

COMMERCE PRESENTATIONS AND PUBLICATIONS



**VCE LEGAL STUDIES
STUDY GUIDE (7th edition)**

BONUS PRACTICE EXAMINATION

**SUGGESTED ANSWERS
AND MARKING SCHEME**

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This practice examination was published prior to the February release of the 2018 examination structure. It is therefore modeled on the 2017 examination structure. Please refer to the VCAA website for the updated format.

Question 1

Advice

- ✓ The task word 'comment' indicates that the student present subjective arguments rather than facts; pairing this task word with 'the extent to which' directs students to express an opinion in response. Both sides of the argument may be looked at if the student wishes.
- ✓ The task word 'outline' requires more than simply naming the roles, but extensive discussion is not required.
- ✓ 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.

1 mark	An outline of the role as a states' house: name and a small amount of explanation.
1 mark	An outline of the role as a house of review: name and a small amount of explanation.
1 mark	One subjective comment on the effect of the states' house role.
1 mark	One subjective comment on the effect of the house of review role.

The primary roles of the Senate are:

- *The Senate acts as a states' house because each state is given equal representation so senators can protect their state, and smaller states are not overpowered by larger states.*
- *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.*

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. The house of review therefore does not make an effective contribution.*
- *The Government usually does not hold a majority of seats in the Senate, so must be able to show other parties and independents that the bill is good for the community so they will vote for it. The house of review therefore makes an effective contribution.*
- *The Senate's committees are more numerous and more active than the committees in the lower house and bills are scrutinised well. The house of review therefore makes an effective contribution.*
- *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. The house of review therefore does not make an effective contribution.*
- *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 house of review therefore does not make an effective contribution.*
- *The Senate cannot be an effective house of review because the Howard Government cut the number of committees and changed it so that each legislative committee was chaired by a Government senator. The house of review therefore does not make an effective contribution.*
- *Each senator is able to consider the interests of their state when voting on bills; they are not expected to only consider party policy. The states' house therefore makes an effective contribution.*

- 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 approved of by a majority of states. The states' house therefore makes an effective contribution.
- If senators vote along party lines rather than in the best interests of their state, the Senate will not be an effective states' house and bills may adversely affect some states in an unfair way. The states' house therefore does not make an effective contribution.

Question 2

a.

Advice:

- ✓ It would be incorrect to say that the 'government' is elected by the people because it is the members of parliament who are elected, but markers can be flexible depending on the meaning that is conveyed by the way in which the student writes their answer.
- ✓ The question does not ask for an independent opinion to be given, and does not provide scope for weaknesses or criticisms.
- ✓ The question does not ask for a separate definition of representative government. In the 2017 Assessor's Report the Chief Assessor reminded us that "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."

- | | |
|--------|---|
| 1 mark | Showing an understanding of what representative government is – the question does not require this to be in a separate definition, however. |
| 1 mark | One or more reasons why the principle protects the Australian people. |
| 1 mark | One or more reasons why the principle limits the power of parliament. |
| 1 mark | An example to illustrate, and/or further reasons, and/or additional elaboration and detail. |

Points that could be made include the following:

- *Representative government is a system of indirect democracy, where people elect representatives to parliament to make decisions and laws on their behalf. This gives the people some control over the laws governing them.*
- *The people are protected because they can refuse to re-elect any member of parliament who abuses her or his power.*
- *The people are protected because the members of parliament are supposed to represent the interests of the public and make laws in line with that the people want. This is a duty each member of parliament has when she or he gets elected.*
- *Representative government stops parliament from abusing its power by making laws that improperly favour its members over other members of the public, because it ensures that each member of parliament will have to defend those laws to the public.*
- *Representative government limits the abuse of parliament's power because parliament cannot pass laws that would, for instance, stop members having to stand for election. The High Court has found representative government implied in the Constitution, and this limits the power parliament can give itself.*

b.

