This document is copyright protected. It is designed for the exclusive use of purchasers of the CPAP Study Guide to VCE Legal Studies. It is illegal to distribute this document to non purchasers of the Study Guide.

Teachers are also reminded that it forms a breach of copyright laws to purchase one copy of the Study Guide and to print a class set of questions and answers.
Question 1
Suggestions for Answers

✓ The purpose could also be described as informing the public that a new law has been made, or giving people the opportunity to inform themselves and make any necessary preparations to comply with the law.

✓ In addition to being published in the Government Gazette, students could also indicate that the date may be written into the act itself, or that the date is by default 28 days after Royal Assent if no other date is published.

Question 2
Suggestions for Answers

✓ The Commonwealth has the power (in s51) to make laws regarding any matter referred – handed over to them – by the states, but their legislation only applies to the state or states that referred the power.

✓ Students may describe these powers as becoming exclusive as a result, however this has not been confirmed by a majority of the High Court. It is not incorrect, however, because of the operation of s109.

✓ Students may also state that states can later take the powers back, however it is not yet confirmed by the High Court whether the Commonwealth can give them back.

✓ Example: The 1996 referral of the workplace relations power to the Commonwealth, done by the Victorian Parliament under the Kennett Government.

✓ Example: The referral of power over the custody and maintenance of children born outside marriage to the Commonwealth, done by all states between 1986 and 1990.

✓ Example: The referral of the power to set rules regarding the establishment of companies to the Commonwealth, done by all states after the Incorporations Case of 1990.

✓ Example: The referral of the power to make laws prohibiting terrorist acts. This referral was a specific text-based one: in their referral acts, the states wrote the exact wording of the legislation that the Commonwealth was allowed to pass, and said that any changes to it had to be agreed to by a majority of states.

Question 3
Suggestions for Answers

✓ Bipartisan agreement is usually necessary for the success of referenda because many people vote along party lines.

✓ Because of the double majority required, smaller states can stand in the way of changes that the majority of people are in favour of. Attention must be paid to getting the support of states, as well as just a majority of the Australian people.

✓ If the proposal is complicated or ‘legal’ and most regular people don’t understand it, they will vote ‘no’ as a reflex to the confusion rather than because they truly disagree with the change.

✓ The public relies on advertising and pamphlets to educate them about the issue, which means they can be confused by too much conflicting information: leading to a ‘no’ vote if the information is not streamlined and easy to understand.

✓ When referenda are held on the day of a federal election the people have often paid more attention to election issues and do not want to vote in favour of a proposal they do not understand.
When referenda are held on the day of a federal election the people may vote against the proposal if they are unhappy with the Government, as they see the ‘no’ vote as a protest vote against the Government.

When a proposal is seen as a grab for power by the Commonwealth, the states will urge the people to vote against it.

Question 4
Suggestions for Answers

The procedure of discovery involves both parties exchanging the evidence they have (except for privileged information). This begins with each party providing a sworn list of documents such as photographs and witness statements in an affidavit; this will be followed by the production of documents: giving copies of anything requested by the other party. Medical reports may also be requested.

One important aim of discovery is to encourage agreement on as many issues as possible, in order to limit what must be argued at trial. If one party sees that the opposition has a great deal of convincing evidence supporting one of their claims, that party may choose to concede the issue and not argue that point at trial. This will speed the trial up.

Question 5
Suggestions for Answers

The roles of the Upper House are:

The Senate acts as a States’ House because each state is given equal representation (12 senators) so they can act in the best interests of their state, and smaller states are not overpowered every time by Victoria and New South Wales.

The Senate acts as a House of Review because the Government usually initiates most of its bills in the House of Representatives, where it has a majority. The Senate views the bills second, and has more debate as the Government usually does not hold a majority.

Comments on the effectiveness of each role may include:

The Government usually does not hold a majority of seats in the Senate, so must compromise with other parties and independents to pass the bill. It therefore is an effective House of Review.

