



GENERAL COMMENTS

The 2013 Legal Studies examination was generally handled well. Students were able to address most questions and showed a good understanding of various aspects of the legal system. Better responses were given to questions about the reasons for a court hierarchy (Question 1a.), the role of the Senate in law-making (Question 2), types and examples of law-making powers (Question 3b.) and dispute resolution methods (Question 6).

There still remain some common misconceptions about the legal system. Many students confused committal hearings with directions hearings, or did not know enough about committal hearings to explain why they are or are not complicated. Alternatives to the jury system were confused with reforms to the jury system, which resulted in many students not gaining marks for Question 9. In Question 11, far too many students addressed the question as if it were asking about dispute resolution methods, such as mediation and conciliation, rather than VCAT. Incorrect cases such as the *Roach Case* or the *Mabo Case* were used in Question 12. Some students incorrectly described the 1967 referendum regarding Aboriginal Australians about giving a 'right to vote'. Finally, far too many students are still using the jury system as a feature of the adversary system when it is not.

Task words require some attention. Students should address similarities and differences in a 'compare' question. 'Evaluate' requires a consideration of strengths and weaknesses with an overall conclusion or judgment about the value or worth of what is being evaluated. Furthermore, Question 3b. required little more than identifying the types of powers and giving an example, but most students went on to also give an explanation of the types of law-making powers when the question did not ask for it.

Students should not rely on rote-learned or pre-prepared answers as these will rarely address the question.

Good examination technique is important, and can be developed and improved only through practice during the year. Black or blue pen should be used. Handwriting should be clear and legible, and students should make use of and become familiar with legal terminology. Paragraphs should be used for longer questions where more than one point/reason/reform is given and, where answers continue at the back of the book, there should be an indication of this (such as writing 'PTO' or 'see extra space'). Students should avoid spending too much time on the shorter questions, and ensure they leave enough time to complete the longer questions.

SPECIFIC INFORMATION

Note: Student responses reproduced in this report have not been corrected for grammar, spelling or factual information.

This report provides sample answers or an indication of what the answers may have included. Unless otherwise stated, these are not intended to be exemplary or complete responses.

The statistics in this report may be subject to rounding errors resulting in a total less than 100 per cent.

Question 1a.

| Marks | 0 | 1 | 2 | Average |
|-------|---|----|----|---------|
| % | 9 | 20 | 72 | 1.7 |

Full marks were awarded for a correct and complete description of one of the reasons for the court hierarchy (which needed to be a reason other than ensuring the operation of the doctrine of precedent). Giving an example was a good way to gain the second mark. One mark was given for a correct reason with limited details.

This question was generally handled well. Acceptable reasons included

- specialisation
- administrative convenience
- appeals.

Some students gave specialisation as a reason and then went on to describe administrative convenience (or vice versa). Students who did this received only one mark (for identifying a reason, but not correctly describing it). Students should understand that specialisation refers to the benefit of having judges specialise or have expertise in certain matters – for example, judges in the Supreme Court (Trial Division) will have expertise in serious indictable offences – whereas

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administrative convenience refers to the convenience of having a court hierarchy (for example, the majority of crimes that take place in society are of a minor nature and will be heard by the Magistrates' Court, of which there are several, thereby avoiding clogging up the court system).

The following is an example of a good answer.

Another reason for a court hierarchy is that it allows for unsatisfied parties to appeal their case on verdict, sanction/remedy and on a point of law, allowing for the case to be reviewed by a higher court which may reverse the lower court's decision.

Question 1b.

| Marks | 0 | 1 | 2 | Average |
|-------|----|----|----|---------|
| % | 39 | 28 | 33 | 1 |

This question was handled well by those students who understood the operation of the doctrine of precedent and could correctly outline why it is that the Court of Appeal is not bound by its own decisions. A brief response was awarded one mark (for example, a response that only stated that the Court of Appeal was not bound by its own decisions, but did not expand to say why). A fuller outline was awarded two marks.

A common incorrect response was one that stated that the Court of Appeal was the 'highest court' in the hierarchy and, therefore, not bound to follow any decisions. This type of response is not correct: a decision of the Court of Appeal can be appealed to the High Court (subject to special leave being granted), which can reverse the decision made by the Court of Appeal. This and many other responses also did not address the question, which was why the Court of Appeal is not bound by its **own** decisions (this required an explanation of the operation of the doctrine of precedent, in that courts of the same level are not bound by decisions of that court).

The following is an example of a good answer.

The doctrine of precedent operates such that decisions made by the same court are only persuasive on that court. Therefore, the Court of Appeal does not have to follow decisions it has previously made because it is only bound by decisions made by higher courts, such as the High Court.

Question 2

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|---|----|----|----|---------|
| % | 9 | 29 | 40 | 22 | 1.8 |

This question drew on knowledge contained in Unit 3, Area of Study 1, and more particularly the roles of the houses in the law-making process. The focus was on law-making and not on the other roles of the Senate.

Students approached this question in two different ways and both (or a hybrid of each) were accepted. The first approach involved an explanation of the progress of a Bill through the Senate. The second approach took on a broader explanation of the Senate's role, including acting as a house of review, the State's house and as a scrutiniser of Bills passed through the House of Representatives.

For three marks, students were expected to make two to three points. If only two points were made, it was expected that those points would be much more developed than if three points were made. Many students were able to provide some detail about the role of the Senate in law-making; however, some responses were far too brief to be awarded full marks.

It was expected that students would understand that the Senate is the upper house of the Commonwealth Parliament, though this did not need to be explicitly mentioned to gain full marks. However, a student who made reference to the Senate being part of the Victorian Parliament did not get full marks.

Responses that discussed the stages of the law-making process made some or all of the following points.

- The Bill is introduced and the Bill is read for the first time, where the title is read.
- The Bill is debated during the second reading stage, where the purpose of the Bill is explained. A vote is taken at the end of the debate.
- The Bill proceeds to the Senate Scrutiny of Bills Committee, which assesses the Bill and its effect on individual rights. Other Senate committees also exist that may be referred a particular Bill.
- A third reading takes place, where the long title is read, and debate may take place.
- If passed, the Bill will either go to the Governor-General for royal assent (if the Bill is introduced in the House of Representatives) or the House of Representatives (if the Bill is introduced in the Senate).

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Responses that took on a broader approach made some or all of the following points.

- acts as a house of review if the Bill is introduced in the lower house
- usually seen as a scrutinising process, given most Bills are introduced in the lower house
- senators represent the states; therefore, it is expected that they will represent the interests of their own state in the law-making process
- can often act as a rubber stamp if the government holds a majority in both houses

The following is an example of a good answer.