Advice:

- ✓ The current Study Design explicitly requires knowledge of one High Court case that involved interpretation of ss7 and 24 of the Constitution. These sections give us the principle of representative government.
- ✓ 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.

- 1 mark An identification of one case in terms of its basic facts.
- 1 mark An understanding of the legal question or issue before the Court.
- 1 mark The decision of the Court in relation to that question.
- 1 mark The impact of the Court’s decision.

Note: If students deviate from the above marks division, the deviation *must* be in the direction of having more material on the significance of the case – absolutely not the facts of the case. It is also possible for particularly good answers to demonstrate knowledge of the facts, legal question and decision entirely *through* a discussion of the significance. This would be ideal.

A sample answer for one case might read as follows:

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 more than 3 years could be prevented, for example – but that the structure of the Constitution, and ss7 and 24 in particular, established a representative government in which large sections of the public could not be prevented from voting without a very good reason. The Constitution therefore protected representative government to the extent that individual people or classes of people can be excluded for good reason, but these need to be specific classes of people and the government must be able to show cause.

c.

Advice:

- ✓ Some students may feel the need to define the concept of express rights before answering the question. This is not required by the question, and no marks should be allocated to it.
- ✓ 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.

- 1 mark An outline of one appropriate right: the name and a small amount of information on it.
The section number is not required.
- 1 mark Repeat for a second right.

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. For this question it would be sufficient to say that it is a "limited" freedom of religion, and better answers will provide perhaps one of the above as an example.*

d.

Advice: Better students may realise that the question includes, technically, summary offences, and may realise that the jury plays *no* role in the resolution of summary offences. This should be awarded a mark if it is noted – however it isn't required to earn full marks, as the question could be thought to imply a reference to only those cases that do in fact use a jury (ie. contested trials for indictable offences). The same can be said for the role of the jury in other hearings such as appeals.

- 1 mark The jury is responsible for returning the verdict of either guilty or not guilty. Better answers may also note that some juries return no verdict and are 'hung'.
- 1 mark Juries must listen to the evidence presented by the parties and decide the facts of the case.
- 1 mark One or more further points about the role of the jury. Answers may discuss the deliberation process, the fact that juries are discharged after their verdict and are not able to advise on the appropriate sanction, or even the role of the jury in representing a cross-section of the defendant's peers.

e.

Advice

- ✓ The wording of the question does not give scope for criticisms of the reform, and no marks should be awarded for this if an answer provides them.
- ✓ Reforms must be changes that are specific rather than vague and general (eg "lower costs"). They must also be changes that have been recommended or investigated by a person or organisation connected in some way with the legal system.
- ✓ 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.

- 1 mark An outline of the change involved in one appropriate reform.
- 1 mark One or more possible benefits of the reform that are related to fairness.
- 1 mark Further detail on the reform, and/or further benefits of the reform in relation to fairness.

Sample answer: *In August 2008 the Victorian Government launched the Youth Peer Panel Project, which was a 'virtual' trial of a reform they were considering introducing. A Youth Peer Panel is a peer justice panel for 10-16 year-old offenders. An adult volunteer judge leads a panel discussion between the offender and a panel of young people who all work with the offender to develop an 'accountability plan' for their punishment and rehabilitation. Youth Peer Panels can prevent young offenders feeling as though they are having their future being taken away from them by the 'system', and can instead encourage them to take responsibility for their choices and the harm they have caused in a way that makes them feel positive for the future and supported by their peers.*

Question 3

Advice: Students only need to know section numbers of the Constitution (by number) if they are expressly listed in the Study Design. Section number 109 is expressly listed.

- 1 mark Section 109 allows Commonwealth legislation to override inconsistent areas of state legislation.
- 1 mark This means that, in areas of concurrent power, the balance of power swings in favour of the Commonwealth.