The Government usually does not hold a majority of seats in the Senate, so must be able to convince other parties and independents that the bill is good for the community so they will vote for it. It is therefore an effective House of Review.

The Senate’s committees are more numerous and more active than the committees in the lower house. It is therefore an effective House of Review.

If the Senate is controlled by the Opposition it will not be an effective House of Review because it will be hostile and will simply block everything.

If the Senate is controlled by the Government it will not be an effective House of Review because it will be a rubber stamp and will simply pass everything.

The Senate cannot be an effective House of Review because the Howard Government cut the number of committees and changed it so that each one was chaired by a Government senator.

Each senator is able to consider the interests of their state when voting on bills; they are not expected to only consider party policy. It is therefore an effective States’ House.
No matter what the population of each state is, the number of senators representing each will always be equal. The Senate is therefore an effective States’ House because any legislation that affects states differently must be agreed to by a majority of states.

If senators vote along party lines rather than in the best interests of their state, the Senate will not be an effective States’ House.

Question 6
(a) Suggestions for Answers

✓ Representative government is a system of indirect democracy, where people elect representatives to parliament to make decisions and laws on their behalf.

✓ The people are protected because they can refuse to re-elect any member of parliament who abuses their power.

✓ The people are protected because the members of parliament are supposed to represent their interests and make laws in line with what the people want.

(b) Suggestions for Answers

✓ Parties may exclude potential jurors by making a peremptory challenge against them. They do not need to give their reasons, and the challenge must be accepted by the judge. Parties can each make six peremptory challenges.

✓ Parties may ask to exclude potential jurors by making a challenge for cause. A legitimate reason for exclusion must be given to the judge, who may decide whether or not to accept it. Parties can make unlimited challenges for cause.

(c) Suggestions for Answers

Changes to the current system of trial by jury may include:

✓ Requiring that juries provide written reasons for their decisions. This could be a summary given by the foreperson, or a collection of individual reasons given by each member of the jury.

✓ Requiring that jurors complete a questionnaire, showing that they understood key evidence and law. This is similar to what is done in several states in America.

✓ Appointing a specialist foreperson who has experience in the area, when the jury is hearing complex cases such as medical negligence or tax fraud.

✓ Reducing the number of peremptory challenges allowed both parties, so that the composition of the jury becomes truly more random.

Alternatives to the current system of trial by jury may include:

✓ Removing trial by jury altogether, considering that they are only used in 0.5% of cases in Australia as it is.

✓ Removing trial by one’s peers, and replacing the jury with a panel of professional lawyers and/or judges.

Examples of ‘critical examinations’ may include:

✓ If juries were required to provide written reasons for their decisions, parties would be able to get the satisfaction of knowing why they won or lost, and could also appeal to request a review of any errors made concerning evidence or law. Jurors are not legally trained, however, so it might
be unfair to require them to provide written reasons that are expressed legally enough to stand up in a court of appeal. This could put unnecessary pressure on people providing what is a community service.

- A specialist foreperson could ensure that the jury understand complicated evidence that could be crucial to the outcome of the trial. If the jury did not understand this evidence they may become confused, and either 'tune out' or make a decision based on factors that were not as important, such as the appearance of the witness or accused. A specialist foreperson may have too much influence during deliberations, however. The jury verdict might end up simply being their verdict, if the other eleven people trust their judgment and go along with them rather than making an independent decision.

- Removing juries would increase the speed of trials on indictment, and would also cost parties and the government less money. People in the community would not be taken away from their jobs, and they would not be put through the stress of having to make such an important decision when they are not trained for it. Removing juries would deny people the important right of trial by their peers, however, and there would be no independent body to bring contemporary values into the courtroom and check the power of the government.

**Question 7**

Suggestions for Answers

- Reversing – if a higher court is hearing a case on appeal they may decide differently, thereby replacing the original precedent set.

- Overruling – if a court has a precedent argued before it that was set in a lower court they can decide differently, thereby replacing the original precedent set.

- Distinguishing – if any court believes the precedent being argued before it was set in a case with different material facts they can decide differently, thereby setting a new precedent that exists in harmony with the original because they are both relevant to different cases.

