COMMERCE PRESENTATIONS AND PUBLICATIONS

VCE LEGAL STUDIES 3/4

CPAP Practice Examination No 2 2019

SUGGESTED RESPONSES / ADVICE

SECTION A

Question 1
Outline <u>one</u> recommendation for change in the law that has been made by a royal commission or a parliamentary committee. (2 marks)

Advice: The commission or committee does not need a separate definition at the start. In 2018 the Chief Assessor wrote "It is not necessary to define key legal terms before answering a question, unless the question asks for a definition. It is also not necessary to give a description of methods, bodies or personnel before answering the question." And, in 2017, "It is not necessary to define legal terms before answering a question (unless the question specifically asks for this). In some instances it may be necessary to explain what a legal term means, but this is best done within the response."

Note that only material relating to the *first* identified recommendation should be marked. In 2017 the Chief Assessor reminded students that "If the question asks for a certain number of reasons/points, etc […], students should provide no more than the number that is asked for." Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into multiple answers.

MARK RANGE	QUALITIES OF ANSWER
2 marks	• A clearly-explained recommendation that identifies the specific body that made it and approximately when it was made; and • That gives sufficient elaboration – this may include whether the recommendation was accepted, but it does not need to. Note that the recommendation may be a slightly broader change with individual reforms comprising it, or one of the small, specific reforms.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example:

✓ *In December 2017 the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that the government establish a National Office for Child Safety to implement a national strategy to prevent child sex abuse.*

Problematic examples:

× *The final report of the Royal Commission into Institutional Responses to Child Sexual Abuse was published in December 2017 after four years of inquiry into the history of abuse in educational institutions, religious and sporting groups, state institutions and youth groups.*

This is problematic because it identifies an inquiry rather than an actual recommendation.

× *In December 2017 the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that the government establish a National Office for Child Safety to implement a national strategy to prevent child sex abuse.*

This is problematic because the recommendation used does not relate to a change in the <u>law</u>. Instead, this was a recommendation made to the Catholic Church.

Question 2
Explain the purpose of the government establishing and funding the Victorian Civil and Administrative Tribunal ('VCAT') in addition to courts in the state. (4 marks)

Advice: Students frequently demonstrate a poor understanding of how VCAT works and what its purpose is. In 2017 the Chief Assessor wrote: "There remain common misconceptions about VCAT. For example, many students wrote that a court was better because it can make binding decisions, without acknowledging that VCAT also makes binding decisions. Other students wrote that a court was better because it could refer the case to mediation, but VCAT also uses mediation and other methods of dispute resolution (such as compulsory conferences) to resolve disputes."

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A clear and accurate answer that states that VCAT hears civil claims and hands down binding resolutions (which includes making binding orders on agreements reached by the parties); and • That supports this answer with appropriate detail; and • That makes a relational statement with courts, such as that VCAT hears claims with simpler evidence or legal claims. Note that it would not be correct to say that VCAT only hears claims of low monetary value or where the parties want a 'cooperative' agreement. It would also not be correct to say that VCAT can 'filter' out disputes *before* they go to court.
3 marks	• An answer that omits any of the required material for a 4 mark answer; or • A complete answer that also contains a content error that is more than merely superficial; or • An answer that falls short in elaboration and detail, but that otherwise contains all the required content.
2 marks	• An answer that addresses the required content but is brief and superficial; or • An answer that is partly undermined by incorrect content; or • An answer that omits more than one piece of required content.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point. It may, for instance, give only one point about VCAT, or it may make a single comparative statement with courts but leave it general and vague.

Example:

✓ *VCAT is a quasi-judicial tribunal created to provide a forum for the resolution of relatively simple civil disputes that is less expensive, more informal, and quicker than court, but that still results in a binding order for resolution. VCAT deals with disputes across a range of highly-specialised sections called 'lists'. These include disputes regarding the purchase and supply of goods, such as faulty goods, regarding discrimination and sexual harassment, and regarding rental agreements – in some areas it has exclusive jurisdiction. The resolution here will be by members with narrower experiences than judges and magistrates and more practical industry experience, but with less legal training – which is why VCAT does not hear complex legal arguments or appeals.*

Problematic examples:

- × *VCAT channels the smaller and less complex civil claims away from the legal system to take the pressure off the courts, and ensure that cases can be heard more quickly, cheaply and with less formality. VCAT is divided into a number of specialised divisions, each with lists tailored to narrow areas of law to increase the specialisation of members.*

  This answer provides a general introductory statement, but does not support any of the claims made with examples or detail. The answer also seems to suggest that VCAT is not part of the legal system.

- × *VCAT is an alternative dispute resolution venue designed to allow people to resolve civil claims in a cooperative way using methods such as mediation, conciliation and arbitration. Unlike courts, it cannot make binding decisions and so parties may still have to go to court later.*

  This answer is almost entirely incorrect. VCAT has some opportunities for cooperative resolution – for instance, it can ratify private agreements, and has mediation programs running in some of its lists – but primarily it conducts hearings in which parties oppose each other. It also uses neither conciliation nor arbitration to resolve disputes: its hearings are run in a similar way to an arbitration, in that there are no formal rules of evidence and procedure, but they are called 'hearings'. VCAT also does make binding resolutions, and parties will only go to court if one appeals.

Question 3
In June 2019 the Australian Federal Police ('AFP') were accused of trying to limit the freedom of the press by conducting a raid on the offices of the Australian Broadcasting Corporation ('ABC') and the home of one private journalist, Annika Smethurst. The ABC and the journalist were in possession of arguably newsworthy information on government defence operations and alleged crimes committed by army personnel in 2017. The warrant gave the AFP the power to alter files and delete files.

a. What role might Victoria Legal Aid ('VLA') play in assisting the journalist, Annika Smethurst, involved in this criminal investigation? (4 marks)

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A clear and accurate answer that states that the VLA can give Annika both legal advice/information and possible representation; and • That supports this answer with appropriate detail; and • That makes use of the question scenario.
3 marks	• An answer that omits any of the required material for a 4 mark answer; or • A complete answer that also contains a content error that is more than merely superficial; or • An answer that falls short in elaboration and detail, but that otherwise contains all the required content.
2 marks	• An answer that addresses the required content but is brief and superficial; or • An answer that is partly undermined by incorrect content; or • An answer that omits more than one piece of required content.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Examples of ways:

- ✓ *VLA could provide Annika with free or low-cost representation if she is charged with a crime and is unable to afford her own legal practitioners. She would need to pass both the means test and the merit test to qualify for this, which means – to receive a fully-funded solicitor – she would need to show that she earned $360 or less a week. VLA would also need to be sure that her defence had merit.*

- ✓ *VLA could give Annika free legal information over their telephone advice hotline. This would not be tailored to the specific nature of her criminal dispute, but she could use it to inform herself of her legal rights and of the likely process should she be charged with a crime. She would also be able to access this telephone information before being charged with anything.*

Problematic examples:

- × *VLA could give Annika a duty lawyer to assist her with making submissions in court and filling in basic court papers and forms.*

  This is problematic because it suggests that duty lawyers are allocated to clients. Duty lawyers are stationed at courts, and unrepresented parties can seek their advice on the day if the party meets the qualification criteria for assistance.