The Senate acts as the 'states' house' in the law-making process. As it is made up of Senators from every state and territory, their role is to represent their own state in determining whether or not to pass a Bill. Usually, as most Bills are introduced in the House of Representatives, the Senate is seen as the 'house of review', as it reviews and votes on those Bills before they are given Royal Assent. Often the Senate can act as a 'rubber stamp' for Bills if the government holds majority in the Senate. These days, however, the Senate is made up of various parties, including smaller parties and independents, which means that the government usually does not have a majority of votes in the Senate and Senators can use their combined voting power to reject or amend legislation introduced by the party in government.

Question 3a.

| Marks | 0 | 1 | 2 | Average |
|-------|----|----|----|---------|
| % | 18 | 21 | 61 | 1.4 |

This question was generally handled quite well and many students were able to gain at least one mark. A detailed description was awarded two marks; a brief one was awarded one mark.

The more common responses described the law-making powers that are exclusive to the Commonwealth as being a restriction on the state parliaments; for example, the coining of money.

Some students incorrectly read this question as asking for restrictions imposed on the Commonwealth Parliament. Careful reading of the question is required to avoid errors such as this one.

It was expected that, if students used section 109 as their restriction, they would know that section number, given that it is specifically stated in the study design. Students did not need to know other section numbers of the Constitution. If students used section 109 as their restriction, it was expected that they would know the wording of that section and understand its implications on a state law.

Restrictions that could have been used included

- section 109 – areas of concurrent power (sections of state law could be declared invalid if they are inconsistent with a federal law)
- section 114 – raising military forces (states are prohibited from raising naval and military forces)
- section 115 – coining money (this is an exclusive power and prevents the states from making their own currency)
- section 90 – customs (this is also an exclusive power and prevents the states from charging an excise duty).

The following is an example of a good answer.

One of the restrictions imposed by the states is that they are not allowed to raise or maintain any naval or military force. This is a restriction imposed by section 114 of the Constitution and is a power that remains exclusively with the Commonwealth.

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Question 3b.

| Marks | 0 | 1 | 2 | 3 | 4 | Average |
|-------|----|---|----|----|----|---------|
| % | 16 | 6 | 10 | 12 | 56 | 2.9 |

It was pleasing to see many students correctly identify the two types of law-making powers and give an example of each. However, many students also gave an explanation of each type of law-making power when this was not required. These students were not awarded additional marks for their explanation.

The state parliaments have only two types of law-making powers: residual powers and concurrent powers. While there is a range of examples that students could have used for each, students needed to be clear which example applied to each law-making power.

Examples that could have been used included

- residual powers: health, transport, education, law and order
- concurrent powers: trade, taxation, marriage, de-facto relationships, bankruptcy and insolvency.

Students should know the distinction between **types** of law-making powers (specific, concurrent, exclusive and residual) and **examples** of law-making powers (examples of each of specific, concurrent, exclusive and residual powers). Students who gave examples (such as roads) as types were not awarded any marks.

Question 4

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|---|----|----|----|---------|
| % | 6 | 14 | 30 | 50 | 2.3 |

Students handled this question well and were awarded one mark for addressing each of the three statements.

The question indicated that each statement was incorrect, so simply stating that ‘the Victorian Law Reform Commission (VLRC) does not give legal advice’ was not awarded any marks (as this sort of response did not explain why and did not expand on the information already given).

Students should have made the following points.

- The Magistrates’ Court only has jurisdiction to hear civil proceedings where the damages sought is up to \$100 000. Sophie’s claim exceeds this amount.
- A civil proceeding is normally heard by a judge alone. If Sophie (or the defendant or judge) requests a jury, it will be made up of six jurors.
- The VLRC is a government body that makes recommendations to the Victorian Parliament for law reform. It does not give legal advice.

There is real confusion about the Magistrates’ Court’s jurisdiction. The Magistrates’ Court has jurisdiction to hear civil matters where the amount sought is up to the value of \$100 000, not ‘between \$10 000 and \$100 000’ as some students incorrectly stated. Students should understand that while matters where the amount sought is under \$10 000 are normally referred to arbitration, the arbitration is still conducted by the Magistrates’ Court under the auspices of that court. Therefore, the Magistrates’ Court’s jurisdiction is not limited to matters above \$10 000.

Many students did not address the fact that a jury, while rare, can be used in a civil trial and will be made up of six jurors. Students who stated that ‘a civil trial will be heard by a judge alone’ without addressing the fact that a jury is available if requested were not awarded marks for that part.

The following is an example of a good answer. Note the use of paragraphs, which helps the student address each part of the question separately.

Sophie’s trial will not be held at the Magistrates’ Court because her civil claims exceed \$100,000, which is the extent of the Magistrates’ Court’s jurisdiction.

Sophie’s trial will not be heard by a jury of 12 because a jury of 12 is for indictable criminal offences, but a jury of 6 may hear her trial if she chooses to have one.

Sophie cannot go to the VLRC for legal advice because it is not their role. The role of the VLRC is to investigate law reform and write consultation papers for the attorney general in areas that need law reform.

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Question 5a.

| Marks | 0 | 1 | 2 | Average |
|-------|----|----|----|---------|
| % | 16 | 25 | 59 | 1.5 |

This question required an understanding of the reasons for statutory interpretation. Judges often interpret statutes while resolving disputes. This involves giving meaning to the words and phrases in laws made by parliament. A number of reasons could have been given, including

- the meaning of a word or phrase might be ambiguous (there might be more than one meaning to the word and the court has to determine what parliament intended)
- words can often change in meaning over time
- mistakes might have been made while the legislation was being drafted and, therefore, the word or phrase might lack clarity
- parliament might not have been aware of all possible circumstances that could arise in relation to the legislation and the court might need to determine whether the statute extends to the circumstances of the particular case before it.

A brief response was awarded one mark (for example, if the student stated that sometimes words can be ambiguous but did not explain what that meant). A fuller response was given two marks. Giving an example was a good way to get the second mark. The most popular examples were the *Kevin and Jennifer Case* and the 'studded belt case'.

A small number of students incorrectly gave examples for why laws may need to be changed; for example, there have been changes in society's values or the law may not be easily understood. Just because a law may not be easily understood does not mean that a judge requires the statute to be interpreted. Similarly, a judge will not interpret a statute simply because society's values have changed. This is a misunderstanding of what statutory interpretation is.

The following is an example of a good answer.

One example for statutory interpretation is the changing nature of words. Sometimes, there may be a particular word in a statute which a court will need to interpret because, at the time parliament passed the law, a particular meaning of the word was not contemplated. This happened in the Kevin and Jennifer marriage case with the interpretation of the word 'man'.

Question 5b.

