

2015 VCE Legal Studies examination report

General comments

Generally, students responded well to the 2015 Legal Studies examination. Many students adopted the advice given in previous examination reports. However, students should not use those reports (and other resources) to construct prepared answers for use in the examination. These types of responses rarely answer the question or gain full marks.

Many students understood what the task word or phrase in a question required them to do; for example, for questions that asked 'to what extent' or 'discuss the extent', many students started their response by addressing this part of the question. This practice should be encouraged.

Some students struggled to complete the examination within the allocated time. Students are encouraged to practise writing questions under examination conditions and adopt good time management techniques. For example, there is no benefit in providing more than one example, method or reason in a question that asks for only one (for example, Question 4b.), because only the first example, method or reason will be assessed. Similarly, students should avoid writing too much on questions that require shorter answers and devote enough time to extended-answer questions.

Students are also encouraged to adopt other good examination techniques. Blue or black pen should be used, and students should specify when an answer is continued at the end of the question and answer book. Paragraphs are required for extended-answer questions, but are not necessary for shorter questions.

Responses showed a strong understanding of remand, dispute resolution methods, court jurisdictions, the adversary system and residual powers. Some students, however, struggled with questions that examined the jury system, the Victorian Civil and Administrative Tribunal (VCAT), courts and parliament as law-makers, the legislative process, discovery and committal hearings. Many students wrote vague or general responses to questions regarding these issues (such as Question 1c.), and full marks could not be awarded.

Specific information

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

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

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

Question 1a.

| Marks | 0 | 1 | Average |
|-------|----|----|------------|
| % | 39 | 61 | 0.6 |

Students are expected to be able to define key legal terminology, and injunctions are specifically listed in the key knowledge for Unit 4, Area of Study 2. Students were able to state that an injunction was a remedy or order given in a civil proceeding that either stopped a party from doing something or compelled a party to do something (one or both were acceptable). Some students mentioned that an injunction can be mandatory or restrictive; these words were not required to receive full marks.

Question 1b.

| Marks | 0 | 1 | 2 | Average |
|-------|---|----|----|------------|
| % | 8 | 28 | 64 | 1.6 |

Possible responses included:

- County Court – as the plaintiff was seeking damages of \$1 million, they could have issued the proceeding in the County Court, as this court has unlimited jurisdiction.
- Supreme Court (Court of Appeal) – the Court of Appeal would hear any appeal made by either party.
- High Court – the High Court would hear any ultimate appeal from the Court of Appeal if leave were granted.

If the student identified the High Court, they needed to recognise that it would be an appeal from the Court of Appeal and not from the Trial Division.

Two critical errors were made in many responses. Many students assumed that the High Court can hear civil claims of any amount, but the High Court has no original jurisdiction to hear a damages claim such as this. There also remains a common misconception that the County Court's jurisdiction is 'over \$100 000' or '\$100 000 to unlimited'. There is no cap or limit to the County Court's jurisdiction. It can hear claims for damages of any amount, including those below \$100 000 (though there can be cost consequences if a party is awarded less than \$100 000 in the County Court, as it is a claim that could have been issued in the Magistrates' Court).

Question 1c.

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|----|----|----|----|------------|
| % | 19 | 22 | 34 | 24 | 1.7 |

The following purposes (as well as others) were acceptable:

- encourages an out-of-court settlement by disclosing all documents to the other side, which may then reveal something that weakens/strengthens a party's case and therefore forces one party to seek a settlement out-of-court
- reduces the element of surprise and avoids 'trial by ambush' by ensuring each party has all the relevant documents
- allows a party to consider what further evidence may be required; for example, there may be gaps in the documents that require the need for a third party to be subpoenaed or for the plaintiff to be medically examined (in a personal injury case)
- allows one party to serve interrogatories (a set of questions that needs to be responded to within a certain amount of time) on another party. This saves time by dealing with some

matters before court and may also narrow the facts in dispute by obtaining concessions or admissions from the other party about certain facts

- in many personal injury cases, the defendant may seek the provision of medical evidence, such as medical reports. This can achieve many purposes, such as saving time by narrowing issues in dispute and encouraging out-of-court settlement if it is proven that some injuries were in fact sustained (the student may have touched on one of those purposes).