- × *If she was charged with a crime and was unable to pay for a proper lawyer, Annika could receive free legal representation from VLA public defenders. This would mean she wouldn't have to speak on her own behalf in court, which would be a benefit as most people are unfamiliar with the legal system. This is why the VLA exists, to protect our right to legal representation.*

  This is problematic for a few reasons. Firstly, calling the private lawyer a "proper" lawyer suggests that lawyers who take on VLA work are not 'proper' lawyers: they are. Most lawyers doing VLA work also work privately, but give a number of hours each year to working at VLA rates for VLA clients. Secondly, the phrase "public defenders" suggests that the student is confused with the public defenders system in the United States of America – Australia's legal aid system does not work like that. Thirdly, the answer suggests that VLA would provide a barrister: this is rare. Usually the legal representation funded by VLA grants is limited to a solicitor. Fourthly, there is no right to legal representation.

b. Describe <u>two</u> responsibilities that the jury would have if Annika were to be prosecuted. (5 marks)

Advice: Note that only material relating to the *first two* identified responsibilities should be marked. In 2017 the Chief Assessor reminded students that "If the question asks for a certain number of reasons/points, etc […], students should provide no more than the number that is asked for." Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into multiple answers; this will likely be a question where responsibilities become tangled or blurry.

In 2017 the Chief Assessor commented that the use of the question case facts needs to be meaningful and not merely lip-service: "The reference to the case needed to be meaningful […].Many students did not achieve full marks because the reference to the case was inadequate."

MARK RANGE	QUALITIES OF ANSWER
5 marks	• An answer that clearly identifies two different responsibilities; and • That includes detail or elaboration for each responsibility; and • That makes meaningful use of the question scenario, perhaps as a way to give context or elaboration on the responsibilities. Note that a similar question was asked on the 2018 VCAA examination, and responsibilities were accepted whether they applied to the jury as a whole or to individual jurors.
4 marks	An answer that fulfils the criteria for a 5 mark answer, but that displays one of the following weaknesses: • It fails to provide sufficient context or elaboration for one of the responsibilities; or • It fails to make properly meaningful use of the question scenario; or • It contains at least one material error of fact, but not enough to undermine parts of the answer.
3 marks	• An answer that contains two of the above weaknesses; or • An answer that contains one of the above weaknesses in *each or both* of the roles; or • An answer that only covers one responsibility, but where that responsibility is done superlatively; or • An answer that entirely omits the question scenario; or • An answer that contains errors of fact that undermine parts of the answer.
2 marks	• An answer that only covers one responsibility, and where that responsibility is done only satisfactorily; or • An answer that identifies two responsibilities, but gives little to no further detail on them; or • An answer that gives a detailed general overview description of the responsibility of a jury, but that does not identify the two parts within that answer that count as the two chosen points; or • An answer that would otherwise be complete, but that contains significant errors of fact that cannot be overlooked and that undermine the answer.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example responsibilities:

✓ *The jury would have the responsibility of reaching a verdict in Annika's case and deciding whether she was guilty or not guilty of the charges levied against her. The jury would have to ensure they only took into account the evidence and legal arguments presented during trial when discharging this responsibility, because the case has received such media coverage it would be possible to allow the verdict to be influenced by outside information, and the jury has a responsibility to not allow this to happen.*

✓ *Each juror would have a responsibility to declare to the judge before the trial started whether they considered themselves unable to hear the case impartially and fairly. Potential jurors have the ability to ask that they be excused from a case before it begins – usually this will be because they will not be free for the duration, but it could also be because they are connected to someone in the case or have heard too much about it in the media and feel they are already biased. For*

example, a potential juror may know Annika as a neighbor and should ask to be excused from the trial.

Problematic example:

- *The jury is a randomly-chosen selection of 12 (in criminal cases) members of the community whose responsibility it is to give the accused a trial by their peers. They must do this by listening objectively and with an open mind to all of the evidence presented, understanding the law as explained by the judge, and finally deliberating to reach a majority or unanimous verdict.*

  This is problematic for a few reasons. Firstly, the answer never makes it clear what the chosen responsibility is. Is it giving a trial by peers? Is everything else just elaboration on this? The signposting should be clearer. Secondly, the information at the start is unnecessary and a distraction – it isn't part of the responsibility. Thirdly, the second sentence seems to run through the general process of being a jury rather than focusing on one clear responsibility.

c. Discuss the significance of <u>one</u> High Court case that considered the interpretation of sections 7 and 24 of the Australian Constitution, and comment on how the precedent might be relevant to the AFP raids. (6 marks)

Advice: In 2017 the Chief Assessor reminded students that "If the question asks for a certain number of reasons/points, etc […], students should provide no more than the number that is asked for." Only the *first* ones are marked – not the *best* ones. Here, students may use a second case to elaborate on the significance or impact of their chosen case, but they should be careful not to switch into a second case discussion.

The task word 'discuss' means to engage with subjective arguments and not simply to list facts. Looking at 'both sides' is not always required, however, depending on the wording of the question; nor is arriving at a final opinion, or even having points that identify clearly as 'strengths' or 'weaknesses' – arguments can be about importance, impact or appropriateness. The task word 'comment' requires subjective arguments to be provided, but 'both sides' do not need to be given and no final conclusion needs to be reached. It also allows students to take a positive view or a negative one.

Not only do detailed facts not need to be given of the case, they should not dominate the answer at all. The question asks for a discussion of the significance of the case: spending a significant chunk of the answer simply describing the facts of the case is not answering this task directive. A 'discussion' involves arguments, points and opinions; and the 'significance' of the case points to the outcome and impact of it more than the facts of it.

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that identifies an appropriate case; and • That provides enough of the factual basis of the case to give context to the answer; and • That correctly identifies the outcome of that case; and • That gives one or more subjective or analytical arguments about the precedent on the meaning of ss7 and 24 that can be derived from that outcome, and the impact of that precedent; and • That makes meaningful use of the question scenario in the final comment – here, the ss7 and 24 precedent must be linked with the scenario.
5 marks	An answer that fulfils the criteria for a 6 mark answer, but that displays one of the following weaknesses:

	• It discusses the impact of the case, but is too focused on the facts of the case; or • It lacks some depth in the discussion of the case; or • It fails to make adequate use of the question scenario in the comment; or • It attempts a sophisticated comment, but lacks accuracy in the way that the ss7 and 24 precedent is linked with the facts of the question scenario; or • It contains at least one material error of fact, but not enough to undermine the answer as a whole.
4 marks	• An answer that contains two of the above weaknesses; or • An answer that contains one of the above weaknesses, only to a greater extent; or • An answer that fails to use the question scenario in a comment at all, even though the separate case discussion is strong; or • An answer that contains a few errors of fact, but not enough to undermine the answer.
3 marks	• An answer that fails to discuss an outside case study, and focuses entirely on the question scenario – but completes that comment very well; or • An answer that responds to all parts of the question but is brief in execution and lacking elaboration; or • An answer that is too factual and fails to adequately address the directives to 'discuss' and 'comment on'; or • An answer that responds to all parts of the question but that contains material errors of law and/or fact that undermine sections of the answer; or • An answer that omits more than one piece of required content.
2 marks	• An answer that recites rote-learned case facts from the case study, and fails entirely to discuss the impact and answer the questions; or • An answer that fails to link the outcome of the case to the interpretation of ss7 and 24 or the significance of the precedent and limits itself to a factual account; or • An answer that addresses a case and a comment but is brief and superficial in both respects; or • An answer that is comprehensive but that is significantly undermined by incorrect content.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example:

✓ *In* Theophanous v Herald Weekly Times *(1994) the High Court had to decide whether the freedom of political communication established two years earlier in the ACTV case extended to the common law. Theophanous was a member of the House of Representatives, and he argued that he had been defamed by the HWT newspaper group; HWT argued the freedom of political communication as a defence to defamation. The High Court allowed this defence, and, in doing so, effectively allowed the common law to be changed to be compatible with the Australian Constitution – it was 'constitutionalised' and a defence of qualified privilege was created. The implied protection from government action that had been found in ss7 and 24 was applied to state-based common law governing the private responsibilities of individuals under civil law. This could apply to the AFP raids because both people – the AFP and Theophanous – are trying to stifle journalistic commentary on political matters. In Theophanous the right of the media to publish even critical material on politicians was protected; in the AFP raids the same protection could apply to allow the ABC to publish material critical of government defence operations.*

- ✓ *In* Roach v Electoral Commission & Anor [2007] HCA*, the High Court had to decide on the constitutional validity of amendments made to the 2006 Electoral Act, which prohibited anyone serving a term of imprisonment from voting in a federal election. Roach was a Victorian woman serving a term of imprisonment, and she argued that restricting prisoners' ability to vote was inconsistent with sections 7 and 24 of the Constitution which required the Houses of Parliament to be 'directly chosen by the people'. The Court held that sections 7 and 24 established a structural protection of representative government, and from that established a protection of the right to vote. The Court held, however, that this right could be limited for a 'substantial reason', and that any limitation must be 'appropriate and adapted' to that reason. In Roach's specific case the Court held that while the amendments to the Electoral Act were invalid, it upheld the validity of the previous legislation which prohibited prisoners serving a sentence of three years or longer from voting. This could apply to the AFP raids because, arguably, representative government is undermined if the media are afraid to be critical of the government for fear of prosecution. It is commonly accepted that the media has a large impact on the public's perception of politics, and therefore, the way in which the public votes. If the media is restricted from criticising the government, but is still free to criticise the opposition, this will undermine whether our elections are truly generating 'representative government' or are being biased towards the existing government. This argument might be used to protect the ABC's ability to publish material critical of the government's defence operations.*

Problematic example:

- × *The question in the scenario is whether the AFP raids and actions towards the ABC and the journalist would be made invalid by the freedom of political communication that was found by the High Court to be protected by the Constitution, first in the ACTV Case of 1992. Limiting campaign donations might be held to be putting an inappropriate burden on political communication, and detrimental to the system of representative democracy established by the Australian Constitution. The ACTV Case of 1992 was the case that established the freedom of political communication. The Commonwealth Parliament passed a law banning most political advertising on radio and television in the 6 months before a federal, state or local government election, although existing members of parliament received fixed allotments of time. This was challenged on the basis that the Constitution contained an implied right to freedom of political communication. Sections 7 and 24, that the Senate and the House of Representatives had to be "chosen directly by the people" were found to imply this right. The High Court therefore found that the Commonwealth had acted ultra vires its powers and invalidated the legislation.*

  This answer makes no errors of fact, and it does address both the question scenario and an outside case study, but it fails to properly engage with the impact of the case study and properly explain the legal significance and precedent set – there is a suggestion that the student doesn't understand exactly how the Court got from ss7 and 24 to the freedom of political communication. They therefore focus too much on the facts of the case.

Question 4
Discuss the extent to which the requirement for standing can affect the ability of the courts to make or change the law. (4 marks)

Advice: The task word 'discuss' means to engage with subjective arguments and not simply to list facts. Looking at 'both sides' is not always required, however, depending on the wording of the question; nor is arriving at a final opinion, or even having points that identify clearly as 'strengths' or 'weaknesses' – arguments can be about importance, impact or appropriateness. The task phrase 'the extent to which' requires a meaningful opinion on the extent in order to receive full marks. In 2017 the Chief Assessor said clearly: "To gain full marks, students needed to provide their opinion or view about the statement."

MARK RANGE	QUALITIES OF ANSWER
4 marks	• An answer that gives a clear opinion in response to the question; and • That clearly expresses an understanding of 'standing' in relation to bringing a legal action, even though a freestanding definition is not required; and • Sophisticated engagement with one or more arguments about how this limits, or does not limit, the ability of courts to reform the law; and • That provides elaboration appropriate to the number of points made – note that examples and case may be used here, but they should not dominate the answer and they should be used to illustrate a relevant point. Note that students are free in the wording of the question to arrive at any opinion between total restriction and no restriction; the arguments should contribute meaningfully to whatever opinion is given.
3 marks	Something slightly less than a sophisticated, complete 4 mark answer. For instance, any of the following in an otherwise excellent answer: • Very little detail on the concept of standing; or • Too much reliance on the concept of standing and on examples of standing being present or absent, rendering some parts of the answer slightly general in terms of the impact on court law-making; or • Slightly too much focus on one argument at the expense of a full and sophisticated discussion of any other aspects; or • A slightly brief 'discussion' with too much focus on factual content; or • An answer that meets the criteria for a 4 mark answer, but that contains one or two factual errors that are more than just superficial; or • An answer that is slightly short.
2 marks	• An answer that contains some content detail but little to no subjective argument, and thus does not answer the question; or • An answer that makes only a couple of valuable points; or • An answer that relies exclusively on one detailed case study; or • An answer that makes an attempt at engaging with the question and making subjective arguments, but that contains significant content errors.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point; or • An answer that gives only a definition of standing; or • An answer that gives only a simple case study.

Example:

- ✓ *Courts will be denied the opportunity to rule on a legal question and thereby to set precedent that has the ability to change the law if any individual concerned – and willing and able to launch an action – is denied standing in the matter or cannot prove a legal interest. Standing is the legal privilege to bring a dispute to court for resolution, and it is only granted to a person or organisation with a direct legal interest in the case. For example, Bob Brown was almost denied standing to challenge the Tasmanian anti-protest laws when the charges against him were dropped. This would have prevented him from asking the High Court to consider questions such as whether a freedom to physically protest was included in the constitutional freedom of political communication. The ability of courts to influence the law is entirely dependent on the ability of a legally-competent person to obtain standing and good legal representation.*

Question 5
Discuss the relationship between the role of the High Court in interpreting the Australian Constitution and the impact of international declarations and treaties on the external affairs power. (5 marks)

Advice: The task word 'discuss' means to engage with subjective arguments and not simply to list facts. Looking at 'both sides' is not always required, however, depending on the wording of the question; nor is arriving at a final opinion, or even having points that identify clearly as 'strengths' or 'weaknesses' – arguments can be about importance, impact or appropriateness.