Question 4

- 1 mark A referendum is the only way in which the wording of the Constitution can be changed.
- 1 mark If the people support the referendum proposal, the wording will be changed; OR if the people fail to vote sufficiently in support of the referendum proposal and the proposal fails, the wording won't be changed and will be, therefore, 'protected'. Students may explain only one side of this, and that is sufficient.
- 1 mark The basic facts of one example that matches whether the answer is focused on changing or protecting the wording. Answers must cover what the proposal for change was, but they do not need to know the exact wording of the proposal or arguments for or against the change.
- 2 marks Two further points of relevant information and detail. These may be on the referendum process, the proposal chosen for the example, or a combination of the two.

Note: The question does not expressly ask for an explanation of the double majority requirement, in terms of the public vote. Therefore, it should in theory be possible for students to receive full marks for very good answers without naming or defining it. Official Examination Reports in coming years will likely clarify whether the double majority (or, indeed, any of the referendum process) is required in an answer to a question of this type.

Sample answer: *A referendum is a proposal to change the wording of the Commonwealth Constitution, and the people can choose to protect the existing wording by failing to provide the double majority required to approve the change. For instance, if a majority of voters across Australia support the change, but if these voters are concentrated in fewer than four states. This would result in the wording not being changed. In 1988, for instance, a proposal sought to alter ss80 and 116, and to add two new sections to work in conjunction with the existing s51(xxxi). All amendments were drafted to expand existing rights in the sections, or to add additional rights. The proposal was rejected by the people and the Constitution was not changed – it received the lowest percentage of nationwide votes in favour since federation, and no states were in favour. Therefore, the Constitution's existing form was protected. The people chose, for instance, to protect the ability of the states to discriminate on the basis of religion, by not changing the wording of s116.*

Question 5

a.

Advice:

- ✓ In past examinations the purposes of pre-trial procedures have been poorly handled, although the procedures themselves were often correctly identified.
- ✓ Inappropriate procedures include: any criminal procedure such as a committal hearing; a letter of demand, as this would not occur at the Supreme Court; and compulsory mediation, as this would not suit the parties, given the circumstances.
- ✓ The procedure must be identified, but the question does not require a description of the procedure. Therefore, no marks have been expressly allocated to it.
- ✓ 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.

1 mark	An outline of one purpose appropriate to the chosen procedure.
1 mark	An outline of a second purpose.
2 marks	Two or more additional points. These could be further detail on the above purposes, additional purposes, examples to illustrate, or information on the chosen procedure that helps explain the purposes.

Points could resemble the following:

- *Pre-trial pleadings ensure that each party is aware of the legal claims made by the other side. The specific civil wrongs that the defendant is alleged to have committed must be spelt out in the statement of claim, and the defendant will often have to give notice of the specific defences they plan to rely on.*
- *Pre-trial discovery ensures that each party is aware of the evidence the other party has to prove their version of the facts, and they ensure that each party has full copies of all admissible, non-privileged evidence held by the other side so they can properly inspect it.*
- *Pre-trial mediation encourages settlement before trial, partly by giving both parties this full and equal knowledge of claims, facts and evidence. Parties can make educated decisions about their likelihood of success, and can offer or accept settlement if they decide they are likely to fare worse at trial.*

b.

1 mark	An outline of one appropriate negotiation option.
1 mark	An outline of a second appropriate negotiation option.
1 mark	One reason in favour of the opinion given.
1 mark	A second reason in favour of the opinion given.
2 marks	Two or more further points of argument or detail. These may be on the negotiation options themselves, on the reasons given, on additional reasons, and/or on examples and data to illustrate.

Note 1: The question demands an opinion to be given in response, but marks are usually not allocated for the opinion itself. Instead, marks are given for providing reasons and knowledge in support and discussion of the opinion.

Note 2: Reference to specific elements of Jane's case do not need to be provided in the descriptions of the negotiation options, because the wording of the question does not expressly demand this.

Reference to her case must be made in the reasons given, however, because the reasons for recommending a particular course of action will naturally depend on the circumstances in which the recommendation is made.