This question was not handled well. Many vague or generic answers were given. Higher-scoring responses provided specifics, showing that the student knew what discovery was.

The following is an example of a medium-scoring response. The answer is correct, but it is vague and general and says little about discovery; the same sort of answer could be given about another pre-trial procedure such as a directions hearing or pleadings.

One purpose of discovery is to achieve an out of court settlement. Discovery allows the parties to find out more information about each other's claims. By doing so, one party may realise that their claim or defence is very weak and then seek to settle the matter out of court. This ultimately saves the parties time, money and stress, and avoids the court having to resolve the dispute.

The following is an example of a high-scoring response.

One purpose of discovery is to achieve an out of court settlement. Discovery requires the parties to exchange documents that are relevant to the dispute and in advance of any trial. If one party holds certain documents which establish their claim (or defence), for example a certain email or signed document, the other party may realise that their defence (or claim) is weak and may aim to settle before trial. This would save the parties time, money and stress, and would avoid the court having to resolve the dispute.

Question 2

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|----|---|----|----|---------|
| % | 29 | 7 | 19 | 44 | 1.8 |

This question was generally handled well. Some students suggested incorrectly that the County Court was in fact higher than the Supreme Court (Trial Division) and therefore could not be bound by the precedent.

The most common response provided was 'distinguishing'. Other acceptable responses included:

- The precedent in the Supreme Court has since been reversed. If the case in the Supreme Court was appealed to the Court of Appeal, the Court of Appeal may have since reversed the decision made in the Supreme Court, in which case it is no longer good precedent and the County Court may not be bound to follow it.
- The precedent in the Supreme Court has since been overruled. There may have been a case heard by the Supreme Court (or possibly a higher court) in between the handing down of the Supreme Court precedent and the decision of the County Court in which the court has decided not to follow the earlier precedent made by the Supreme Court, and has therefore overruled it. The County Court would not have to follow the original precedent.
- Abrogation by parliament. Parliament may have since abrogated the precedent made by the Supreme Court, in which case the County Court will no longer be bound by it.

'Disapproving' was not accepted as an answer, given that the County Court would still be bound by the decision even if it expressed disapproval of the precedent.

Question 3

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|----|----|----|----|---------|
| % | 23 | 11 | 22 | 44 | 1.9 |

The focus of this question was on residual powers or concurrent powers. While concurrent powers could have been used, most students used residual powers to form their response. Students were expected to explain why residual powers or concurrent powers enabled the state parliaments to make different laws about the same area of law.

Many students were able to support their answer with examples, with the most common examples being about road laws and education. High-scoring responses required a comprehensive and detailed explanation. Some students mentioned section 107 of the Constitution in their answer, though it is not expected that students know this section.

Question 4a.

| Marks | 0 | 1 | Average |
|-------|----|----|---------|
| % | 32 | 68 | 0.7 |

This question was generally handled well. High-scoring responses stated that judicial determination occurs when a judicial officer (or judge, or president or vice-president of VCAT) hears a dispute and makes a binding decision on the parties. Some students omitted one or more of these elements; others confused judicial determination with other methods of dispute resolution such as arbitration.

Question 4b.

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|---|---|----|----|---------|
| % | 7 | 9 | 32 | 52 | 2.3 |

Possible methods included:

- mediation
- conciliation
- arbitration.

High-scoring responses provided a comprehensive and detailed explanation. The discriminating factor was the level of detail. Students should have asked themselves whether they had fully explained what the dispute resolution method was. If not, then the response was unlikely to receive full marks.

Some of the points that could have been made included:

- mediation
 - Mediation involves the use of a third party, the mediator, who will assist the parties to come together to attempt to explore issues, consider possible outcomes and reach an agreement.
 - The mediator acts to facilitate discussion, encourage parties to explore options and ensure both parties have their say. The mediator will not make a decision, nor will the mediator be involved in drafting any formal agreement. The mediator will not give advice to the parties.
 - Parties normally enter into terms of settlement or a formal agreement setting out the resolution of the dispute reached at mediation.