In the 2018 VCAA examination a question on the interpretation of the external affairs power was handled poorly. The Chief Assessor wrote: "Although many students were able to explain what an international treaty is and what the external affairs power is, few were able to describe the relationship between the two. That relationship is ultimately founded upon the decisions by the High Court that have established that the 'external affairs power' includes the power to pass laws to give effect to international treaty obligations. It was not necessary to use a case to gain full marks. While many students did describe a case, such as the Tasmanian Dam case, very few were able to explain how this case demonstrated the relationship between international treaties and the external affairs power. If examples of cases are used in responses, they should be used in a way that enhances the rest of the response."

MARK RANGE	QUALITIES OF ANSWER
5 marks	• An answer that communicates a clear understanding of High Court interpretation – specifically, that the High Court can elaborate on the meaning of words in the Constitution and make law on their meaning; and • That communicates a clear understanding of how the High Court has interpreted the 'external affairs' power – specifically, that it gives the Commonwealth Parliament to legislate on any matter pursuant to a legitimate treaty; and • That connects this interpretation with the consequential impact of treaties and declarations on the scope of the external affairs power – specifically, that treaties will effectively 'add' legislative heads to the power, but that declarations will not; and • That uses this content as the basis for one or more thoughtful and subjective points on the impact.
4 marks	Something slightly less than a sophisticated, complete 5 mark answer. For instance, any of the following in an otherwise excellent answer: • An answer that takes High Court interpretation for granted, and fails to clearly communicate what it is; or

	• That demonstrates an understanding of the High Court's interpretation of the external affairs power, but makes it something less than perfectly clear; or • That demonstrates an understanding of the impact that the interpretation will have on the scope of the external affairs power, but makes it something less than perfectly clear; or • That has insufficient detail on the legal specifics, rendering some parts of the answer slightly general; or • That has a slightly brief acknowledgement of the subjective arguments due to too much focus on factual content; or • That allows the answer to be somewhat dominated by a case example; or • That contains one or two factual errors that are more than just superficial (for instance, failing to distinguish between treaties and declarations, but not allowing that to otherwise ruin the answer); or • An answer that is slightly short.
3 marks	• An answer with two of the problems indicated in the 4 mark answer range; or • An answer with any one of the above problems, but present to a larger extent; or • An answer that responds entirely through a case study, so that the required content is present in the answer but is consistently implied rather than clear and express; or • An answer that discusses the relationship between the High Court interpretation and treaties and declarations, but that fails to say clearly what the actual interpretation of 'external affairs' is; or • An answer that consistently confuses treaties and declarations, or that overstates the overstates the impact of international agreements – for instance, saying that any matter relevant to any international agreement can be legislated on broadly by the Commonwealth.
2 marks	• An answer that contains content detail but no subjective argument and thus does not answer the question; or • An answer that relies entirely on a relevant case example but fails to clearly answer the question with it; or • An answer that makes an attempt at engaging with the question and making subjective arguments supported with content detail, but that has significant content errors.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example:

✓ *The High Court has the responsibility under s76 of the Constitution to interpret the meaning of the wording of the Constitution and to set precedent on it. This interpretation can have the effect of limiting the matters the Commonwealth can legislate on, by defining a matter as being outside the scope of one of the specific powers or subject to a restriction. Alternatively, the High Court has the power to extend the Parliament's legislative authority by confirming that the matter is included in the scope of the specific powers. The High Court has interpreted the meaning of the 'external affairs' power to give the Commonwealth Parliament ability to legislate on any matter pursuant to a legitimate treaty, even if it is in an area of residual power. Over time the High Court's interpretation of the Constitution has broadened the meaning of 'external affairs' and thereby expanded the power of the Commonwealth Parliament. Treaties entered into by the executive will therefore effectively 'add' power to the Commonwealth. Conversely, declarations have not been found to 'add' power in the same way as they are not legally binding on nation states like treaties are.*

Question 6

Since the 2014 Lacrosse Tower fire in Melbourne, the government and the building industry have known that thousands of buildings are covered in combustible 'cladding' – a building material that can burst into flames. The problem has not been addressed, and thousands of people are still living in apartments that are unsafe; no-one has the power or the money to fix their entire building, though, because there are many different apartment owners managed by an overall owners corporation.

Evaluate the impact that factors to consider when initiating a civil claim might have on the ability of apartment owners to take legal action, and comment on the role that representative proceedings could play in fixing this problem. (10 marks)

Advice: Each factor does not need a separate definition at the start. In 2018 the Chief Assessor wrote "It is not necessary to define key legal terms before answering a question, unless the question asks for a definition. It is also not necessary to give a description of methods, bodies or personnel before answering the question." And, in 2017, "It is not necessary to define legal terms before answering a question (unless the question specifically asks for this). In some instances it may be necessary to explain what a legal term means, but this is best done within the response."

The task word 'evaluate' means to reflect on both sides of the argument *and* provide an opinion or conclusion. In 2017 the Chief Assessor said in response to an 'evaluate' question: "To gain full marks, students needed to explore the strengths and weaknesses […], and provide a conclusion. The conclusion needed to be meaningful, rather than one that merely said, 'Overall the strengths outweigh the benefits and therefore it is an adequate method of protection.' Many students focused on one strength and one weakness only; this produced an insufficient evaluation that could not gain full marks." The task word 'comment' requires subjective arguments to be provided, but 'both sides' do not need to be given and no final conclusion needs to be reached. It also allows students to take a positive view or a negative one.

In 2018 the Chief Assessor said that, for clarity of structure, "Students are advised to use paragraphs in extended responses."

MARK RANGE	QUALITIES OF ANSWER
10 marks	• An answer that provides a clear opinion or conclusion in response to the impact of the factors to consider when initiating a civil claim, at the start of the answer, at the end of the answer, or woven throughout the answer; and • That demonstrates meaningful engagement with multiple arguments in relation to how the factors considered in initiating a civil claim might impact apartment owners in this scenario; and • That has support provided for the arguments in the form of specific detail and/or examples; and • That covers both sides of the issue *to some extent* in these arguments – in other words, that considers both how apartment owners might be swayed *toward* or *away* from legal action based on these factors; and • That explains the role that representative proceedings could play in fixing the problem from the scenario; and • That relates the role of representative proceedings in fixing the problem back to the factors considered in initiating a civil claim.
9 marks	An answer that otherwise meets the criteria for an 10-mark answer, but that demonstrates one the following weaknesses: • It makes one small error in its explanation of the separation of powers; or • It lacks a sophisticated opinion in response, and gives a more general "I agree to a certain extent" with insufficient clarification through the arguments; or