Negotiation options include the following:

- *A letter of demand is sent by a party who believes they have been wronged, to the person or organisation they believe has wronged them. It gives the recipient a period of time in which to respond before legal action is taken.*
- *The parties may take part in mediation: they may meet with an independent third party who acts as a mediator, assisting them to discuss the issues in dispute and identify a way to resolve some or all of the claims without trial.*
- *The parties may take part in conciliation: they may meet with an independent third party who acts as a conciliator, assisting them to discuss the issues in dispute, and actively advising on ways to reach agreement on some or all of the claims.*
- *Early neutral evaluation is where the parties present arguments and evidence in support of their case to a dispute resolution practitioner, and the practitioner gives a non-binding opinion on the likely outcome of the case. This helps each party determine its likely chances of success, and might encourage negotiation.*

Reasons why Jane might consider other negotiation options include the following:

- *Letters of demand provide a very early opportunity for her to negotiate and settle the claim before it reaches court in any fashion. This contributes to access, by giving Jane the opportunity to avoid the legal system altogether, which is generally cheaper and faster.*
- *Mediation and conciliation are relatively inexpensive, and can be conducted in any neutral place. Jane has already lost money, and may not want to spend any more resolving the dispute than she absolutely needs to.*
- *Mediation aims to be cooperative rather than blame-focused, and this enhances Jane's access to appropriate dispute settlement: she does not want to preserve a continuing relationship, but she possibly does not desire the adversarial approach of a court proceeding because of their past relationship and the fact of working in the same industry.*
- *By giving Jane expert advice on their prospects of success before a trial, early neutral evaluation facilitates more informed access to the legal system. She may realise that she has little chance of success and may choose not to waste more time.*

Reasons why Jane might be better off avoiding negotiation options include the following:

- *Mark may ignore letters of demand because they are often sent as 'scare tactics' by wealthy organisations or individuals who do not intend to take formal legal action. He may try to call Jane's bluff – especially since he has broken promises to her before and she hasn't taken action yet.*
- *In mediation, the absence of strict rules of evidence and procedure may allow Mark to dominate the other and obtain an outcome he is not otherwise entitled to. The mediator has no power to intervene if this is the case.*
- *Early neutral evaluation is not binding, and admissions made during the process are without prejudice, meaning that Jane cannot rely, during court proceedings, on anything Mark says at ENE.*

- *Mark may be willing to come to an agreement at conciliation or mediation, but if either is done privately the outcome won't be made binding by the usual process of court ratification. Jane will have to remember to ask for a contract, and Mark may not sign it. If this is the case, the outcome will not be binding and Mark may break his promises again.*

C.

Advice: In the 2017 Assessor's Report the Chief Assessor reminded students that rote-learned material will not, by itself, usually satisfy questions. She said, "Students who [...] wrote prepared answers or did not specifically address the question were not awarded full marks." This is an example of a question that needs to have the wording of the answer tailored to respond to it.

1 mark The identification of an appropriate remedy. The task word 'suggest' is slightly ambiguous – it could be read as the same as 'name', and merely the name could be required; or it could be read as closer to 'outline', and a short definition could be required. For the purposes of this examination, only the name is required, but some students may wish to play it safe and give a very short definition.

1 mark One purpose the remedy would likely fulfil.

1 mark A second purpose the remedy would likely fulfil.

Note: The purposes do not need to be expressly linked with Jane's case, as the wording of the question does not demand this. Better answers are likely to still do this, however, and this would read well. To get the mark, the purposes chosen do need to be reasonable and *capable* of being fulfilled in the context of Jane's case.

Remedies include the following:

- *An award of damages, which is money payable by the defendant to Jane.*
- *An award of a more specific form of damages, such as compensatory or possibly punitive (highly unlikely – but could be argued on the basis that Mark has a pattern of behaviour that makes his business dealings particularly unacceptable).*
- *An injunction, which is a court order directed towards the defendant's behaviour.*
- *A more specific injunction, such as a prohibitory injunction or a mandatory injunction.*

Purposes of civil remedies that could be relevant in this case include the following:

- *To restore Jane to the position she was in before the harm occurred.*
- *To compensate Jane for loss she suffered as a result of the wrongdoing.*
- *To vindicate Jane and provide public, legal acknowledgement of Mark's wrongdoing towards her.*
- *To punish Mark for his unethical and disrespectful business behaviour.*

d.