- Mediation is now normally a mandatory pre-trial procedure. Courts often require the parties to attend mediation (either privately arranged or through the courts) before listing the matter for trial.
- conciliation
 - Conciliation involves the use of a third party, a conciliator, who will assist the parties to reach a decision. Traditionally, the conciliator will listen to the parties, make suggestions and assist the parties to reach an outcome.
 - A conciliator normally exercises more influence than a mediator.
 - The other features of conciliation and mediation are similar – the processes are much the same and the outcome is not binding unless the parties enter into terms of settlement (which they normally do).
- arbitration
 - Arbitration involves a third party who is independent and unbiased, listening to both sides and making a determination that is binding on the parties. This is normally called an arbitration award.
 - Arbitration is normally conducted privately. It is not open to the public.
 - Depending on the case, arbitration can be quicker and less costly than judicial determination as it often involves a limited amount of evidence.
 - Arbitration is more formal than mediation and conciliation. It normally involves the submission of evidence.
 - Arbitration is used by the Magistrates' Court for matters below \$10 000.

Question 5a.

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|----|----|----|----|---------|
| % | 35 | 11 | 22 | 32 | 1.5 |

This question was not handled well by students. Many students did not know the correct stage of the legislative process, and some students knew the stage but could not properly describe what happens during that stage. Many incorrectly identified the stage as 'stage 2' or 'second stage'.

Students are expected to have an understanding of the legislative process of a Bill, and what occurs during each of the stages. The second reading stage is one of the more critical stages of the legislative process and is the stage at which a Bill will be debated for the first time.

As to what happens during that stage, students were expected to say more than the fact that the Bill would be debated (given that this information was already provided in the question). Other points that could have been mentioned were:

- The member must table a Statement of Compatibility, which states whether, in the opinion of the member introducing it, the Bill is compatible with human rights and, if so, how it is compatible.
- The member introducing the Bill will move that it be read a second time.
- The member will then make a second reading speech outlining the Bill's intentions.
- Following the speech, debate on the Bill will be adjourned to give members time to study the Bill.
- Members can make speeches in support of or against the Bill.
- Members will then vote on the Bill.

The following is an example of a high-scoring response.

The second reading stage is where the Member of Parliament responsible for the Bill presents a speech outlining the purpose and broad objectives of the Bill. The explanatory memorandum to the Bill is presented and the member will state whether the Bill complies with the Victorian Charter of Human Rights and Responsibilities. The Bill is then examined by members of parliament before it is debated and then voted on.

Question 5b.

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|----|----|----|----|---------|
| % | 11 | 17 | 32 | 40 | 2 |

High-scoring responses provided a full explanation about the role of the VLRC.

Many students understood the role of the VLRC, but there were some common misconceptions seen in the responses. First, the VLRC is not given terms of reference by the Governor-General, but by the Attorney-General. Students should know the difference between the two. Second, the VLRC writes a report, including recommendations to reform the law, which is delivered to the Attorney-General then tabled in parliament. At that stage, the VLRC's role in recommending a change in the law ends – it is not involved in the legislative process should legislation be introduced into parliament.

The following points could have been made:

- The VLRC is a law reform body that is given terms of reference by the Attorney-General to investigate a particular area of law (or, for minor issues, investigate possible changes without any terms of reference).
- The role of the VLRC is to consult with the community, which may involve:
 - asking the community questions
 - inviting written submissions from the public and other organisations
 - undertaking consultations through discussion groups or forums.
- The VLRC publishes draft reports for comments by the public.
- After consulting with the community and experts, the VLRC makes recommendations to the Victorian parliament, through a detailed report about its findings.
- The VLRC also monitors and coordinates law reform activity in Victoria, undertakes educational programs on any area of the law relevant to a reference, and can suggest to the Attorney-General that a proposal or matter relating to law reform be referred to the VLRC.

The following is an example of a high-scoring response.

The VLRC is an independent, government-funded body which plays a crucial role in law reform. The VLRC is able to examine and consider law reform when it has received terms of reference from the Attorney-General, and for areas of law which are considered to be relatively minor and of concern to the community. The VLRC can also ask the Attorney-General to provide it with terms of reference for a particular issue. When considering law reform, the VLRC will consult with the community and experts on that area of law, and will produce a report with recommendations for law reform. The report will then be tabled in parliament. Parliament is not bound to follow any of the recommendations.