- Disapproving – if a court has a precedent argued before it that was set in a court at the same level they can decide differently, thereby setting a new precedent that exists in conflict with the original. They are on similar material facts, and neither has more authority than the other.

- Applying a persuasive precedent – if a court believes that a precedent is effective law they can choose to apply it, thereby making the legal principle binding on a wider range of courts.

- Making a new common law rule – if there is not statute or common law relevant to the area, the court can make a new common law rule.

**Question 8**

Suggestions for Answers

Reasons for a court hierarchy may include:

- A hierarchy allows a system of appeals to exist. If one party is dissatisfied with an element of the decision made by a lower court, they can ask a higher court to scrutinise the decision and hopefully correct any mistakes.

- A hierarchy allows for greater specialisation. Lower courts like the Magistrate's Court can develop expertise in small cases such as traffic fines and petty theft, thereby processing them more quickly and avoiding delays.

- A hierarchy allows for greater speed and efficiency. More serious cases can be timetabled across weeks or even months in higher courts, allowing witnesses to be properly examined; while the Magistrate's Court can hear many small cases in one day, almost like a factory line.
A hierarchy allows the doctrine of precedent to operate. Decisions made by higher courts such as the Supreme Court will be binding on lower courts when the material facts of the cases are similar.

**Question 9**
Suggestions for Answers

✓ The United States of America has an entrenched bill of rights in its constitution, which takes the form of ten amendments added; Australia has five express rights entrenched in its constitution, but they are not organised into a bill of rights. Instead, they are scattered throughout the constitution. Australia could learn from the USA’s approach, as having a bill of rights makes the rights easier for members of the public to find, and can make a symbolic statement about the importance of the rights.

✓ The Supreme Court of Canada can issue an ‘advisory opinion’ on whether a particular law or action would infringe the Charter of Rights. An example is the bill to legalise gay marriage. The Australia High Court does not give advisory opinions; the action must be taken, and then the matter must be challenged by a party with standing. Australia could learn from Canada’s approach, as making High Court challenges is very expensive, and it would be more efficient to resolve the confusion before legislation has been passed.

✓ In South Africa the constitutional rights apply both vertically and horizontally. In other words, they protect South Africans from the power of the government as well as from the power of individuals and companies. In Australia, constitutional rights only apply vertically: they only protect us from the power of the government. Australia could learn from South Africa’s approach, as large companies, employers and families have the power to infringe our rights, but the Australian Constitution does not stop them from doing so.

**Question 10**
Suggestions for Answers

The three types of rights are:

✓ An express right is one written clearly into the wording of one section of the Constitution (and can only be changed by referenda).

✓ An implied right is one not stated explicitly in the Constitution, but that the High Court has found to be implied by the wording of two or more sections being read together.

✓ Structural protections are safeguards for the public as a whole or for our democratic system, based on the structure of the legal system that is set up by the Constitution. They are not personal rights held individually by each person.

The recognised express rights are:

✓ The s80 right to trial by jury for federal indictable offences.

✓ The s51 right to being paid ‘just terms’ for compulsory Commonwealth acquisition of private property.

✓ The s92 right to ‘free intercourse among the states’, which involves being allowed to trade interstate without border taxes.

✓ The s117 freedom from Commonwealth discrimination on the basis of state residence.
The s116 freedom of religion, giving freedom from Commonwealth legislation establishing a state religion, banning a religion, telling people how to follow a religion, setting a religious test for a Commonwealth Government job, or preventing people from choosing to have no religion.

The implied right is:

The ss7 and 24 freedom of political communication, giving a freedom from legislation stopping members of the public from communicating and developing public opinion on political or social issues.

Structural protections include:

- Representative government (as confirmed in the Roach Case), which gives the community as a whole the right to a democratically elected parliament, by preventing the Commonwealth from stopping large sections of the population from voting, without a significant reason for doing so.