1 mark	Information regarding the civil part of the first difference.
1 mark	Information regarding the criminal part of the first difference.
2 marks	Repeat for a second difference.
2 marks	Repeat for a third difference.

Differences might resemble the following:

- *Negotiation options outside trial include processes such as mediation and letters of demand in a civil case. In a criminal case there are limited negotiation options – the defendant can choose to plead guilty and might be charged with a lesser offence as a result.*
- *Civil trials are usually not heard by juries – one party may request a jury in the County Court and above, but this is rare. Criminal trials heard in the County Court and above must be heard by a jury, by law.*
- *Assistance from Victoria Legal Aid is available for more criminal matters than civil matters. Civil assistance is usually limited to areas such as family law (which Jane's is not), whereas criminal defendants can usually apply for a grant of assistance – even though they may be refused, or may be required to plead guilty, for instance.*
- *Sanctions following a criminal trial can be much more serious than remedies following a civil trial. The most onerous civil remedy involves the defendant having to pay money, or to perform an action in restitution for their wrongdoing; criminal sanctions extend to life imprisonment (or indefinite imprisonment in some instances).*

Question 6

1 mark	The judge must listen to the evidence and arguments of the parties.
1 mark	If sitting with a jury, the judge must sum up the evidence and law. Answers may also note that the judge must reach a verdict, if they are sitting without a jury (here, the word 'judge' is taken generally to include magistrates; also, some jurisdictions permit indictable offences to go ahead by judge alone).
1 mark	One argument that relates to the opinion given.
1 mark	A second argument that relates to the opinion given.
2 marks	Globally-allocated marks based on the overall quality and detail of the points made and the number of them. It would be difficult to receive these final two marks without some additional arguments and/or information on the role of the judge being given, however; relying on just the points already made would be a thin answer.

Note: The task direction 'the extent to which' suggests that students must give an opinion on the positive or negative nature of the role of the judge, but marks are not usually allocated for the opinion itself. Instead, marks are generally awarded for the reasons and discussion on which the opinion is based.

The role of the judge might be explained along the following lines:

- *The judge must act as an independent umpire, overseeing proceedings impartially and ensuring that neither party has the appearance of being favoured over the other by applying the rules of evidence and procedure equally and fairly. When sitting without a jury, their primary task is to reach a verdict in the case. When sitting with a jury, the judge will sum up the evidence and legal arguments for the benefit of the jury.*

Or

- *In the trial stage the judicial officer focuses on ensuring that each party receives natural justice. They will interpret and apply the rules of evidence and procedure, listen to the submissions and evidence given by each party, and reach a final verdict in all matters where there is no jury. If there is a jury, the judge will direct the jury and sum up the law and evidence on which the jury verdict should be based. The verdict will be guilty or not guilty.*

Arguments made regarding the role of the judge could resemble the following:

- *In the pre-trial stage the judicial officer often meets with the parties to give directions and manage pre-trial procedures. In criminal pre-trial the judge will be instrumental in establishing a timeline for the trial and ensuring that pre-trial disclosures have been made according to schedule, which keeps the trial on track.*
- *The judge is an impartial third party, who shows preference to neither side over the other, and who assists neither party in the presentation of its case. This ensures that the parties are treated equally and fairly, and that natural justice is preserved.*
- *The case management powers of the judge can be used to promote a more efficient and effective resolution to the case, giving both parties better access and ensuring that neither party uses bad faith strategy designed to unfairly disadvantage its opposition.*
- *The judge generally does not participate in the trial by calling witnesses, deciding which legal arguments and precedent to raise or presenting and arguing the interpretation of evidence – thus, their legal expertise cannot be used to benefit either party in the case or to actively search for the truth.*
- *Judges can only make decisions based on evidence and arguments put to them, and the outcome should be based on the best legal arguments rather than whom the court thinks is right. Judges have limited scope to use their own judgment.*