Question 6

| Marks | 0 | 1 | 2 | 3 | Average |
|-------|----|----|----|----|---------|
| % | 10 | 16 | 33 | 41 | 2.1 |

Students were generally able to provide a factor that could affect the success of a referendum. High-scoring responses provided a comprehensive and detailed explanation.

The most common response was the difficulty in achieving the double majority requirement. If students used this factor, they needed to adequately explain what ‘double majority’ means and why it is difficult to achieve. High-scoring responses were able to do this by explaining why it is that so many voters may vote ‘no’ – for example, due to a conservative nature towards change or a lack of understanding about the change.

The following responses were acceptable.

- Double majority requirement. Section 128 requires the majority of voters plus the majority of voters in the majority of states to say ‘yes’. This requirement is very difficult to achieve, and if it is not achieved, the referendum will not be successful.
- Timing. Normally referendums are held at the same time as a government election, given the cost of holding them, in which case voters are often less interested in the referendum and more interested in the election. This can mean that the importance of the referendum is lost and voters vote ‘no’ because they are not sure about the nature of the change or the need for it.
- Whether there is support from the major parties. If both major parties support the changes that are proposed, then voters are more inclined to vote in favour of the referendum, because voters will often vote consistently with the party they support.
- The question that is asked. If the referendum question that is being asked is long or confusing, the voter may get confused and vote ‘no’, in which case the referendum may not be successful.
- The information that is provided prior to the referendum. Information is normally sent to households, outlining reasons for and against the proposed change. The information may be long-winded, confusing or difficult to read, and therefore voters may choose not to read it, and thus not understand the reasoning for the referendum and vote ‘no’.
- Reluctance to change. There can be a general reluctance among the voter population to make changes. Voters can be conservative and therefore may vote ‘no’.
- Support in the houses. Before the referendum goes to the public, it must be voted in favour by both houses of parliament. If there is not support from both parties, or there is a hostile Senate, the referendum may not be successful.

The following is an example of a high-scoring response.

One factor that could affect the likely success of a referendum is whether or not the referendum has bipartisan support. Voters may tend to vote for the referendum according to the views of their preferred political party. If one party disagrees with the referendum, voters may then vote no. However, if the referendum has bipartisan support (that is, both the government and the opposition party are in favour of the change), then it is more likely that voters will say yes, and therefore the double majority requirement will be achieved, and the referendum would be successful.

Question 7a.

| Marks | 0 | 1 | 2 | Average |
|-------|---|----|----|---------|
| % | 6 | 15 | 79 | 1.8 |

The majority of students provided a good description of a purpose of remand. Some students mentioned more than one purpose, but only the first purpose was marked.

The following purposes were acceptable. (These purposes are only briefly mentioned; it was expected that students expand on one of these points.)

- As remand involves a person being detained in custody, it aims to protect the community, particularly if there is a real risk that the person may reoffend or inflict harm.
- It ensures that the person being remanded will appear at the next court hearing.
- It ensures justice is achieved – as there is a guarantee that the person will appear at the next court hearing, it ensures that the accused will be tried.
- It avoids any issues with the accused tampering with evidence or seeking to speak with witnesses.

Question 7b.

| Marks | 0 | 1 | 2 | 3 | 4 | Average |
|-------|----|----|----|----|----|---------|
| % | 17 | 14 | 24 | 28 | 17 | 2.1 |

A discussion of the extent to which a committal hearing could achieve one of the elements of an effective legal system requires a consideration of how, and to what extent, a committal hearing does or does not achieve that element. High-scoring responses provided a comprehensive and detailed discussion that addressed ‘the extent to which’ part of the question, and considered both sides of the argument.

Many students considered only one side of the argument; other students confused committal hearings with other pre-trial procedures, such as directions hearings. Many vague or generic answers were provided, without specific detail about committal hearings. These sorts of responses could not achieve full marks.