High Court cases relating to rights protection include:

- The ACTV Case involved the Commonwealth banning most political advertising in the lead-up to an election. The High Court had to decide whether this infringed an implied freedom to speech, or perhaps a more limited freedom of political communication. They found that it did, because ss7 and 24 of the Constitution sets up a system of representative government, so a freedom of political communication is needed to make an informed vote.

- The Rabelais Case involved a student newspaper publishing a manual on shoplifting, which they said was protected by the implied right to freedom of political communication because the manual was commenting on the divide between rich and poor. The High Court found that the implied right does not extend to this, because the right only covers speech helping the “development of public opinion on the whole range of issues which an intelligent citizen should think about”: manuals on crime do not come within this definition.

- In the Roach Case the parliament passed a law preventing anyone who was in jail from voting, no matter how short their sentence was. The High Court had to decide whether this infringed an implied right to vote. They found that there was no individual right to vote – because people serving 3 years or more could be prevented, for example – but that the structure of the Constitution establishes a representative government in which large sections of the public cannot be prevented from voting without a very good reason. Roach was therefore successful because of this structural protection.

**Question 11**

Suggestions for Answers

- Inquisitorial judges exercise almost complete control over the case. They collect and examine evidence, choose which witnesses to hear, and decide the relevant law and facts.

- The adversary judge, on the other hand, is impartial and does not participate in the contest. They rule over the court, ensuring the rules of evidence and procedure are followed; they listen to the arguments presented by the parties; and then decide which argument was the strongest from those put to them.

Evaluation for the role of the judge in the adversary system may include:

- **STRENGTH:** The judge’s impartiality and lack of bias protects the public perception of the court, and the respect they have for its decisions.
STRENGTH: The judge is impartial and so the verdict will be based on the strength of evidence and arguments rather than on personal prejudice.

STRENGTH: Because they are an independent umpire the judge can ensure that neither party manipulates or breaks the rules of evidence and procedure, keeping the contest fair.

WEAKNESS: The judge is usually the most qualified person in the room, but this knowledge is largely wasted.

WEAKNESS: The judge cannot assist an unrepresented party or a party with a lawyer who is not representing their interests in the most effective way possible.

WEAKNESS: The judge cannot ensure that all evidence is brought before the court or recommend that important questions be asked of witnesses.

Evaluation for the role of the judge in the inquisitorial system may include:

STRENGTH: The judge is usually the most qualified person in the room, and having an inquisitorial role means that their knowledge and experience can be used more fully.

STRENGTH: The judge can ensure that both sides of the case are looked into with equal strength and detail so that one side is not disadvantaged.

STRENGTH: The judge can call new witnesses to investigate different aspects of the case as they emerge in trial.

WEAKNESS: The judge loses some of their impartiality by becoming involved in the investigation and contest; or, at the very least, they may appear to be less impartial.

WEAKNESS: The judge does not have a vested interest in the outcome, so they may not work as hard as the parties to uncover all of the evidence as efficiently as possible.

WEAKNESS: The parties may feel ‘at the mercy’ of the judge, and not be content with the lack of control they have over their own futures.

(a) Sample Answers features of the adversary system

Strict rules of evidence make sure the parties only present relevant, reliable and legally obtained evidence, and strict rules of procedure ensure that both parties have a fair and equal opportunity to present their case.

Legal representation is vital for the best chance of success. Lawyers control most aspects of the case, and are necessary to ensure that witnesses are found and examined correctly, and that all rules of evidence and procedure are followed.

Parties take an active role. They decide which witnesses to call to support their version of the facts, what questions to ask their witnesses, and what questions to ask opposing witnesses under cross-examination; or, indeed, whether to cross-examine at all. Parties also choose what interpretation of the law to argue to the judge, and also what precedent to argue to support their case.

In the adversary system the burden is strictly on the party bringing the action, and both sides of the case are not examined simultaneously. The standard of proof is also high: it is beyond reasonable doubt in criminal trials, and on the balance of probabilities in civil trials. The focus is on the prosecution/plaintiff meeting the standard of proof rather than finding the truth.
**Question 12**
Suggestions for Answers

- Mediation is where a trained mediator supports parties, ensuring that each gets a chance to explain their power of view and keeps focused on solutions. Parties are encouraged to come to a non-binding (without a contract) agreement.