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|----|----|----|----|---------|
| % | 30 | 22 | 26 | 22 | 1.4 |

This question involved a consideration of the relationship of parliaments and courts, as required by Unit 3, Area of Study 2, and the supremacy of parliaments as law-makers.

Many students did not handle this question well and believed it to be a question about separation of powers, arguing that parliament cannot interfere in the decision-making of the courts when they enforced the law. This type of response failed to address the fact that parliament does have the ability to abrogate common law given it is the supreme law-making body.

Some students stated that parliament was the 'highest' in the court hierarchy, assuming that parliament, in some way, is part of the court system. It is expected that students understand the mechanisms of the parliamentary system, which are separate and distinct from the mechanisms of the court system.

To gain full marks, students needed to make reference to the point that parliament is our supreme law-making body and can, therefore, abrogate common law. Only two marks were awarded if students explained that parliament can abrogate common law but did not say why. Use of examples assisted students to achieve full marks, with many students making good use of the *Trigwell Case*. It was pleasing that a few students wrote that while parliament can abrogate common law, it cannot do so in situations where the High Court has determined a law to be ultra vires. While very few made that point, which was not necessary to gain full marks, it showed a very good understanding of the relationship between parliament and the courts, as well as the limitations of parliament's law-making ability.

The following is an example of a good answer.

This is incorrect. Parliament is our supreme law-making body. Because of its supremacy in law-making, if the Supreme Court has made a decision which then becomes precedent for future cases, and Parliament does not agree with the precedent, it can make law which abrogates that precedent, thus overriding the law. This happened when the Victorian Parliament in 1984

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introduced an amendment to the Wrongs Act in relation to owners of animals being liable for the animals' action, after the High Court's decision in the Trigwell case.

Question 6

| Marks | 0 | 1 | 2 | 3 | 4 | Average |
|-------|----|---|----|----|----|---------|
| % | 10 | 6 | 21 | 40 | 22 | 2.6 |

Students are expected to know the four dispute resolution methods in Unit 4, Area of Study 1, all of which are used by the courts in some way: mediation, conciliation, arbitration and judicial determination. Two to three marks were given for a brief description of each of the two dispute resolution methods selected (depending on the level of detail); a fuller description was given full marks.

Many students demonstrated a sound knowledge of two of those dispute resolution methods and how the courts use them. Weaker students were able to give one or two brief points about one or both dispute resolution methods. Some students, who obtained no marks, described criminal sanctions or civil remedies.

It was expected that students would apply their knowledge by making reference to how their two selected dispute resolution methods are used by the courts. Some students gave examples of how these methods are used (for example, by referencing that mediation is often used as a pre-trial procedure or that arbitration is used for smaller claims in the Magistrates' Court).

There are still some misconceptions about dispute resolution methods. First, many students argued that mediation is used for small matters, without recognising that it has been a successful resolution method for many large-scale matters. Second, many argued that mediation and conciliation are 'not legally binding', without making the point that in most (if not all) situations, the parties will normally sign an agreement, upon an outcome being reached, which binds them to what they have agreed on (and that could be enforced in court if not complied with). Third, some differences between judicial determination and arbitration were not addressed – some students merely stated the same thing for both of these methods without recognising the key differences between the two. For example, an arbitrator will normally hand down an 'arbitration award', whereas a judge in court using judicial determination will hand down a judgment. Arbitration is conducted privately and sometimes without the need for a hearing, whereas judicial determination normally involves a court hearing that is open to the public.

Some of the points that could have been made include the following.

- mediation
 - Mediation involves the use of a third party, the mediator, who will assist the parties to come together to attempt to explore issues, consider possible outcomes and reach an agreement.
 - The mediator acts to facilitate discussion, encourage parties to explore options and ensure both parties have their say. The mediator will not make a decision, nor will the mediator be involved in drafting any formal agreement. The mediator will not give advice to the parties.
 - Parties normally enter into terms of settlement or a formal agreement setting out the resolution of the dispute reached at mediation.
 - Mediation is now normally a mandatory pre-trial procedure. Courts often require the parties to attend mediation (either privately arranged or through the courts) before listing the matter for trial.
- conciliation
 - Conciliation involves the use of a third party, a conciliator, who will assist the parties to reach a decision. Traditionally, the conciliator will listen to the parties, make suggestions and assist the parties to reach an outcome.
 - A conciliator normally exercises more influence than a mediator.
 - The other features of conciliation and mediation are similar – the processes are much the same and the outcome is not binding unless the parties enter into terms of settlement (which they normally do).
 - The Family Court often sends parties to conciliation.
- arbitration
 - Arbitration involves a third party who is independent and unbiased, listening to both sides and making a determination that is binding on the parties. This is normally called an arbitration award.
 - Arbitration is normally conducted privately. It is not open to the public.
 - Depending on the case, arbitration can be quicker and less costly than judicial determination as it often involves a limited amount of evidence.
 - Arbitration is more formal than mediation and conciliation. It normally involves the submission of evidence.
 - Arbitration is used by the Magistrates' Court for matters below \$10 000.



- judicial determination
 - Judicial determination involves the use of a judiciary officer to make a binding decision on the case.
 - Judicial determination is much more formal than arbitration and the other methods. It normally involves rules of procedure, the making of submissions and the presentation of evidence.
 - All cases that go to trial/hearing are judicially determined.

The following is an example of a good answer.

One dispute resolution method used by courts is mediation. This is where the parties will come together with a third party, called a mediator, to try and resolve the dispute without going to court. The mediator will assist the parties in exploring issues, considering possible resolutions and reaching an agreement. The parties will normally sign formal terms of settlement which will bind them to their agreement. Mediation is now regularly used as a pre-trial procedure in court matters.

Another dispute resolution method used by courts is arbitration. Usually, all matters below \$10,000 filed in the Magistrates' Court will be referred to arbitration. The arbitrator will listen to both sides and make a determination that is binding on the parties, called an arbitration award.

Question 7

| Marks | 0 | 1 | 2 | 3 | 4 | Average |
|-------|----|----|----|----|----|---------|
| % | 13 | 12 | 23 | 26 | 26 | 2.4 |

This question required a comparison, using one similarity and one difference, of Australia's approach to the protection of rights with the approach adopted by one of the countries listed.

Two marks were awarded for each similarity and difference, with the marks given depending upon the level of detail given. Use of terms such as 'similarly' and 'the same as' for similarities, and 'whereas', 'on the other hand' and 'different from' for differences, may assist students when answering this type of question.

While this question was generally approached in a methodical way, many students were either too vague, too brief or discussed particular rights (such as the right to bear arms) as opposed to the actual approach used by each country. Students needed to ensure the difference or similarity is clear. For example, some students stated that 'the difference is that the USA has a Bill of Rights'. This is not enough – students should have discussed how that approach is different from Australia's.