	• It lacks a small amount of scope or detail in its arguments, either covering slightly too few methods or a good number of methods in slightly too little depth; or • It contains a small number of minor errors in understanding or content that do not undermine the answer; or • It covers both sides of the issue, but lacks some engagement between the sides and sounds a little like separate arguments.
8 marks	An answer that otherwise meets the criteria for an 10-mark answer, but that demonstrates one the following weaknesses: • It has one of the above problems, demonstrated to a slightly greater extent; or • It fails to reach any conclusion for the first part of the question; or • It lacks scope or detail in a number of its arguments, or is one good argument short of a full answer; or • It contains multiple small errors of understanding or fact; or • It lacks in covering both sides of the issue because one side is too little considered or there is too much of a gap between the sides and they are not weighed against each other.
7-6 marks	• An answer that has two of the above problems; or • An answer that provides a strong to excellent evaluation, but that fails entirely to explain the role of representative proceedings in fixing the problem.
5 marks	Answers that demonstrate significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: • An answer that explains the factors to consider in initiating a civil claim and contains specific detail and content, but lacks meaningful engagement with any arguments and is factual rather than argumentative; or • An answer that explains the role of representative proceedings and presents multiple ways in which representative proceedings could fix the problem in the scenario but fails to clearly link them with the factors to consider in initiating a civil claim; or • An answer that contains errors of fact or understanding that are significant enough to undermine parts of the answer as a whole; or • An answer that explains the role of representative proceedings but that covers significantly too few arguments related to the factors to consider in initiating a civil claim (such as perhaps two points only); or • An answer that omits the role of representative proceedings and provides limited discussion of perhaps three or four arguments relating to the factors to consider in initiating a civil claim; or • An answer that provides little detail to support its arguments and relies instead on assertion without explanation and general statements.
4-3 marks	• An answer that demonstrates any of the above significant problems to a greater extent; or • An answer that has two or more of the above problems.
2 marks	• An answer that makes only two accurate and effective points, from either the evaluation or the role of representative proceedings; or • An answer that makes one accurate and effective point about each of the sections.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example arguments:

- ✓ *The original purpose of implementing a representative proceedings regime in 1992 was to enhance access to justice by reducing the cost of court action to the individual plaintiff, in situations where multiple people had been harmed in similar fact scenarios. The purpose of the reform in the first place was to allow people to achieve redress, even in situations where they could not afford to initiate proceedings themselves and especially when the defendant was a powerful and wealthy organisation. These instructions were part of the ALRC's advice in 1988 and guided the provisions in the legislation.*

- ✓ *In 2013 Federal Court justice Bernard Murphy said in a speech, when Queensland was considering adopting the same regime as Victoria has, that representative proceedings should be introduced there because laws are "no more than an illusion" if they say they protect people but no-one can use them in practice; class actions were therefore "important in improving access to the protection of substantive laws," partly because the group members bear no risk in terms of the costs of losing, as outlined in the source material, and do not need the money to fund the legal advice and representation in the first place.*

- ✓ *Because the financial risks for the entire group are borne by the named plaintiff, it could sometimes be difficult finding a group member willing to take on those responsibilities on behalf of the rest of the group. Class actions are often launched with respect to matters of a public interest and where vulnerable complainants are concerned – for instance, with the recent proceedings on behalf of asylum seekers detained offshore. The most thorough research into the regime in Australia, by Prof Vincent Morabito, shows that the average named plaintiff is a middle-aged white professional male, and surmised that this was because the representative plaintiff needed to be comfortable taking that risk. Not all actions may find such a plaintiff to give the other group members access.*

- ✓ *The costs that need to be recouped by the courts are high, when compared with the income and assets of the average person, but there are also good reasons for imposing these costs. In 2018 the attorney-general published a regulatory impact statement on court fees that explained how fees send an important signal to the community on the value of having a formal justice system, ensure that people who benefit from the system contribute to its financial viability, and discourage frivolous actions. They also help the courts simply keep running, because government funding alone would be inadequate – in 2016-2017 the costs of running the Supreme Court were just under $72m. In order to balance these priorities against the reality that many people whose rights have been infringed or who deserve to defend themselves cannot afford the kinds of fees that governments and corporations can, however, in October 2018 the County and Supreme Courts introduced a tiered fee schedule: now, the Standard Fee for individuals is 50% of the Corporate Fee, and the Concession Fee is 50% of the Standard Fee.*

- ✓ *Enforcement issues can be extremely problematic in cases involving the building industry. Residents of unsafe apartment buildings may find that they are unable to obtain any compensation if the builders responsible for the issues declare bankruptcy. For example, 'H Buildings' in Victoria was facing up to 13 claims for rectification of building work, including four flammable cladding cases, when it entered voluntary administration in August of 2018. Residents of their buildings were seeking up to $3.8 million for the rectification works, but the costs of the claims far outweighed the assets owned by the construction company.*

✓ *Limitation of actions may also impact on the ability of apartment owners to take legal action. In* Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd *[2014] VSCA 165 the Victorian Court of Appeal held that a claimant may bring a building action within 10 years of the date of the certificate of occupancy or final inspection. Typically, major flaws in new apartment buildings are discovered within the first 10 years. Yet combustible cladding such as in the Lacrosse Tower fire has been in use for many decades, in which case the limitation of actions could be a substantial bar to pursuing legal action for those in older apartment complexes affected by this issue.*

SECTION B

In 2018 the Chief Assessor made it clear the extent to which the source material *must* be used in each answer to Section B: "However, some students did not get full marks for responses to questions in Section B because they did not incorporate/apply the relevant stimulus material in all of their responses, despite an instruction on the examination to do so."

Question 1

a. Explain how mitigating and aggravating factors might have been taken into account in the above case. (5 marks)

MARK RANGE	QUALITIES OF ANSWER
5 marks	• An answer that explains how aggravating and mitigating factors can be taken into account to increase or reduce culpability and severity of sentence; and • That provides examples of both aggravating *and* mitigating factors from the case to support this explanation; and • That comments on how the relative importance of each aggravating or mitigating factor might have been taken into account in determining the final sentence.
4 marks	An answer that fulfils the criteria for a 5 mark answer, but that displays one of the following weaknesses: • It fails to provide sufficient detail or elaboration for how the factors are taken into account in determining sentence; or • It fails to draw this detail out through an example exploring the relative importance of an aggravating or mitigating factor; or • It contains a material error of fact, but not enough to undermine the answer as a whole.
3 marks	• An answer that defines aggravating or mitigating factors and provides examples of aggravating or mitigating factors from the case, but that fails to explain their impact in relation to the scenario; or • An answer that is superficially correct but too brief; or • An answer that is partly undermined by errors in content.

2 marks	• An answer that identifies some examples of aggravating or mitigating factors from the case but gives no further detail; or • An answer that defines aggravating and mitigating factors but that gives no examples and fails to use the case; or • An answer that defines only one of aggravating or mitigating factors and provides at least one example, but that lacks in discussion and fails to cover the other type of factor; or • An answer that is undermined by significant errors in understanding.
1 mark	• An answer that gives little more than one brief, accurate, point.