- Conciliation is where a conciliator manages discussion between parties and assists them to come to a fair agreement, which is non-binding (without a contract). Conciliators are generally experts in the area of the dispute, so can offer useful advice.

- Judicial determination is a process in which parties explain their sides of the dispute to a third party, who asks questions or looks at evidence. The third party then makes a binding decision for them.

Similarities between VCAT and court may include:

- Both VCAT and court utilise judicial determination, where an independent third party makes a decision on behalf of the parties. Courts use it in all hearings and trials, while VCAT uses it in hearings before the President or one of the Vice-Presidents.

- The decisions made through judicial determination in each are binding on the parties.

- The decisions made through judicial determination in each can be appealed to a higher court if one party believes that an error has been made.

- The third party in each has legal training and/or experience, and conducts the hearing/trial in a way that gives each party natural justice and the right to argue their case.

- Hearings and trials both use an adversarial process of resolution, in which the parties argue against each other, and a win/lose outcome is sought.

- Both VCAT and courts use non-judicial methods of dispute resolution such as mediation and conciliation to encourage the parties to work together.

Differences may include:

- Parties have a limited right of appeal from VCAT decisions compared with court ones. VCAT decisions can only be appealed on a question/point of law.

- VCAT tends to be a cheaper process than court. There is a one-off filing fee that is generally lower than court, and fewer expert witnesses and barristers are used, for example.

- VCAT judicial determination uses a less adversarial process than court. There is less reliance on legal argument and cross-examination; the VCAT member may ask their own questions, and conversations can be held with witnesses.

- Court trials are frequently thought to be unjust if one party does not have legal representation (see the Dietrich case), whereas in VCAT barristers are frequently barred from representing parties.

- VCAT has more flexible rules of evidence and procedure than court does. Written evidence is more readily allowed, for example.

- Juries are used in the County and Supreme Courts to decide cases, whereas VCAT never uses juries.

Comparative strengths and weaknesses could include:

- Resolution through court is time-consuming, and so incidental costs such as childcare and time off work add up. VCAT conducts faster hearings, and some can be resolved over the Internet.
Parties have a right of appeal from court decision, which can lengthen the time taken to reach a final resolution. VCAT hearings limit the right of appeal.

The limited right of appeal from VCAT hearings may mean parties are less confident that justice has been achieved. Appeals are not limited from court decisions.

A formal environment with wigs, gowns, raised platforms and special witness boxes can be very intimidating. VCAT hearings have a less formal environment.

VCAT has one low filing fee to initiate a dispute, usually around $35, and then there are no further fees to pay. This contrasts with courts, which have filing fees that are much higher – starting from over $100 in the Magistrate’s Court. Fees are also ongoing, and must be paid each time any document is filed.

The use of barristers to represent parties is discouraged in VCAT, and is usually prohibited if the amount claimed is under $10 000. Barristers are strongly encouraged in all court hearings.

If parties are prevented from using barristers to represent them in a VCAT hearing, they may feel unable to adequately present their case by themselves. They may not understand the law, or simply may not be confident. In court, parties can always be represented.

The tribunal member takes a more active role in proceedings than a judge does, because they conduct proceedings, and can ask questions of parties and witnesses.

Since the judge in court does not get involved they can ensure that both parties respect the rules, and that neither gains an unfair advantage. They also cannot be accused of bias or corruption in the way that a VCAT member could, if they took more control over the conduct of the case.

VCAT hearings can be made more flexible in terms of location and time, to work around the lives of the parties. In some cases, hearings can even be conducted without the parties present.

Rules of witness examination are flexible in VCAT. They can give evidence via written statements and can also make uninterrupted statements in the hearing. In court hearings all witnesses must generally be there in person, and they respond only to questions.

