (such as shopping centres and community facilities) has also helped VCAT resolve disputes in a more flexible and timely manner and improves access for individuals (e.g. on average, takes 18 weeks to resolve a dispute from the time the matter is lodged at the tribunal).[1]

(Students must discuss the degree to which VCAT is able to improve the ability of individuals to use or access the legal system. Students must link their knowledge of VCAT to the ability of the legal system to provide effective access (which is one of the three 'elements of an effective legal system' that must be examined in Unit 4). Generally, to be awarded 8 marks students should evaluate at least four ways (2 marks allocated for each) that VCAT improves the ability of individuals to access the legal system and provide sufficient depth in their explanations. The use of examples also will enhance a response.

The task word 'discuss' means students should examine, deliberate and provide strengths and weaknesses (if applicable). Students may also provide their own opinion and/or a closing statement. The task words 'to what extent' means students should to indicate the degree or amount to which they support a particular statement, which will usually require an examination of strengths and weaknesses. If students wish to abbreviate Victorian Civil and Administrative Tribunal to VCAT they must write Victorian Civil and Administrative Tribunal in full followed by the abbreviation (VCAT) in brackets, at the commencement of their response. Better responses will give an introductory sentencing and continually refer back to the question.

Alternative response: Another reason why VCAT is able to improve the ability of individuals to use the legal system to resolve minor civil disputes is because it consists of a number of 'lists', each of which has

specialised jurisdiction to resolve particular types of disputes (e.g. the Residential Tenancies List is one of sixteen different VCAT lists and specialises in hearing minor disputes between landlords and tenants). The existence of specialised lists enables the staff within each list to develop appropriate expertise and processes that work towards the efficient and effective resolution of disputes. This expertise creates confidence in the system and increases the likelihood that people will use the tribunal to help resolve their disputes.[1] In addition, VCAT continually expands the range of lists offered in an attempt to constantly improve access to its services. For example, in 2010 the Owners Corporations List was created to deal with disputes involving owner corporations (body corporates), which manage the common ownership of shared property (such as ownership of common garden areas in unit blocks). VCAT has also developed specific services and strategies to assist the Koori community, including having support staff available to assist with preparing their claims.[1]

Similarly, VCAT is able to improve the ability of individuals to access the legal system because disputes are generally resolved in a non-adversarial and confidential manner, compared to the courts, meaning processes are private and less threatening for the parties concerned. This can especially encourage parties who must continue an ongoing relationship after the dispute is resolved (for example, business partners or family members) to use VCAT to resolve their dispute. [1] However, while VCAT generally uses non-adversarial methods of disputes settlement, other than in cases resolved by arbitration or at hearings, decisions are not binding on the parties. [1])

8 marks

Question 10

The following comment appeared in a leading Victorian newspaper.

> A trial conducted under the adversary system is like a battlefield with two opposing parties being more concerned with winning their case than establishing the truth. Our adversary system of trial is in desperate need of reform and could be improved by adopting some features of the inquisitorial system.

Evaluate the operation of the adversary system of trial in Australia and discuss possible improvements to this system.

The adversary system of trial is to some extent like a battlefield in that two opposing parties do prepare and present their case (in accordance with strict rules of evidence and procedure) before an independent and impartial adjudicator, with the aim of 'winning' their case rather than establishing the truth. However, this weakness is counterbalanced by various strengths and, while our adversary system can be improved, it does have many benefits.

One main feature of the adversary system of trial is that parties are in control of and responsible for the preparation and presentation of their respective cases (for example, subject to the strict rules of evidence and procedure, the parties each decide what evidence is brought before the court, how it is presented, and whether or not witnesses are called and questioned) and aim to present the best evidence to 'win' their case. However, while this may mean that each party is focussed on winning their case rather than establishing the truth, it is hoped that, in an attempt to win, each party will present the best evidence available and by doing so the truth should emerge. [1] Also party control can increase the likelihood of parties being satisfied with outcome. Although, having parties control the preparation and presentation of their own case does give them the opportunity to deliberately omit (or accidentally miss) vital evidence that does not support their case, which can impede the discovery of the truth. [1] Similarly, another disadvantage of party control and the adversary system is that if parties fail to present relevant evidence or raise particular legal issues that would assist with their case, the judge, who must remain independent and impartial, cannot use their legal expertise to assist them. [1] This can especially disadvantage parties who are self-represented because they have not been able to afford costly legal representation because legal representatives can ensure cases are prepared and presented in the best possible manner.