Example:

✓ *Aggravating factors increase the seriousness of the offence, or the offender's culpability, and as a result will increase the severity of the sanction imposed. Conversely, mitigating factors decrease the seriousness of the offence, or the offender's culpability, and as a result will decrease the seriousness of the sanction imposed. In this case there were a number of mitigating factors which were highly influential in the judge's decision not to impose a sentence served in an adult prison. Specifically, the offender offered an early guilty plea which saved the community the costs of a trial, and spared witnesses the stress and trauma of testifying. Further, and perhaps more importantly, the offender also expressed remorse for his actions; judges often comment that genuine remorse is given great weight in the sentencing process. Finally, the offender had good prospects for rehabilitation which meant that a term served in an adult prison may be counterproductive. The serious nature of the offending, however, was such an important aggravating factor that the judge held that imprisonment was the only appropriate sentence that could reflect the gravity of the offending. As a result of these countervailing factors, the judge decided on a sentence of imprisonment served in a Youth Justice Centre instead of an adult prison. This demonstrates that judges consider both aggravating and mitigating factors in a balancing act to determine an appropriate sanction given the facts and circumstances of the offender and their offending.*

b. Identify the role that the Office of Public Prosecutions might have played in the offender's early guilty plea. (2 marks)

Some students incorrectly stated that plea negotiations will determine the sentence (this is not correct – the sentencing role is left with the court). Others incorrectly stated that Ada is the prosecutor or will be negotiating with Bob. Some students confused plea negotiations with sentence indications. These types of responses were generally low-scoring responses. [2018]

MARK RANGE	QUALITIES OF ANSWER
2 marks	• An answer that identifies the OPP's role in plea negotiations; and • That makes a clear link between plea negotiations and early guilty pleas.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point; or • That identifies the role of the OPP in plea negotiations but does not link this with early guilty pleas.

Example:

✓ *The Office of Public Prosecutions is involved in plea negotiations with the defence which can result in an early guilty plea if the defendant believes it is in their best interest. In this case, the defendant may have chosen to plead guilty to the lesser charge of culpable driving causing death rather than a possible manslaughter or murder charge, because of the likelihood of receiving a lower sentence.*

Problematic example:

× *Plea negotiations may lead to early guilty pleas because the sentence for the accused is decided privately, without a public trial. The accused has the ability to negotiate a sentence that she or he is happy with, and is likely to accept only those punishments that are lower than what is likely to be given in sentencing at the end of a full trial with a verdict of 'guilty'. In this case the defendant was able to negotiate for a sentence to be served in a Youth Justice Centre instead of in adult prison.*

This answer makes the fundamental error of confusing charges with sentencing. Plea negotiations determine the charges the accused is pleading guilty to – they do not determine the sentence. This answer also refers to the sentence as a 'punishment', which is sloppy language: punishment is <u>one</u> of the purposes of sanctions, but is not a synonym for sentencing.

c. Explain the different standards of proof that apply to criminal matters versus civil matters. (3 marks)

MARK RANGE	QUALITIES OF ANSWER
3 marks	• An answer that explains the different standards of proof; and • That refers to the stimulus material, such as by indicating that a culpable driving charge must be proved beyond reasonable doubt whereas if the defendant were to be sued for negligence the claim would have to be proved on the balance of probabilities.
2 marks	• An answer that explains the standard of proof in a criminal trial (beyond reasonable doubt) and the standard of proof in a civil trial (on the balance of probabilities) but that omits the scenario; or • An answer that uses the scenario but that only answers one of the criminal or civil standard correctly.
1 mark	• An answer that gives more than nothing, but that is little more than one brief (accurate) point such as an identification of one standard of proof.

Example:

✓ *The standard of proof that applies in criminal matters is that the case must be proved beyond reasonable doubt, whereas the standard of proof in civil matters is on the balance of probabilities. The standard of proof in a criminal case is much more demanding than in a civil case. In this case, the defendant's criminal charge of culpable driving would have to be proved beyond reasonable doubt if he had gone to trial. If the defendant were to be sued for negligence in relation to the same matter, the standard of proof would be on the balance of probabilities.*

d. To what extent is imprisonment an appropriate sanction in this case? (6 marks)

Advice: The task phrase 'the extent to which' requires a meaningful opinion on the extent in order to receive full marks. In 2017 the Chief Assessor said clearly: "To gain full marks, students needed to provide their opinion or view about the statement."

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that provides a clear opinion in response to the question, at the start of the answer, at the end of the answer, or woven throughout the answer; and • That demonstrates meaningful engagement with multiple arguments in relation to the appropriateness of imprisonment; and • That has support provided for the arguments in the form of specific detail from the scenario – the aims of sanctions do not need to be used, but may be relevant to 'appropriateness'. Note that arguments do not need to cover 'both sides' depending on the nature of the opinion given, but more is required than a simple list of weaknesses or strengths with no reflection or engagement.
5 marks	An answer that otherwise meets the criteria for an 6 mark answer, but that demonstrates one the following weaknesses: • It lacks a sophisticated opinion in response, and gives a more general "I agree to a certain extent" with insufficient clarification through the arguments; or • It lacks scope or detail in its arguments, either covering slightly too few or a good number in slightly too little depth; or • It conflates some of the aims of sanctions, such as rehabilitation and deterrence; or • It errs a little on the side of discussing imprisonment in relation to the aims of sanctions rather than its 'appropriateness' in this particular case; or • It focuses too little on the question scenario; or • It contains a small number of minor errors in understanding or content that do not undermine the answer as a whole.
4 marks	• An answer that has one of the above problems, demonstrated to a slightly greater extent; or • An answer that has two of the above problems; or • An answer that covers too few arguments (such as two or three good points only); or • An answer that provides little detail to give reasons *why* imprisonment would be appropriate or inappropriate, and relies instead on assertion and generalisations; or • An answer that has a couple of significant errors in understanding or content.
3 marks	Answers that demonstrate significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: • An answer that sounds like a rote-learned list of points regarding imprisonment, and is not tailored properly to the question; or • An answer that is significantly short, covering perhaps only two points or listing three very briefly; or • An answer that contains errors of fact or understanding that are significant enough to undermine parts of the answer.
2 marks	• An answer that discusses appropriateness, but fails to use the scenario at all; or

	• An answer that summarises aspects of the scenario, but that fails to make arguments in relation to appropriateness; or • An answer that makes only one good point or two fairly brief points; or • An answer that is undermined by significant errors in content or understanding.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example points:

✓ *Rehabilitation should be the primary focus of the sentencing, because of the offender's age – younger offenders are more likely prospects for rehabilitation and learning better social and living strategies. Sentencing him to a custodial term would therefore be inappropriate if it were to be served in a facility with poor access to meaningful therapy, education and job skills opportunities.*

✓ *Carter comes from a close family, and a term of imprisonment would be likely to create distance in this relationship. We know that people rehabilitate better and in a more lasting way when they are surrounded by positive influences and family support; not only does the judge express concern over the negative influences in prison, serving a custodial sentence could alienate Carter from his supportive family and hamper rehabilitation prospects.*

e. Culpable driving was first inserted into the *Crimes Act 1958* (Vic) in 1967 with the *Crimes (Driving Offences) Act*. The maximum penalty was originally seven years imprisonment; in the 1990s the Parliament began increasing the maximum, and now it stands at 20 years and a Level 3 fine – the same as manslaughter.