The more flexible rules of evidence and procedure in VCAT can mean the experience is less stressful for parties and witnesses, and can see a wider range of evidence being brought into consideration than in court, which has very strict rules.

The stricter rules of evidence and procedure in court than VCAT can ensure that only relevant and reliable evidence is taken into account, so the decision-maker is not swayed by anything unreliable or unfairly prejudicial.

Matters resolved in court can be heard by jury, giving parties a trial by their peers. VCAT does not use juries.

The third party in court is generally more qualified and experienced than the third party in VCAT. Judges and magistrates are trained in the law, while VCAT members often only have practical experience working in the area themselves.

Unlike winning a case in the Victorian Civil and Administrative Tribunal, the winner in court usually has their costs awarded to them, which means the losing party has to pay them.
Question 13
Suggestions for Answers

Arguments relating to parliament may include:

✓ Lawmakers in parliament are elected, therefore are accountable to the people for the law that they make; because of this accountability, however, parliament may make short-term decisions to attract votes, rather than making the best decisions for the long-term.

✓ Electing parliament means that laws are more likely to reflect majority values and needs, because each MP needs a majority in their electorate; this can lead to tyranny of the majority, however, and can mean that laws pander to majority interests rather than protecting those who need assistance.

✓ The passage of a bill involves debate and scrutiny, to ensure that flaws in proposed legislation are fixed; this debate can slow the process down, however, or alternatively can be cut short by the Government using its majority to ‘guillotine’ debate and push the bill through.

✓ Parliament is more accessible to the public through lobbying, interest groups, campaign funding, and making submissions to law reform bodies; this means that it has little independence, however, and can make law to please the interest groups that gave the party in power the most money, which may not be in the best interests of the community.

✓ Parliament can delegate the power to make laws to subordinate authorities such as local councils, who have more expertise and time to make specific, detailed and relevant laws; apart from local councils, many of these bodies are unelected, however, and parliament does not have the necessary time to review every regulation they make. This is undemocratic lawmaking.

✓ Important bills introduced to parliament are generally supported by the entire party, and so have a greater chance of success; a party system is also more efficient than dozens of individuals having to debate and compromise on every single bill. On the other hand, the views of the electorates are often not represented because MPs vote with their parties, and everyone who did not vote for the majority party is effectively not represented.

Arguments relating to courts as lawmakers may include:

✓ Courts make law through their decisions on cases, therefore they must wait for an appropriate case to come before them before they can change the law. This means, however, that the common law will always be needed in society and relevant to something that actually happened.

✓ Judges usually recognise that it is not their role under the separation of powers to make law, and so prefer to leave large changes in the law to parliament. This means they are reluctant lawmakers, but it also means that they respect the separation of powers.

✓ Judges in courts lower than the High Court may frequently be bound by precedent, and so cannot make changes to legal principle. The doctrine of precedent, however, ensures that the common law remains consistent, fair and predictable.

✓ Reversing can only be done if parties have the time, money and grounds to appeal, and overruuling can only be done by a higher court. The methods of departing from precedent do, however, ensure that judges have the flexibility to adapt the common law when society or cases change.

✓ Judges are unelected and therefore unaccountable for the law that they make. Courts do not bow to the whims of the majority, however. They can make law that protects the environment, minorities or future generations because they do not need to win elections.

Arguments may also compare and contrast courts and parliament, for example:

✓ Courts make law through hearing cases, so the law they make is specific to real-life situations. Parliament’s on the other hand, can be vague and have gaps left in it.
Courts can use their powers of statutory interpretation to make parliament’s statutes more relevant and up-to-date: this creates a cooperative relationship between them, because courts stop legislation from needing constant amendment.

Judges are unelected and hold security of their position, so they are not accountable for the law that they make. This means there is no way the people can make the courts respond to changes that are wanted by the majority. Parliament, on the other hand, is held accountable through regular elections.

Courts can only make or change the law when a case comes before them; it must come before a superior court of record, or be an entirely novel case. This can take a long time. Parliament, meanwhile, can make law on any area within its jurisdiction whenever it feels that change is required.