Question 7

Advice:

- ✓ The task word 'outline' requires more than simply naming the methods, but extensive detail is not required.
- ✓ In many years up to and including 2017, students failed to gain full marks because they said that tribunals were "quicker, cheaper and more informal" than courts, without providing any evidence or discussion for this (or any accurate evidence).
- ✓ The VCAA Assessor's Report consistently reminds students that extended answer questions do not need comprehensive introductions and conclusions, but they do need points to be arranged into logical paragraphs with topic sentences.

1 mark	One argument in relation to how the bodies are similar.
1 mark	One argument in relation to how the bodies provide different experiences.
1 mark	One argument in support of the opinion given.
5 marks	Globally-allocated marks, awarded based on a combination of the number of points made and the quality and detail of them – but it would be difficult to receive full marks without at least three more points being made. Points could be additional arguments regarding similarities, additional arguments regarding differences, additional arguments in relation to the opinion, and/or specific examples and data points to illustrate.

Note: Students must give an opinion on which venue they believe is the most effective, but marks are not usually allocated for the opinion itself. Instead, marks are generally awarded for the reasons and discussion on which the opinion is based.

Similarities may include the following:

- *Each venue employs specialised officers who act impartially and bring expert knowledge to the dispute.*
- *Each venue offers a range of support services – online, in person, over the telephone, and via paper information pamphlets – to help explain their processes to parties involved in the dispute, and to help self-represented parties navigate through the resolution.*
- *Each venue uses non-judicial methods such as conciliation, to help the parties resolve their own dispute in a non-adversarial environment.*
- *Each venue has the ability to resolve disputes – they are not merely advice-provision or advocacy services.*

Differences may include the following:

- *VCAT and the courts use forms of judicial determination, presided over by Chapter III judges, whereas the CAV does not.*
- *VCAT and the courts both provide outcomes that are automatically binding and can be enforced by the courts. The CAV does not have this authority – it is a body that must itself use the courts.*
- *The main business of the CAV is advice-provision rather than direct dispute resolution. The courts and VCAT provide advice during the course of a dispute resolution, but they do not have a primary advocacy role.*
- *VCAT and the courts both offer public hearings, whereas the CAV does not.*
- *VCAT and the CAV are cheaper processes than court.*
- *The CAV has the power to bring legal actions itself, whereas VCAT and the courts never pursue their own disputes – they merely resolve disputes brought to them.*

Strengths and weaknesses could resemble the following:

- *Facilities and processes that provide information and education of legal rights improve public access to legal processes.*
- *The provision of advice and processes to consumers and tenants for contacting traders and landlords assists less sophisticated consumers to achieve equality in their attempts to resolve disputes independently.*
- *The CAV's compliance role enables it to take action against traders and landlords for breaches of consumer protection legislation. CAV can obtain orders of refunds and damages for consumers. This ensures fairness where widespread conduct has impacted consumers significantly.*
- *The CAV's compliance and support role is targeted only to consumers and tenants. There is no similar government body to represent the interests of traders and landlords, who must pay for private legal advice for a similar service.*