Discuss the reasons that might have influenced the Parliament to make these legislative changes. (6 marks)

Advice: The task word 'discuss' means to engage with subjective arguments and not simply to list facts. Looking at 'both sides' is not always required, however, depending on the wording of the question; nor is arriving at a final opinion, or even having points that identify clearly as 'strengths' or 'weaknesses' – arguments can be about importance, impact or appropriateness.

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that provides two or more reasons for parliament to change the law – these reasons must be appropriate to the question scenario; and • That has support provided for the reasons in the form of specific detail from the scenario. Note that students have two options here for source material: the extracts at the beginning of Question 1, or the introduction to Question 1(e). Students do not need to use all sources.
5 marks	An answer that otherwise meets the criteria for an 6 mark answer, but that demonstrates one the following weaknesses: • It lacks scope or detail in its reasons, either covering slightly too few (but a minimum of two) or a good number in slightly too little depth; or • It errs a little on the side of discussing reasons for law reform in general, not focusing sufficiently on this particular case; or • It contains a small number of minor errors in understanding or content that do not undermine the answer as a whole.

4 marks	• An answer that has one of the above problems, demonstrated to a slightly greater extent; or • An answer that has two of the above problems; or • An answer that covers two reasons in insufficient detail, or three reasons in a slightly list-like way; or • An answer that tacks on references to the scenario in a somewhat superficial way; or • An answer that has a couple of significant errors in understanding or content.
3 marks	Answers that demonstrate significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: • An answer that sounds like a rote-learned list of reasons for law reform and is not tailored effectively to the question; or • An answer that is significantly short, covering perhaps only two points or listing three very briefly; or • An answer that contains errors of fact or understanding that are significant enough to undermine parts of the answer.
2 marks	• An answer that makes no effort to use the scenario, but that otherwise has accurate reasons for law reform; or • An answer that summarises aspects of the scenario, but that fails to clearly identify any reasons; or • An answer that makes only one good point or two brief points; or • An answer that is undermined by significant errors in content or understanding.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example:

✓ *The Parliament possibly decided that the law regarding the maximum sentence needed to be changed because the original sentence was not adequately protecting the community. As the County Court judge said in the case of Carter, culpable driving involves the death of another person and is offending of a serious nature – only seven years imprisonment may have seemed inadequate to ensure that pedestrians, passengers and other drivers were kept safe from this threat of recklessness of dangerous behaviour.*

Problematic example:

× *The Parliament may have needed to change the law because of changes in values. Over time, society's opinions, attitudes and priorities change, and what was acceptable behaviour in the past ceases to be seen in a positive light by the community. For the law to be effective it must be respected and followed; in order for people to willingly continue following it, it needs to change when society changes. The Queensland Parliament may have felt that the law needed to change to keep up with evolving values and attitudes in the sixty years since it was first created.*

This is problematic because it superficially relates to the question sources, but isn't actually tailored to the facts of the situation. The answer doesn't say exactly what values have changed, and how these changes affected the community's opinion on culpable driving or its sentencing.

Question 2

a. The Queensland Parliament responded to this call for reform in 2016 and passed an act. Outline the role played by the Crown in this process. (2 marks)

MARK RANGE	QUALITIES OF ANSWER
2 marks	• A clear and comprehensive answer that details how the Crown provides royal assent to bills that have passed through both houses of parliament; and • That references the stimulus material, such as by indicating that royal assent would be needed before the act could come into effect and reverse the effect of the *Barbaro* decision. Answers may specify either that royal assent signifies the Queen's approval, or that it is necessary for the bill to become law, but something more than 'signing the bill' is necessary to communicate the importance of the action. Note that answers do not need to expressly give the names of the Crown's representative in both tiers of parliament for them to receive full marks, but nor should they expressly focus only on one tier (state or federal). Note also that it is technically possible to answer this question without using royal assent, or by mentioning royal assent briefly and then supplementing the answer with another contribution. Examples are given below.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point; or • An answer that otherwise falls within the 2 mark range but that contains material errors of fact, or does not refer to the stimulus material at all

Examples:

✓ *Royal assent is the final stage in a bill becoming law during which errors in drafting can be caught and the parliament can be prevented from acting outside its constitutional powers or creating legislation that has oversights or impracticalities in its implementation.*

✓ *The Crown can contribute to law-making by heading up non-partisan reform initiatives or authorising royal commissions by issuing letters patent. These could have led to the Queensland Parliament drafting the reform bill, as they could have made this recommendation for change.*

b. Would the reform enacted by the Queensland Parliament make the change uniform across the whole of Australia? Refer to the constitutional division of legislative powers in your answer. (4 marks)

MARK RANGE	QUALITIES OF ANSWER
4 marks	• An answer that identifies that reform would not be uniform across Australia; and • That shows an understanding that residual powers are held by the states and can only be used to enact legislation within a given state; and • That shows an understanding that uniform legislation across Australia would need to be enacted by the Commonwealth Parliament under a concurrent or exclusive power; and • That refers to the stimulus material, such as by indicating that criminal law is an area of residual power held by the states and therefore any reform enacted by the Queensland Parliament would be restricted in application only to Queensland.
3 marks	• An answer that meets the criteria for 4 marks, but refers to the stimulus material only briefly or superficially; or • That demonstrates accurate understanding, but fails to use one of the key terms from the division of powers in the answer – ie fails to use the term 'residual powers', or fails to use one of either 'exclusive powers' or 'concurrent powers'; or • That covers the necessary content, but very briefly and without sufficient explanation; or • That introduces some inaccurate content (for instance, incorrect examples of powers) in a way that doesn't undermine the answer.
2 marks	• An answer that inaccurately submits that the reform would be uniform but that otherwise uses the division of powers effectively; or • An answer that fails to use the scenario but that otherwise uses the division of powers effectively; or • An answer that explains that the law would not be uniform, but gives no further elaboration; or • That contains significant errors in understanding or content that undermine parts of the answer; or • That explains what the division of powers means, but does not relate this information back to explaining why the reform would not be uniform.
1 mark	• An answer that gives more than nothing, but that is little more than one brief (accurate) point such as an identification that the reform would not be uniform.