Depending on the country chosen, the following points could have been made.

- United States of America
 - The protection of democratic and human rights is contained in a Bill of Rights that takes the form of the first 10 amendments to the American Constitution (Australia has no Bill of Rights).
 - The Bill of Rights contains an extensive list of rights (Australia does not have an extensive list of rights).
 - The rights are fully enforceable. This means that legislation that infringes any of those rights can be declared invalid by the US federal courts (in Australia, the High Court can declare legislation invalid if it is outside its powers).
 - The rights are entrenched, which means that a right can be abolished only if the Constitution is amended (although similar, this is a much more complex process than the process used in Australia, involving separate referenda being held in states).
 - The list of protected rights can be added to through constitutional amendment; for example, slavery was abolished after the Civil War and the vote was introduced for 18-year-olds in 1971 (in Australia, rights can only be expressly added through the referendum process)
 - The Bill of Rights includes implied rights; for example, a right to privacy has been implied. In *Roe v Wade* (1973), this right was extended to cover the relationship between patient and doctor, hence making it unlawful to interfere in doctor–patient issues on matters such as abortion (Australia also has one implied right, being the right to political communication).
- Canada
 - Protection is contained in the Charter of Rights, which was adopted in 1982 (Australia, instead, has a Constitution adopted in 1901 that contains no Charter of Rights).
 - The Charter contains a comprehensive set of rights (in comparison, Australia does not have a comprehensive set of rights). Students could have referred to examples or specific cases as evidence of this point.



- The rights are entrenched. This means that a right can be abolished only if the Constitution is amended (procedures for amending the Constitution are similar to the referendum process in Australia).
 - The rights are fully enforceable, which means that legislation that infringes any of those rights can be declared invalid by the Canadian Supreme Court (the High Court of Australia can also declare legislation as ultra vires if it infringes anything expressed in the Constitution).
 - Certain rights can never be overridden by parliament (for example, the right to vote). However, some rights can be overridden; parliament can respond to a Supreme Court declaration of invalidity by passing legislation again and indicating that it is to override the Charter. This legislation has a five-year sunset clause; it will lapse at the end of five years unless parliament passes it again and indicates that it is to override the Charter (parliament can never change any wording of the Constitution in Australia; this can be done only through s.128 – referendum).
 - The Supreme Court can give an opinion on whether proposed legislation will infringe the Charter.
 - Rights can be limited where it is ‘necessary in a free and democratic society’.
 - The courts can read down the impact of legislation (that is, interpret the legislation narrowly) to bring its operation within the boundaries set by the Charter.
- New Zealand
 - The *Bill of Rights Act* (BORA) was passed in 1990 and contains a comprehensive set of rights (Australia does not have a Bill of Rights).
 - It is not constitutionally entrenched, so parliament can abolish rights by amending the BORA (the Australian Parliament cannot abolish anything in the Constitution – s.128).
 - The rights are not fully enforceable by the courts, that is, the courts cannot declare legislation invalid if it infringes the BORA (this is different from Australia, where the High Court can interpret the Constitution, particularly with regards to s.109 and law-making powers).
 - Courts are required to interpret legislation in accordance with the BORA.
 - The attorney-general scrutinises all Bills and advises parliament if there is any infringement of the BORA.
 - While not fully enforceable, it has affected the political culture in that governments are expected to comply with it.
 - South Africa
 - Chapter Two of the Constitution of South Africa contains the Bill of Rights (there is no Bill of Rights in Australia).
 - The rights are entrenched, which means that a right can be abolished only if the constitution is amended (as in Australia, any section of the Constitution can be amended only through the referendum process).
 - The rights are fully enforceable, which means legislation that infringes any of those rights can be declared invalid by the Constitutional Court (this is similar to Australia).
 - The Bill of Rights contains a comprehensive list of rights. Students could use examples and specific cases to illustrate this point, such as equality, freedom, slavery, privacy, freedom of religion and expression, and human dignity (Australia’s constitutional protection of rights is not comprehensive and is limited to five express rights).
 - A special feature of the South African Bill of Rights is its inclusion of economic, social and cultural rights (as above, Australia’s constitutional protection of rights is limited to five express rights).
 - The courts are to develop the common law in accordance with the Bill of Rights (similarly, common law in Australia will need to comply with any constitutional restrictions).
 - Rights can be limited, where justified, in a free and democratic society (rights cannot be limited in Australia).

The following is an example of a good answer using the United States as a point of comparison.

The Australian Constitution protects implied rights, that is, rights that are deemed to exist due to the High Court’s interpretation of the Constitution. For example, the right to freedom of political communication is protected because the High Court ruled in favour of Australian Capital Television when the Commonwealth wanted to ban political broadcasting during election time. Similarly, in America, implied rights exist due to the Supreme Court’s interpretation of their Constitution. For example, the right to privacy is implied because their Bill of rights has the express right that citizens should feel secure in their homes.

Although both countries protect express rights in their constitution, the rights are protected differently. The Australian Constitution only outlines five express rights that are entrenched; for example, the right to freedom of religion in that the

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Commonwealth cannot impose, establish or restrict a religion. The American Constitution, however, has a Bill of rights that has 10 amendments and protects a broad range of rights from freedom of speech to the right to bear arms.

Question 8

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | Average |
|-------|----|----|----|----|----|---|---------|
| % | 16 | 14 | 21 | 24 | 18 | 8 | 2.4 |

Students needed to consider the stimulus material and form a view as to whether or not they agreed or disagreed with the statement provided. The focus was on committal hearings, but the key words in the statement were ‘complicated’ and ‘serve no useful purpose’. Both of those aspects needed to be addressed to get full marks. Students also needed to state whether they agreed or disagreed, and to what extent.

A three-mark response, for example, may have included good points about why committal hearings served a purpose, but made no mention of whether or not they were complicated (and why or why not). A response that was awarded four marks may have addressed the statement (and very well), but the student may not have indicated the extent to which they agreed or disagreed with the statement.

While many students were able to touch on the purposes of committal hearings, with most arguing that they did serve a useful function, very few commented on the complexity of those hearings. It is expected that students have a general idea about what takes place at committal hearings; for example, the examination of witnesses, the provision of a hand-up brief, the applications that could be made by either party and what happens following the conclusion of the hearing (including whether the accused is committed to stand trial). Students needed to address the complicated nature of committal hearings to receive full marks.

Many students misunderstood the purpose of committal hearings, stating that the purpose was to ‘determine whether there was enough evidence to go to trial’. This is not correct. Section 97 of the *Criminal Procedure Act 2009* (Vic.), which also sets out other purposes, states that one of the purposes of a committal proceeding (which includes a committal hearing) is to determine whether there is evidence of sufficient weight to support a conviction for the offence charged. Students should learn the subject-specific language, understand what it means and avoid oversimplifying the purpose such that it is described incorrectly.