- *The CAV is considered to be a 'toothless tiger' by many because its resources are mainly focused on educating members of the public about the law and providing templates and advice for consumers and tenants to negotiate with the businesses and landlords themselves.*
- *VCAT members who have specialised legal or professional knowledge appropriate to their list provide reliable, impartial determinations of legal disputes. Their decisions are binding, providing certain and fair outcomes for the parties.*
- *VCAT aims to provide timely outcomes, and this involves giving a determination orally. Parties may request written reasons for a determination, which ensures that the determination by the VCAT member was fair and impartial.*
- *Informal hearing rooms, where parties meet to present their cases to the tribunal member, ensure that litigants are treated equally by the process.*
- *Open hearings ensure that VCAT determinations are transparent, contributing to the fairness and equality of its procedures.*
- *Unlike CAV, VCAT provides a forum for both consumers and traders to resolve disputes about the provision of goods and services, providing parties with equal access to speed and cost-effective methods of dispute resolution.*
- *VCAT tries to limit the use of legal representation to keep costs low and not disadvantage a party if they are unable to afford a lawyer. Where parties do not have legal representation, however, there is a risk that they do not receive a fair hearing because their case has not been advocated effectively.*
- *VCAT encourages negotiation between the parties to speed up resolution and encourage compromise. When VCAT facilitates negotiations between the parties to achieve resolution of their dispute, however, there is a risk that negotiations may not be conducted equally. A stronger party may attempt to intimidate their opponent into accepting an unsatisfactory outcome.*
- *The lack of formality in proceedings may leave parties feeling dissatisfied with the result, and concerned their legal claim was not adequately considered.*
- *If a party faces a lengthy hearing, accumulating daily hearing fees may deter them from bringing a claim, or from pursuing it fully. Respondents may also be pressured into accepting a settlement in order to avoid the daily hearing fees of a longer resolution.*
- *Costs can sometimes be recouped from the losing party if a party is successful in a civil action.*
- *All court hearing and trial decisions are legally binding, which is a strength as parties receive finality and can move on with their lives.*
- *Parties frequently have the opportunity to reach an agreement they are both happy with at court. For example, mediation and pre-trial conferences often occur before the hearing, and an outcome can be reached through negotiation at any time until the verdict is handed down.*
- *Decisions made by the parties outside trials and hearings (for example, decisions during mediations) are usually made legally binding with a deed of settlement.*
- *Strict rules of evidence and procedure apply in court and during the pre-trial stages of a dispute. These allow both parties to be treated equally and to prepare for trial, and also ensure that all evidence presented is relevant, reliable and legally obtained.*

- *All elements of court trial and hearing decisions are subject to appeal. This gives an opportunity for any errors to be fixed and justice to be achieved.*
- *Courts are generally considered to be very expensive, which is a weakness. Parties are required to pay for legal advice and representation, ongoing court fees and perhaps even a jury (for civil cases). Expenses are also involved in preparing evidence and arguments for trial.*
- *Mediation and conciliation at court do not require the parties to come to an agreement while they are there, though, so their attendance may simply waste time.*
- *Although not compulsory, it is highly recommended that both parties hire legal representation. This is a cost, which can be seen as a weakness of the system – especially since not having a lawyer will put a party at a serious disadvantage.*
- *The procedure is more focused on treating parties equally and fairly rather than determining the truth. This can be a weakness, as the party truly in the right may not win.*
- *The high level of formality may be intimidating, and requires expensive legal representation. The rules may also mean that compelling evidence is found inadmissible and is not allowed to be presented.*
- *The ability to appeal can add to the time and cost associated with resolving a dispute. Appeals are virtually unlimited from court hearings, as all elements of trial are subject to appeal and multiple appeals can be held up to the High Court.*

Question 8

Advice:

- ✓ In years up to and including 2016, questions on the courts as law-makers have been poorly handled. Students seem to find the process of lawmaking through precedent a difficult concept to critically examine.
- ✓ The Assessor's Report has often reminded students that 'parliament' and 'precedent' are legal words that are often misspelled.

1 mark	A subjective or 'analytical' comment on one difference between the law-making of courts and parliament.
1 mark	A second subjective or 'analytical' comment.
1 mark	One argument in support of the opinion given.
7 marks	Globally-allocated marks, awarded based on a combination of the number of points made and the quality and detail of them – but it would be difficult to receive full marks without at least five more points being made. Points could be additional arguments regarding differences, additional arguments in relation to the opinion, and/or specific examples and data points to illustrate.

Note: Students must give an opinion on which law-maker they believe is the most effective, but marks are not usually allocated for the opinion itself. Instead, marks are generally awarded for the reasons and discussion on which the opinion is based.

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 overruling 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.*