Students needed to correctly state the purposes of a committal hearing. One purpose is to determine whether there is evidence of a sufficient weight to support a conviction at trial. Variations of this explanation (for example, that the committal hearing ensures that there is enough evidence to take the case to a higher court) were incorrect and the student could not be awarded full marks.

The most common element of an effective legal system used by students was the timely resolution of disputes, but the other two elements (fair and unbiased hearing and effective access to the legal system) were also acceptable.

The following is an example of a high-scoring response.

A committal hearing does greatly help to achieve a timely resolution of disputes, but can hinder it in some ways.

Committal hearings are designed to determine whether there is evidence of sufficient weight to support a conviction at trial. By ensuring there is such evidence, it means the courts do not waste their time and expertise on cases that are not strong enough, which therefore ensures that there isn't a backlog of cases to be heard at higher courts. Further, the committal hearing can result in narrowing issues, or reducing the charges against the accused, such that it can save time in the future.

However, committal hearings add to the time it takes for a case to go to court, especially where the case is strong. The parties have to undertake the whole committal proceeding process (which includes the committal hearing) before the actual trial is heard, resulting in sometimes it taking years for a case to be heard. The accused could also drag out the proceeding by cross-examining lots of witnesses, or seeking adjournments of hearings, meaning that there is not a timely resolution of the matter.

Therefore, whilst the committal hearing process is designed to in some ways speed up criminal cases, in other ways it can prolong the resolution of cases.

Question 8

| Marks | 0 | 1 | 2 | 3 | 4 | Average |
|-------|----|----|----|----|----|---------|
| % | 20 | 10 | 18 | 28 | 24 | 2.3 |

This question asked for an explanation of the significance of the case, and not an explanation of the case. There is a difference. The first requires a focus on what the case stands for and, in particular, how it impacted on the division of law-making powers. The latter would require only a factual explanation of the case, which may not include an explanation of its significance.

High-scoring responses provided a comprehensive and detailed explanation of the significance of the case. Some students were very vague in explaining the significance and stated that the High Court case 'shifted the division of law-making powers in favour of the Commonwealth'. More needed to be stated here. For example, if students used the Tasmanian Dam case, they should have explained that the Commonwealth's powers were increased because of the expanded definition of what 'external affairs' meant, and therefore the decision allowed the Commonwealth to assume power over other issues involving international treaties. In relation to that case, students could also have mentioned its significance for the ultimate outcome in *Croome v Tasmania* (1997).

Common misconceptions or errors in responses included:

- Students used a case that was not a High Court case, such as *McBain*.
- Many students used a case that was not related to the division of law-making powers, such as rights cases (including the *Roach* case), the *Studded Belt* case, *Mabo* and even the 1967 referendum.
- Some students gave too much detail about the case than required – the focus was on the significance of the case – although higher-scoring responses described the material facts of the case that were needed to explain its significance.

The most popular cases used were *R v Brislan; Ex parte Williams* (1935) ('Brislan case') and *Commonwealth & Anor v Tasmania & Ors* (1983) ('Tasmanian Dam case'). Other cases that were acceptable included:

- *South Australia v Commonwealth* (1942) ('First Uniform Tax case')
- *Victoria v Commonwealth* (1926) ('Roads case')
- *Victoria v Commonwealth* (1975) ('Appropriations Power case')
- *New South Wales v Commonwealth* (2006) ('Workplace Relations case').

Finally, students needed to ensure that the case was properly cited or named. A vague reference to a case or an incorrectly named case could not be awarded full marks.

The following is an example of a high-scoring response.

One High Court case is the Tasmanian Dams case.

The Tasmanian government proposed to construct a dam on the Franklin River. The Franklin River was part of a world heritage site. The Federal government passed legislation which prohibited the damming of the Franklin River, implementing the Commonwealth's obligations under a signed international treaty which sought to protect heritage sites. The Tasmanian government challenged this legislation, arguing that the Federal government had no power to pass it, and that the power to legislate on the Franklin River was part of their residual power over the environment.

The High Court found that the federal legislation was valid. It found that the federal parliament had the power to make laws under its 'external affairs' power (listed in section 51 of the Constitution). It found that the federal legislation gave effect to an international treaty and was an exercise of the Federal parliament's external affairs power.