Many students agreed that committal hearings were complicated, but did serve a useful purpose. While any position could have been taken, the discriminating factor was the justification for that position.

Some students confused committal hearings with directions hearings. Those who did so did not gain marks.

Some of the points that could have been made include the following.

- Committal hearings are complex and difficult to understand if the accused is not legally represented. The complications concern
 - the possible need to cross-examine witnesses
 - the making of submissions
 - the rules of evidence and procedure, including the admissibility of certain evidence
 - the use of the hand-up brief
 - special rules relating to sexual offences
 - attending to any applications that may need to be made.
- There are many pieces of legislation, which are complex to understand, dealing with criminal procedure, including the *Criminal Procedure Act 2009* (Vic.), the *Criminal Procedure Regulations 2009* (Vic.) and the *Magistrates’ Court Criminal Procedure Rules 2009* (Vic.).
- With the use of a legal representative, the accused may find the process of a committal hearing straightforward.
- Committal hearings are expensive. They often take months to prepare for, adding to the cost.
- The purpose of a committal hearing is to determine whether there is enough evidence to support a conviction at trial. Therefore, it serves the purpose of ensuring weak cases do not proceed beyond the committal stage.
- Committal hearings may be seen as unnecessary in situations where it is clear from the hand-up brief that there is enough evidence to convict. Therefore, they can be a waste of the court’s time. However, the ability of the prosecution to directly present cases overcomes this issue.
- Committal hearings are intended to clarify issues in dispute and determine whether there is enough evidence to convict. Therefore, they serve a useful purpose in that they avoid wasting the County or Supreme Court’s time.
- Committal hearings serve a purpose by encouraging the accused to plead guilty, limiting the charges to be heard or limiting the witnesses to be called.



- Committal hearings may speed up a trial by increasing the number of agreed facts and issues.

The following is an example of a good answer.

I largely disagree with this statement. Although it is true that committal hearings are complicated, they do serve a very important purpose in ensuring that the legal system is effective.

A committal hearing is a criminal pre-trial procedure in which the strength of the prosecution's case is tested (where the Magistrate determines whether there is enough evidence to ensure a conviction in a higher court). This ensures the time of the higher court and the parties is not wasted by cases which are weak going straight to trial. It also ensures fairness when points of law are clarified, the defendant has an opportunity to cross-examine and test the prosecution's witnesses, and the defendant can also plead guilty to some or all charges.

However, committal hearings can be complicated. Examination of witnesses can be difficult and time-consuming, and an accused may not have the ability to examine witnesses without the use of a lawyer (which may then become very expensive). The hand-up brief can be bulky and contain lots of documents such as witness statements, the prosecution's summary of the facts etc. There are rules of evidence and procedures, and applications that the accused could make without even knowing. All of this means that it is very difficult for an accused to understand without a lawyer.

Therefore, whilst committal hearings do serve a useful purpose, they are complicated and can be unfair to an accused.

Question 9

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | Average |
|-------|----|---|----|----|----|----|---------|
| % | 29 | 7 | 22 | 15 | 15 | 12 | 2.2 |

This question required students to discuss two possible reforms to the jury system. A discussion requires something more than an explanation – normally, a discussion is a consideration of all sides of an issue and, in this case, would also demonstrate how the reforms could improve the jury system. To gain full marks two reforms needed to be discussed, and students also needed to give a comment on how each reform could improve the jury system.

The key to answering this question was pointing out how the reforms could improve the jury system. Many students used the elements of an effective legal system to make this point; this was not necessary so long as it was clear that the reform was linked to some sort of improvement.

Possible reforms, not reforms already made, were required. Some students did not gain marks for identifying reforms already passed, such as the changes made in 2008 to the sections related to a person being excused from jury service.

The study design requires students to learn about both reforms **and** alternatives to the jury system. Students should learn the distinction between the two: reforms are improvements to the jury system, while alternatives replace the jury system with something else entirely. Alternatives, such as appointing professional jurors or adopting a judge-alone system, were not accepted.

Some of the reforms that could have been used included the following.

- amend the *Juries Act 2000* (Vic.) to allow broader representation – this would include allowing lawyers, police officers and other ineligible categories to become a part of the jury
- reduce or abolish peremptory challenges – challenges ‘without cause’ could be reduced to avoid a possible ‘manipulation’ of the compilation of a jury based on the parties’ views about a juror
- specialist foreperson – having a person on the jury with relevant experience in the legal profession be the foreperson
- reasons for decisions – a jury may be required to provide reasons for its decision, to allow the parties to understand the outcome reached
- not proven verdicts – introduce a new verdict that can be given as opposed to guilty/not guilty so that an offender can be retried
- recommendations in sentencing – jurors could make recommendations (for an appropriate sentence) to the judge once an accused is found guilty
- more information provided – jurors could be given more instructions or more booklets (similar to the *Juror's Handbook*) to provide them with more information about what happens during the trial or what occurred at the trial, such as the transcript, to help them reach a verdict



The following is an example of a good answer.

One possible reform is to have a professional foreperson. A professional foreperson who is familiar with the responsibilities of the jury and legal proceedings generally can help the other jurors with understanding complex legal language, and their role in determining the facts of the case to come to a verdict. This could make the jury system more timely and easier for ordinary people to understand. However, the foreperson's words might be given more weight by the other jurors and they may be persuaded by the foreperson's views rather than coming to a conclusion through their own judgment.

Another possible reform could be to abolish peremptory challenges as these challenges are subjective; based only upon someone's name and occupation. Furthermore, it prolongs the empanelment process and increases costs associated with additional jurors who are called but not used. However, peremptory challenges help to ensure the composition of the jury is even in terms of age, gender and race, helping the parties to give the defendant a fair trial.

Both of these reforms could help to have a more fair and unbiased hearing.

Question 10

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | Average |
|-------|---|---|---|----|----|----|----|---------|
| % | 3 | 3 | 8 | 17 | 27 | 27 | 15 | 4.1 |

This question, which drew on students' knowledge of Unit 3, Area of Study 1, required an evaluation of two methods used to influence a change in the law. Some students did not evaluate, but merely explained two methods.

Many students touched on strengths and weaknesses, but did not provide an overall conclusion. This could get a maximum of only five marks. Other students provided strengths only, failing to touch on the weaknesses of both methods. Again, these responses could not get full marks (though they may have been awarded three or four marks depending on how well the strengths were evaluated).