Example:

- ✓ *The reform enacted by Queensland Parliament would not be uniform across the whole of Australia. The state parliaments can only legislate in areas of residual or concurrent powers and they can only do so in a way that applies to their state, meaning they have no capacity to make uniform legislation across Australia. Only the Commonwealth Parliament, legislating within an area of concurrent or exclusive power, can enact laws that are uniform across Australia. In this instance, any act to reform the* Barbaro *decision relates to criminal law, and this is an area of residual power. The Queensland Parliament could therefore pass legislation reforming this area, but it would only apply within the criminal law jurisdiction of the State of Queensland.*

c. Explain how it is that the High Court's decision in *R v Barbaro and Zirilli* was able to create law and "cast its effects Australia-wide". (5 marks)

MARK RANGE	QUALITIES OF ANSWER
5 marks	• An answer that gives a clear explanation of how precedent is set and its status as law; and • That explains how a precedent established by the High Court applies to all lower courts Australia-wide; and • That elaborates on this by using accurate content material from the doctrine of precedent – this elaboration may or may not include examples or hypotheticals; and • That makes meaningful use of the source material.
4 marks	An answer that fulfils the requirements of a 5 mark answer, but that demonstrates one of the following weaknesses: • It lacks something in the elaboration and detail of the material; or • It covers too few points or aspects of the doctrine of precedent, such as omitting the idea of binding precedent or *stare decisis*; or • It contains one or two slight errors in fact; or • It has a slightly superficial use of the source material.
3 marks	• An answer that runs through a factual definition of precedent but does not use that definition to answer the question or link with the source material; or • An answer that engages in a discussion of the source material, but does not clearly link this discussion with the question; or • An answer that provides a basic argument as to the impact of precedent but that lacks entirely in elaboration and specific content on the doctrine of precedent; or • An answer that contains a couple of errors in understanding or content that undermine parts of the answer; or • An answer that is list-like and fails to elaborate or adequately 'explain'.

2 marks	• An answer that demonstrates a fundamental lack of understanding about precedent, but manages to bring out a few accurate and relevant points in the midst of that; or • An answer that makes one or two solid points about the scenario, but does nothing more; or • An answer that understands precedent, but is limited to a definition of precedent or a couple of summary content points; or • An answer that contains fundamental errors in fact that undermine the answer.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example:

✓ *The High Court's decision in* Barbaro *was able to create law through the doctrine of precedent. The doctrine of precedent means that when a court is required to resolve a legal dispute, the reasons for the decision (the* ratio decidendi*) establishes a new legal rule that is binding on all lower courts in the hierarchy. This is sometimes referred to as the common law, or judge-made law, because establishing a new precedent is how the courts create law. The High Court's decision in* Barbaro *is a perfect example of the court's law-making role in action; the High Court's decision had the effect of creating new law because prosecutors had to immediately change what they could say and do during sentencing. Further, this law was able to "cast its effects Australia-wide" because of how the doctrine of precedent functions to bind* all *lower courts in the hierarchy. The highest court in the Australian hierarchy is the High Court. Therefore, all of the other courts in Australia, including the state Supreme Courts, are now bound to follow the precedent in* Barbaro*. This is the case even if they disagree with the decision. They can, however, try to distinguish aspects of the decision such as how His Honour Judge P E Smith of the Queensland District Court held in* R v Costin [2014] QDC 39 *that the decision in* Barbaro *does not prohibit the defence from making submissions as to sentencing range, only prosecutors, applying the High Court's decision in* Barbaro *to prosecution submissions only, whereas his case related to the defence, too.*

d. Explain the role played by His Honour Judge Smith in the development of the law. (3 marks)

MARK RANGE	QUALITIES OF ANSWER
3 marks	• An answer that explains the role played by judge in developing law, in terms of making a decision that set precedent; and • That provides sufficient elaboration on this; and • That makes meaningful use of the stimulus material.
2 marks	• An answer that explains the role played by judges in the development of law, but does not refer to the stimulus material at all, or only briefly; or • An answer that discusses the source material, but fails to ground the discussion with adequate legal terminology and content from the doctrine of precedent; or • An answer that contains some errors in content or understanding; or • An answer that is accurate, but too brief and lacking in elaboration.
1 mark	• An answer that gives more than nothing, but that is little more than one brief (accurate) point such as an identification of precedent.

Example:

- ✓ *One role played by His Honour Judge Smith relates to the responsibility of the judge to make decisions of law where that is necessary, and in doing so play a part in the development of precedent. For example, in the case of* R v Costin*, His Honour was required to make a legal decision with regards to whether defence counsel were still permitted to make submissions on sentencing ranges. The judge's decision elaborated on the High Court precedent, clarifying it for legal practitioners in Queensland.*

e. Was the Queensland Parliament's 2016 reform an example of the codification of common law or the abrogation of common law? Explain your answer, using the principle of the supremacy of parliament. (4 marks)

Advice:

Codification, abrogation and supremacy do not need separate definitions at the start. In 2018 the Chief Assessor wrote "It is not necessary to define key legal terms before answering a question, unless the question asks for a definition. It is also not necessary to give a description of methods, bodies or personnel before answering the question." And, in 2017, "It is not necessary to define legal terms before answering a question (unless the question specifically asks for this). In some instances it may be necessary to explain what a legal term means, but this is best done within the response."

MARK RANGE	QUALITIES OF ANSWER
4 marks	• An answer that states clearly that this is an example of abrogation; and • That shows an understanding of the fact that abrogating a precedent invalidates it and stops the courts from following it; and • That refers to the stimulus material to justify why this is an example of abrogation; and • That shows an understanding of the fact that Queensland Parliament is able to abrogate this precedent because of the principle of supremacy of parliament.
3 marks	• An answer that fulfills the criteria for a 4 mark answer, but that refers to the stimulus material only briefly or superficially; or • An answer that answer the abrogation part of the question well, but that omits the second part on the supremacy of parliament; or • An answer that fulfils all the requirements for a 4 mark answer, but that contains one or two errors of fact that undermine the student's understanding of the material.
2 marks	• An answer that fails to address both parts of the question adequately *and* contains material errors of fact, but that draws out a couple of valid points; or • An answer that addresses the supremacy of parliament well, but that fails to engage with the question of abrogation (or is incorrect in it); or • An answer that addresses both parts of the question in a perfunctory, list-like way that is too brief; or • An answer that contains significant errors of content that undermine parts of what otherwise is a competent answer.
1 mark	• An answer that gives more than nothing that is accurate and responsive, but that is little more than one brief point.

Example:

✓ *Queensland Parliament's 2016 reform is an example of the abrogation of common law. Abrogation refers to enacting legislation that overturns or abolishes court-made law, which is likely what has happened in this instance because Queensland's 2016 reform was in response to calls to restore the position that existed before the* Barbaro *decision. Queensland Parliament is able to do this because of the principle of the supremacy of parliament, which means that parliament is the primary and most powerful law-maker, and that it has the power to override law made by other law-making bodies. For instance, if parliament disagrees with a common law rule established in precedent, it can legislate to abrogate that rule, which is what has happened in this instance.*

Problematic example:

× *Supremacy of parliament means that parliament is the best law-maker, and the most effective one at its job. Parliament has the most resources to research law reform and make appropriate laws, and it is a representative body so it reflects community values.*

This answer is problematic because being an effective law-maker and being the supreme law-maker are two independent issues – 'effective' is not a definition of 'supreme'.