Whilst the case was significant in that it banned the construction of the dam, it has been significant for other reasons. The expansion of the meaning of 'external affairs' has meant that the Commonwealth can

encroach into areas of residual powers where it enacts legislation which fulfils Australia's international obligations. It therefore affords the Commonwealth government with a potentially wide constitutional power to make laws in residual areas, including the environment. This significance was seen in the ultimate outcome in Croome, which also saw the use of the external affairs power to expand into Tasmania's laws regarding homosexuals.

Question 9

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | Average |
|-------|----|---|----|----|----|----|---------|
| % | 18 | 7 | 13 | 21 | 25 | 15 | 2.8 |

This question was generally handled well. This question was marked globally. Students were able to identify a variety of weaknesses of the adversary system of trial, and explain possible reforms that could overcome the weakness. Higher-scoring responses explained how the reform could overcome the weakness, possibly by linking it back to one of the elements of an effective legal system.

By far the most popular weakness used by students was the role of the judge. Students explained that the judge is often underutilised and that, given his or her expertise and knowledge, the judge could be better utilised in assisting the parties.

Students are urged to be cautious when discussing the expanded role of the judge. Students should recognise that the judge has significant powers in case management, including increased powers under the *Civil Procedure Act 2010* (Vic). For example, the court is able to make an order appointing an expert to assist the court, and it can make any direction or order it considers appropriate, including orders that control the progress of a proceeding or that limit the number of witnesses at the hearing. Similarly, judges have an active role in the proceeding when overseeing directions hearings and judge-led mediations. This should be taken into consideration when discussing the role of the judge.

Further, when considering increasing the role of the judge, students should discuss this in the context of the adversary system of trial. Students need to consider carefully whether having the judge actively assist the parties or actively investigate would work within the adversary system of trial and uphold the element of a fair and unbiased hearing. A better response focused on increasing the role of the judge so he or she can make orders for the calling of a particular witness who may be critical to the dispute.

The following is an example of a high-scoring response.

One weakness of the adversary system of trial is the strict rules of evidence and procedure. Witnesses often present their evidence through a strict form of responding to questions asked by them by the parties. This can be a weakness – an experienced or nervous witness can feel intimidated, or may not be able to convey all of his or her points when responding to questions. This can be a problem for witnesses of an indigenous background who struggle to adhere to the strict format.

One reform that could overcome this is to adjust the way that witnesses give their evidence. New rules could be introduced which allow witnesses to tell their evidence in story form and in a manner that helps reduce the pressure they might feel. Similar to written statements, a witness could be asked to tell their story (and not in a question and answer format), which may help the witness be more free to say what he or she can.

Question 10

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | Average |
|-------|----|----|----|----|----|----|---|---------|
| % | 13 | 14 | 18 | 19 | 17 | 12 | 8 | 2.8 |

This question was marked globally. Students needed to consider both strengths and weaknesses, and come to an overall and well-informed conclusion.

Many students had difficulty with this question. Some could not describe a means by which the Commonwealth Constitution protects rights in Australia, despite these being specifically listed in the study design. Other students could only describe the means and did not consider its strengths or weaknesses. Some responses did not evaluate but merely discussed strengths. Many students identified the separation of powers as a means – this is part of the structural protection means. Separation of powers alone, without discussing the other structural protections, did not give enough depth for students to write a full response. High-scoring responses considered both strengths and weaknesses and came to an overall and well-informed conclusion – one which was based on the balance of the student’s answer and not one that was pre-prepared.

The most popular means that was evaluated was express rights. Higher-scoring responses were able to expand on the fact that the rights are very limited in nature, and there are very few of them. They also explained how the rights are unlikely to be removed – because they are entrenched and can only be changed by referendum – and are fully enforceable.

It is advisable that paragraphs are used in an extended response such as this. Paragraphs allow the students to signpost their answer.

The following is an example of a high-scoring response.

The existence of express rights is a means by which the Commonwealth Constitution protects rights in Australia.

Australia has 5 express rights that are expressly worded and entrenched in the Constitution and include section 116, which provides for a limited freedom of religion, and section 80, which provides for the limited right to a trial by jury. A strength of express rights is that because they are entrenched, they cannot be easily changed, and require a referendum to do so. As proven by many past referenda, the success rate is low, which means that any changes to express rights will be thoroughly considered and not go through if the double majority requirement is not met.