The most popular methods were petitions, demonstrations and the use of the media. Other methods, such as lobbying, writing submissions to a law reform commission and becoming a member of parliament, could have been used. Students should not assume that the assessor 'knows what they know'. They should explain what a petition is and what happens to a petition once signed. They should also explain how the media could be used to influence change.

There needs to be a greater understanding of what petitions are. First, it is expected that students understand that petitions are tabled in parliament. Second, while 'lots' of signatures may be far more effective than very few signatures, ultimately the change in the law that is being sought will need to be one that is generating interest or attention, or is clearly targeted as an area of reform. That is, while lots of signatures may seem attractive, the petition may well be about a change of law that is trivial or unnecessary. Similar points can be made about demonstrations.

The following points could have been made about petitions, demonstrations and the use of the media.

- petitions
 - Petitions can often be very influential, particularly when a number of signatures are on the petition.
 - Particularly with e-petitions, greater awareness can occur when gaining signatures and thus can result in greater numbers.
 - A member of parliament is required to table the petition through parliament. Therefore, even if it is unsuccessful initially, it may gain the attention of another member of parliament or the media.
 - Without a significant number of signatures, petitions are not often influential.
 - The influence a petition has often depends on the minister who tables it.
 - Petitions often do not gain public or media attention.
 - There are often opposing petitions. This reduces the impact of the petition.

- demonstrations
 - Large demonstrations are likely to have a big impact, particularly on media reports and public awareness.
 - Previous demonstrations have often been influential; for example, the WorkChoices demonstrations resulted in widespread awareness of WorkChoices, which could be seen as one of the reasons for the change in government in 2007.
 - Demonstrations often get the attention of members of parliament, who may 'take on' a cause.
 - Demonstrations are difficult to organise and are time-consuming.
 - Unless it concerns a matter with wide support, demonstrations do not often have a great influence.



- Demonstrations can turn violent and this can put a negative focus on the subject matter or on the people seeking to influence change.
- use of the media
 - The use of social media, in particular, is resulting in widespread understanding or knowledge of a need for change in the law, and can result in better use of demonstrations and petitions (as the ‘word’ can get out there quicker and to a broader audience).
 - Members of parliament often have a media presence now – on Twitter and Facebook, answering questions on forums or participating in programs such as Q&A – and, therefore, can have a greater understanding of what changes are being demanded.
 - There are a number of media outlets which can be used to ‘spread the word’ – newspapers, radio stations, social media and websites.
 - Often there are conflicting views on the need for change in the law and so the media may simply demonstrate to members of parliament that there is no widespread support for a particular change.
 - Some media outlets – newspapers, radio stations, etc – have far less of an impact today than previously.
 - Use of the media may not overcome other factors involved in being able to influence a change, such as member conservatism.

The following is a good example of evaluating petitions.

One method used by individuals to influence change is petitions. This involves the signing of the individual’s name (and address) for proposed law change. The petition is then handed to a member of parliament who must table the petition in parliament. Petitions could be effective if there is a large number of people who sign it and involves an area of law that has been discussed as requiring reform, therefore showing politicians there is a majority support for a law change. However, petitions may not be a good method because people may not sign the petition, therefore reducing the effect of the petition. If the petition is about an area that is not a current focus for law reform, it may be ignored. Overall, petitions can be useful in demonstrating strong people support for law reform, but it is not always effective, particularly if not a lot of people sign it.

Question 11

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | Average |
|-------|---|----|----|----|----|----|----|---|---------|
| % | 6 | 10 | 15 | 18 | 18 | 16 | 11 | 6 | 3.5 |

The statement suggested that VCAT was always a better option to resolve civil disputes than the courts because it is less expensive and quicker. In addition to stating whether they disagreed or agreed with the statement, students were expected to address all parts of the statement: that is, why VCAT was or was not always a better option than the courts, and whether it was, in fact, less expensive and quicker.

This question was marked globally. It was expected that students would draw on similarities and differences between VCAT and the courts in their justification. That is, students should have demonstrated why it was that VCAT was, or was not, the preferred dispute resolution body.

Far too many students confused dispute resolution methods (arbitration, mediation, conciliation and judicial determination) with VCAT. These types of responses argued the benefits of those dispute resolution methods rather than discussing VCAT as a dispute resolution body. It was difficult to award any marks for such responses, given they missed the point of the question. Furthermore, an argument that VCAT is better than the courts because it uses dispute resolution methods, such as mediation, cannot be supported when the court itself uses and encourages mediation as a dispute resolution method.

There is a misconception that VCAT outcomes are not binding. In fact, VCAT decisions are binding and enforceable.

It was expected that, if students claimed that VCAT had some weaknesses or was not appropriate in some cases, that their conclusion would not be that VCAT was always a better option. That is, the points raised should have coincided with the conclusion reached.

Many students argued that VCAT was appropriate for smaller claims, where the application fee was low and legal representation was not needed, and where the time to have the matter heard was generally quicker than the courts, but not appropriate for larger, more complex cases. The following points should have been made when responding to this question, but very few students made them.

- There is a limited right to appeal a decision made by VCAT.

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- VCAT does not have jurisdiction in some areas of law and so is not appropriate or not available for some civil disputes.
- The time it takes to have a hearing in VCAT is increasing; for example, in 2012/13, the average time it took to have a case heard in the Civil Claims List was 18 weeks (see *VCAT Annual Report 2012-3*).
- VCAT's awards are generally not as enforceable as court judgments (see section 121 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic.)*).
- While the application fee is small (\$44.90) for many claims, that fee is normally for claims under \$500. Application fees range from \$44.90 to more than \$3 000 (for example, for an application made in the Planning and Environment List), depending on the type of case. Further, changes to the fees in July 2013 means that there is now a hearing fee applicable for some cases.

The above points are those that help to distinguish students who understand the detail, and have an in-depth knowledge of VCAT and the courts, from those students who have learnt only brief details about both.

Some other points that could have been made include the following.

- VCAT's waiting times are generally shorter than those of the courts. Often, it takes a few weeks to have a matter heard. This can usually be attributed to less time taken with pre-trial procedures or determination of evidence.
- It is not always the case that VCAT takes less time than the courts; for example, in early 2012, the Victorian Government announced funding for VCAT to tackle the backlog in some of the lists (such as the Environment and Planning List), where some cases had an eight-month delay.
- The speediness of a hearing date may result in evidence being missed or some issues not identified before hearing.
- VCAT's application fees are generally lower than those of the courts and, therefore, VCAT is more accessible than the courts, particularly for small and simple matters.
- VCAT's lists often do not require legal representation (normally for simple and straightforward matters, such as a straight debt claim), which results in a less expensive exercise.
- Some lists are complex and require pre-trial procedures or a lawyer, so some might spend as much as in a court case.