One improvement to the adversary system might therefore be to allow the judge to take a more active role in the proceedings, as they do in the inquisitorial system. For example, allowing the judge to assist in the gathering of evidence and call and question of witnesses in order to determine the facts may assist in discovering the truth and support self represented (or under represented) litigants who have inadvertently missed vital evidence. [1] Opponents of such a reform, however, argue that allowing judges to have more involvement in the questioning of witnesses would diminish their independence and could result in the judge giving unfair assistance to one party. [1]

Increasing state and Commonwealth government funding to legal aid organisations, such as Victoria Legal Aid (VLA), is another reform that would also improve the operation of the adversary system. For example, increasing funding to VLA could enable them to expand the level of free or low cost legal representation available for basic criminal and civil matters and family disputes, and allow the VLA to offer a greater range

of assistance in regional areas and to various disadvantaged groups including cultural and linguistically disadvantages communities (e.g. immigrants and refugees), indigenous Australians and those suffering mental or health disabilities or from substance abuse. [1] In 2013, Victoria Legal Aid has been severely underfunded leading to an increase in self-represented litigants and judges being forced to delay criminal cases. Similarly, the state government could increase funding to provide support for self-represented litigants. For example, the provision of a self-represented litigants coordinator, as exists in the Victorian Supreme Court, could be expanded to all courts. Although it can be argued that increasing spending on legal aid and assistance is not a high priority for governments in times of budget deficits and is not electorally popular. [1]

Increasing funding to improve court infrastructure is another reform that could improve the operation and efficiency of the adversary system (which is dependent on the use of legal representatives and experienced judges and the ability of the court system to provide a timely resolution of disputes). For example, increasing the provision of traditional and specialised courts (such as the Koori and drug courts), increasing the provision legal personnel (including judges and support services) and improving the use of information technology (such as increasing the use of electronic filing of documents and improving video conferencing and online litigation procedures) could all help improve the operation of the adversary system by providing a more fair, timely and effective resolution of disputes. [1]

Another strength of the adversary system of trial, unlike a battlefield, is that the judge enforces strict rules of evidence and procedure to promote a fair trial and ensure each party has an equal opportunity to present their case. [1] For example, only reliable and legally obtained, evidence can be presented to the court. Although, it can be argued that some of the strict rules of evidence and procedure can be disadvantageous in certain situations. For example, while the heavy reliance upon verbal evidence allows witnesses credibility to be tested, it can disadvantage witnesses that may be intimidated by legal representatives or do not have strong English skills. [1] Similarly, having witnesses respond to questions posed by legal representatives can be confusing for some witnesses and impede their testimony.

Perhaps one way to improve the adversary system in this area might be to adopt some of the features of the inquisitorial system and simplify the strict rules of evidence and procedure by allowing a greater reliance on written evidence (especially expert evidence) to reduce court time and cut costs associated with calling and questioning witnesses, although written evidence cannot be cross-examined and tested for its authenticity and would be costly to prepare and check. [1] Similarly, allowing witnesses to give their evidence in their own words, could reduce the stress associated with giving evidence verbally and assist in the discovery of the truth by increasing the likelihood of a more informed and accurate version of the facts being presented [1], although it may increase the length of a testimony and increase the likelihood of irrelevant or inadmissible evidence being raised. Also witnesses may also be more likely to omit vital evidence when not prompted by legal representatives. [1]

Increasing the use of alternative methods of dispute resolution (for civil matters) such as mediation and conciliation could also improve our adversary system as these methods encourage parties to resolve their disputes between themselves in a less formal and more cost effective and timely manner compared to resolving a dispute at trial using judicial determination. Using mediation and conciliation can also increase satisfaction between the parties because they resolve the dispute between themselves. [1] Although, resolving disputes under the adversary system of trial, which adheres to the use of strict rules of evidence

and procedure and allows the use of legal representation, while being costly, does ensure each party is given an equal opportunity to present their case to the court and can have their case prepared and presented in the best possible manner. [1]

(When responding to this question, students must ensure they evaluate the main features of the adversary system (including most significantly, the role of the judge, party control, the existence of strict rules of evidence and procedure and the need for legal representatives) and discuss possible improvements to the system (with some specific reference to the inquisitorial system as mentioned in the stimulus material). Extended response questions should be marked 'globally' but approximately 5 marks should be awarded for evaluation of the main features of the adversary system and 5 marks for the discussion of possible improvements (i.e. explanation and evaluation of possible improvements). Better responses will provide an introduction, refer to the stimulus material and constantly refer back to the question throughout. Also it is essential that students do <u>not</u> discuss the strengths and weaknesses of the jury system, as the jury system is <u>not</u> a key feature of the adversary system of trial (because juries are not present in all trials, for example, Victoria is the only state where the option to use a jury is available in a civil trial).

Alternative response: Another strength of the adversary system is that the burden of proof in a criminal trial upholds the prevailing legal right to the presumption of innocence where the accused is presumed to be innocent until they are proven (or plead) guilty by the prosecution. The high standard of proof required in a criminal case (i.e. the accused to be proven guilty beyond reasonable doubt) also gives the benefit of the doubt to the accused and aims to ensure an innocent person is not convicted. [1] Although, this high standard of proof, and the subjective nature of the meaning of 'reasonable doubt' may lead to a greater amount of hung juries and the possible acquittal of a guilty party in cases where despite overwhelming evidence, jurors believe they have a small yet 'reasonable' level of doubt as to the guilt of the accused).[1])

10 marks

END OF SOLUTION BOOK