However, a weakness of express rights is that most of them are more so restrictions on the Commonwealth in regard to legislating, as opposed to human rights that directly protect the community. For example, section 116 provides a limited right to freedom of religion. However, this simply restricts the Commonwealth Parliament from legislation to establish a state religion or from imposing a religious observance, and does not go so far as to say that the people have a right to ‘freedom of religion’.

Further, the fact that the Constitution is hard to change also works as a negative. It means that it is very unlikely that further entrenched rights will be incorporated into the Constitution, as referenda are so difficult to achieve.

Finally, the number of entrenched rights are small – 5 – and are insignificant when comparing them to the rights afforded to, for example, South Africans in their constitution. That means that Australians have to rely on statute to provide them with basic human rights.

Overall, whilst entrenched rights are good in that they are entrenched and can’t easily be removed, they are very limited in nature and it will be difficult to gain more entrenched rights in the future because of the referendum process.

Question 11

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | Average |
|-------|----|----|----|----|----|----|----|---------|
| % | 11 | 11 | 15 | 20 | 19 | 15 | 10 | 3.1 |

The focus of this question was on the operation of the Victorian Civil and Administrative Tribunal (VCAT) and the weaknesses of that operation. Despite this, many students used pre-prepared or rote-learned answers and simply recited the strengths of VCAT. Other students seemed to confuse VCAT with dispute resolution methods. Students are encouraged to read past examination reports, which emphasise that there is a distinct difference between the institutions that resolve disputes (i.e. courts and VCAT) and the methods that these institutions use to resolve disputes (i.e. mediation, conciliation, arbitration and judicial determination). A discussion of mediation, for example, would have received a low score.

Higher-scoring responses were able to discuss contemporary issues with VCAT, such as the increased fees, the long waiting time for some of the lists and the increased use of legal representation for some disputes. Those students were also able to discuss that VCAT is not appropriate for some disputes, such as large and complex civil proceedings; that it has a limited right of appeal; and that its orders require certification in the Magistrates' Court before they can be enforced.

There still remains a misconception that VCAT outcomes are not binding. VCAT decisions are binding and enforceable.

High-scoring responses involved a comprehensive and thorough discussion of VCAT, with more of a focus on its weaknesses rather than its strengths. Both sides of the argument were addressed.

The following is the beginning of a high-scoring response.

VCAT offers a means of dispute resolution that is accessible to the whole of society. It offers cost effective, time efficient and informal avenues of dispute resolution, but does have some weaknesses.

One weakness is the limited right of appeal. Appeals from VCAT can only be made to the Supreme Court (and in some instances only to the Court of Appeal). This acts as a deterrent to parties to a VCAT hearing, who may not have the funds to appeal.

Another weakness is that some cases can be costly. VCAT has recently increased its fees, and in some lists legal representation is used. Pre-trial procedures may also be ordered. This means that whilst some VCAT cases may be cost-effective, others may not and may cost just as much as a court hearing.

Question 12

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | Average |
|-------|---|---|----|----|----|----|----|---|---|---------|
| % | 4 | 7 | 13 | 16 | 16 | 16 | 13 | 9 | 6 | 4.2 |

This question draws on knowledge from Unit 4, Area of Study 2, and more particularly the existence of, and justification for, the use of a jury in proceedings.

There were many high-scoring responses for this question. High-scoring responses were comprehensive and detailed, providing a strong justification for the stance given. Students either agreed or disagreed with the statement, but they also needed to rebut the alternative argument. These responses were able to link the justification back to the statement. For example, for those students who argued that juries should decide matters of fact, they were able to provide advantages for the use of a jury, demonstrating how this would be lost if these matters were left up to the judge.

There appeared to be a trend of using pre-prepared or rote-learned answers for this question. Many students seemed to be responding to a question that asked for strengths and weaknesses of

a jury. Those students provided their contention and then went on to provide one strength of a jury, then one weakness, then one strength, then one weakness. This sort of response did not answer the question and, while it could have been awarded some marks, it did not receive full marks. Students need to adapt their knowledge of the jury and its strengths and weaknesses to the question that is asked.