The following example is the beginning of a good answer.

I do not agree with this statement as both the courts and VCAT have their strengths and weaknesses when it comes to resolving civil disputes, and some disputes are more suitable for the courts to hear.

VCAT is generally better for small civil claims such as those about disputes with a neighbour or about goods or services purchased from a retailer. Their fees are low for those claims less than \$10,000 and legal representation is not often needed for such a small claim involving limited facts and a small number of documents. However, over the years VCAT's fees have increased and it has seen an increasing amount of legal representation used, thus increasing the cost to the parties.



Question 12

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | Average |
|-------|----|---|----|----|----|----|----|---|---|---------|
| % | 18 | 8 | 10 | 10 | 13 | 12 | 15 | 9 | 5 | 3.6 |

This question required consideration of the impact of referendums and the High Court's interpretation of the Commonwealth Constitution on the division of law-making powers. It was marked globally. To gain full marks, students needed to analyse both referendums and the High Court's interpretation, and provide an example of each in their analysis.

While many students provided details of one successful referendum and one High Court case, and analysed both of these, this type of response did not address the question. Students needed to analyse the two methods (interpretation and referendums), with examples being used to support that analysis, rather than simply analyse the two examples.

This question was generally not handled well. Students who gained full marks were able to adequately analyse the impact of both methods on law-making powers and pointed out that both have been limited in their impact on the division of powers (though the High Court could be seen to historically have had a far greater role in the shift in power). Some students made the point that the impact of both methods was such that the balance of power generally shifted towards the Commonwealth and away from the states.

The most popular referendum used as an example was the 1967 referendum in relation to Aboriginal Australians. Very few students discussed the other three successful referendums (social services or state debts). However, there is a significant amount of confusion regarding what the 1967 referendum was about. Many students argued that it was about giving Aboriginal Australians the right to vote, perhaps confusing this with the *Roach Case*. The 1967 referendum was about amendments to sections 51(xxvi) and 127 of the Commonwealth Constitution, giving the Commonwealth Parliament power to legislate with respect to Aboriginal Australians. It was not a 'right to vote' referendum as many students suggested. If students use examples, they should study those examples adequately to ensure the examples can be used correctly in their answers.

The most popular cases were the *Franklin Dam Case* and the *Brislan Case*. Better explanations were given for these two cases than those given for the 1967 referendum, but greater clarity is needed about the details of the *Franklin Dam Case* (particularly in relation to the impact on the division of powers).

It was disappointing that many students discussed a High Court case that was not related to the division of law-making powers. Examples of such cases included the *Roach Case*, the *Mabo Case* and the *Lange Case*. Students should ensure that the cases they choose are appropriate to the questions being answered.

Some of the points that could have been used in the analysis include the following.

- High Court interpretation
 - This rarely occurs for various reasons, including need to have standing to apply, it is expensive, it is risky and the courts can interpret only when a case is before them.
 - When it has occurred, the Commonwealth generally increases its powers.
 - It has had a far greater impact on the division of law-making powers than that of referendums. Many different cases could be used to demonstrate this point.
- referendums
 - Referendums rarely occur and, when they do, are rarely successful for various reasons, including people do not understand referendums, are unlikely to want change, vote on party lines and can be confused about the issue.
 - Many referendums have nothing to do with law-making powers and so have no impact on the division of powers.
 - Every time a referendum has been successful, the Commonwealth has increased its power.
 - They are expensive and time-consuming.
 - Generally, only uncontroversial referendums or those with strong community support will pass.

Some of the points that could have been made about each referendum include the following.

- state debts (1910)
 - The Commonwealth Parliament had power to assume any pre-existing debts held by the state governments at Federation. The purpose of this was to ensure the financial health of each of the states.
 - Section 105 of the Constitution stated, 'The Parliament may take over from the States their public debts as existing at the establishment of the Commonwealth'.



- This referendum altered section 105 of the Constitution to remove the words in bold. This alteration extended the power so that the Commonwealth could take over any debts incurred by a state at any time.
- state debts (1928)
 - In 1910, the Commonwealth and the states reached an agreement whereby the Commonwealth provided annual grants to each state. In 1927, the Commonwealth and the states entered into a financial agreement that discontinued the 1910 arrangements and established the Loan Council, which was to control all governmental borrowing.
 - There was some concern as to the constitutionality of the financial agreement and, in particular, whether the Loan Council could be established. Therefore, it was proposed in the referendum to insert a new section, 105A, into the Constitution.
 - Section 105A allows the Commonwealth to make agreements with the states with respect to the public debts of the states, including the taking over of debts by the Commonwealth and the management of debts. Section 105A also enables the Commonwealth Parliament to make laws to validate any such agreements, thus enabling it to create, for example, the Loan Council.
 - This, therefore, increased the power of the Commonwealth, enabling it to enter into financial agreements and to set up the Loan Council.
- social services (1946)
 - Prior to the referendum, the only social services provision contained in the Constitution was section 51(xxiii), which gave power to the Commonwealth Parliament to legislate on invalid and old-age pensions.
 - Prior to 1946, the Commonwealth had legislated on other social services, such as widows' pensions and unemployment benefits. The *Pharmaceutical Benefits Case* raised questions as to the validity of that legislation and, ultimately, the High Court held that the *Pharmaceutical Benefits Act 1944* was unconstitutional.
 - The Commonwealth Parliament, therefore, wished to extend the powers relating to social services and proposed the insertion of section 51(xxiiiA) into the Constitution. It stated, 'The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services . . . , benefits to students and family allowances'.
 - The referendum was successful and increased the power of the Commonwealth Parliament with respect to social services.
- Aboriginal Australians (1967)
 - Prior to the referendum
 - section 51(xxvi) stated that the Commonwealth Parliament shall have power to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'
 - section 127 stated 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted'.
 - The consequences of these sections were that the Commonwealth Parliament could not legislate with respect to Aboriginal Australians and Aboriginal Australians were not counted in the population of the states or territories. The implication of this was great for states such as Queensland and Western Australia, who had larger Aboriginal populations, as it impacted on their Commonwealth grants (calculated on a per head basis) and the allocation of seats in the lower house of the Commonwealth Parliament. It also impacted on census information.
 - The alteration of these sections meant that the Commonwealth Parliament could legislate with respect to Aborigines (intended at the time to be used beneficially) and that Aborigines would be counted in state or territory populations, thus increasing the Commonwealth's power.

Some of the points that could have been made about the *Franklin Dam Case* and the *Brislan Case* include the following. (These were the more popular cases used; others could have been used too.)

- *Franklin Dam Case*
 - The High Court was required to interpret the words 'external affairs' after the Commonwealth of Australia objected to the Tasmanian Government's intention to build a dam.
 - The Tasmanian Government argued that its intention to dam the Franklin River was within its residual powers (power/electricity needs). The Commonwealth Government claimed it had a duty to prevent work likely to damage or destroy Australia's national heritage (the area covering the dam was included on the World Heritage List). It passed a law prohibiting the construction of the dam and argued this was under their external affairs power (international treaty/World Heritage listing).



- The High Court decided Australia's relationships with other countries was an external affairs power and because the area was a heritage listing due to an international treaty, it fell within the external affairs power. This, therefore, expanded the Commonwealth's power somewhat as it expanded the meaning of 'external affairs'.
- *Brislan Case*
 - The Commonwealth passed an Act in 1905 requiring all owners of wireless sets (radios) to hold a licence. The defendant had a wireless radio without a licence and was charged and fined.
 - She challenged the validity of the Commonwealth Act, claiming that broadcasting to a wireless service was not 'other like services' and, therefore, did not fall within the Commonwealth's power under s.51(v).
 - The High Court found it was within 'other like services' as the wireless radio had a function that was consistent with postal, telegraphic and telephonic services, namely, communication services, and is, therefore, a 'like service'. This increased the Commonwealth's powers.

The following example is the beginning of a good answer.

High Court interpretation and referendums are two ways that the division of law-making powers can be shifted. Generally, referendums have had little impact on law-making powers, with only four referendums changing those powers. High Court interpretation is more frequent and has had a greater impact than referendums on the law-making powers.

Section 128 of the Constitution sets out the referendum process, whereby the parliament and then the people vote on whether the wording of the Constitution will change. Once the people vote (which involves a vote by double majority), the referendum will go to the Governor-General for royal assent. Traditionally, referendums are very difficult to get through the public. The double majority requirements are difficult to achieve, and it is often seen that people are reluctant for change. Therefore, very few referendums have been successful and the process has therefore had very little impact on the division of law-making powers. Therefore, largely the Commonwealth and state powers have remained unimpeached by referendums, but for two relating to state debts, one relating to social services and one relating to Aboriginal Australians.

One of those referendums was in 1946 and was in relation to social services. It was after World War II and the Commonwealth had passed a law in relation to widows' pensions and unemployment benefits. Questions were raised as to the validity of that law, particularly given section 51(xxiii) only gave the Commonwealth the power to legislate regarding invalid and old-age pensions. A referendum was proposed which was to insert a new section 51(xxiiiA) into the Constitution, allowing the Commonwealth to make legislation in relation to other social services such as maternity allowances, widows' pensions and unemployment benefits. The referendum was successful, and ultimately resulted in an increase in the Commonwealth's powers.

Question 13

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Average |
|-------|----|---|---|---|----|----|----|----|----|---|----|---------|
| % | 11 | 4 | 7 | 9 | 11 | 12 | 12 | 11 | 10 | 6 | 6 | 4.9 |

There were two parts to this question. The first asked for a discussion about the extent to which the adversary system achieved one of the elements of an effective legal system. The second asked for a comparison of two features of the adversary system with the inquisitorial system.

Many students did not correctly identify the features of the adversary system. The jury system and the court hierarchy, for example, are not features of that system. The features of the adversary system are: the role of the judge, the role of the parties, the need for legal representation, the burden and standard of proof, and the rules of evidence and procedure.

Many responses were too vague about either the adversary system or the inquisitorial system. For example, there seems to be an incorrect assumption that the inquisitorial system maintains the principle that an accused is 'guilty until proven innocent'. This is not correct. Furthermore, many students argued that the judge's role in the inquisitorial system is far greater than what it is, suggesting that the judge becomes involved and active in every case (in most cases, the judge is not involved in investigations, which are largely conducted by law-enforcement agencies).

High-scoring responses used appropriate features to address whether or not the chosen element of an effective legal system was achieved, following through with a consideration of the similarities and differences of those two features with the inquisitorial system. Weaker students merely listed and described the five features without any discussion or comparison.

The number of points that a student could have made is extensive and depends on the element chosen. Therefore, not all points are addressed here. The following are some of the more popular points that were made.

- fair and unbiased hearing



- party control – ensures fairness by allowing parties to direct the conduct of the case, not the judge; however, this means that some evidence may not be led or less weight is given to certain evidence
- rules of evidence and procedure – ensures both parties are subjected to the same rules; however, often, the rules of evidence and procedure are strict, disallowing evidence that may be helpful, thus impacting on the fairness of an outcome not necessarily decided by consideration of all evidence
- role of the judge – independent and unbiased, issues of bias can be appealed
- legal representation – often, the outcome may depend on the experience or credibility of legal representation, which may be seen as unfair
- access to the legal system
 - legal representation – all parties have an equal right to legal representation and some can get access to legal aid; however, some parties cannot afford legal representation or may only be able to afford legal representation that is less experienced than another party's
 - role of the judge – at any time, the judge can direct the parties to attend mediation, which can help reduce costs and time; however, the judge is unable to get involved in the case, therefore limiting a person's access to the judge's expertise
 - rules of evidence and procedure – ensures that each party has a right to present the case; however, due to the complexity of the rules, it limits a person's ability, particularly an unrepresented person, to effectively access the system
- timely resolution
 - role of the judge – the judge can make directions and orders during the course of the trial and during pre-trial proceedings, which reduces the time it takes for a case to be heard – note in particular the enhanced powers of the judge by virtue of the *Civil Procedure Act 2010* (Vic.); however, the judge's broad powers may not be used and the judge may take a more traditional, passive role in the case, thus increasing the length of the trial
 - legal representation – the use of legal representation can reduce the time taken to explain procedures and/or rules to unrepresented parties
 - parties can choose which witnesses to call and what evidence to rely on, which can reduce the time it takes for a hearing to take place; however, the reliance on oral evidence increases the time it takes for a matter to be heard and, also, as parties have control over what evidence to call, this could delay the trial if the evidence is extensive

The more common comparison points used were those regarding the role of the judge, the role of the parties and the involvement of legal representation. Features of the inquisitorial system that could have been used as a point of comparison include the following.

- The role of the parties is greatly reduced given the role of the judge.
- Often, the parties are not required to attend court in civil proceedings.
- The parties are required to respond to the court's directions.
- The judge in this system has a far greater role than in the adversary system and can investigate and question witnesses.
- The examining judge does not sit on the trial court (in some systems, the trial court is held in a similar manner to the adversary trial).
- Similar to the adversary system, the legal practitioner can question witnesses.
- Rules of evidence and procedure are not as strict as those in the adversary system.
- There is an extensive use of written evidence and witnesses are free to tell their story.
- The judge will determine whether the evidence is relevant and reliable (similar to the adversary system).