The following strengths and weaknesses could have been used as a basis for a student's response.

Some strengths of the jury system, which would be lost if it were a judge alone that decided matters of fact, are:

- the decisions reflect the views of the common person/community
- juries are independent and impartial
- juries are a cross-section of the community and reflect prevailing community attitudes
- juries ensure that the system remains intelligible to the ordinary person and involves the community
- decision-making is spread across a number of people
- there may be less likelihood of a wrong decision being handed down
- juries provide a trial that is free from political interference
- juries can act as a social conscience
- juries ensure that the hearing of evidence is conducted in an open forum.

Some weaknesses of the jury system are:

- jury deliberations are kept secret and reasons do not have to be given (which would not be the case if a judge alone made a decision, and the reasons of that decision were recorded)
- juries may not be a true cross-section of the community as people are able to be challenged or excused for a good reason, and so there would be no loss if a judge alone decided matters of fact
- juries can add to the cost and length of a trial
- jurors may not understand or recall evidence that can be complex and technical, whereas a judge is more likely to recall and understand evidence
- jurors may be influenced by factors other than the facts before them (for example, rhetoric of counsel) or they may be influenced by bias and prejudice.

The following is the beginning of a high-scoring response.

I don't agree with the above statement at all. Juries should be able to decide matters of fact and it should not be left up to the judge.

The use of the jury ensures that the responsibility of deciding matters of fact is shared. All jurors take part in the deliberations. This ensures that the decision is not left to just one person. As unbiased as a judge may be, it then means that only one viewpoint, one experience and one opinion is used in making the decision.

Following on from that, it means that 12 sets of community values and opinions are used when deliberating on a case. The trial by peers methods allows the action of the individual to be judged by his or her community.

Whilst some may argue that jurors may be overwhelmed by the evidence, there are rules in place to ensure that this is avoided. Jury directions need to be clear and there have been recent reforms to ensure the directions given by the judge to the jury help to ensure the jury assess the evidence properly. Further, the judge can order that certain documents be given to the jury to help them understand the issues or the evidence (such as charts, diagrams or chronologies).

Question 13

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Average |
|-------|----|---|----|----|----|----|----|---|---|---|----|---------|
| % | 16 | 9 | 11 | 10 | 10 | 10 | 10 | 8 | 7 | 5 | 4 | 4.1 |

Drawing on knowledge from Unit 3, Areas of Study 1 and 3, students were required to demonstrate their understanding of the limitations (or weaknesses) of parliament in making laws, and the extent to which courts could overcome those limitations. High-scoring responses provided a comprehensive and detailed discussion that addressed the 'extent to which' in the question.

This question was by far the most challenging question on the examination paper. Many students struggled to structure their responses. Others did not understand what the question was asking them to do and took different approaches that received few marks; for example, some students discussed the strengths and weaknesses of parliament, while others discussed the strengths and weaknesses of courts without any reference to parliament.

A response to a question such as this requires some planning, either on paper or in thought. In particular, students should have thought carefully about the limitations of parliament that would best be able to help them write a full answer. Some limitations of parliament provided limited scope for discussion, such as the fact that delegated authorities are not elected and therefore do not represent the people when making rules. A limitation such as this one is difficult to discuss in the context of courts.

Using proper paragraphs and structure was also advisable when responding to this question. Higher-scoring responses started with a limitation of parliament, discussed how courts could overcome that limitation and then discussed whether there was any limitation on courts when overcoming it.

Students could write their first detailed point using a plan such as the following:

- limitation of parliament – not often sitting, has limited sitting days
- courts overcome that limitation – they can somewhat overcome the limitation as they are not restricted by parliament sitting days
- any limitation on courts when overcoming it – courts have to wait for a case to come before them and they cannot 'stand in the shoes' of parliament by simply making laws when parliament doesn't have time to.

Students could then plan the following point as follows:

- limitation of parliament – as they are elected, they are often reluctant to make controversial laws (such as laws around same-sex marriage)
- courts overcome that limitation – they are not elected by the people and are not subject to political pressure
- any limitation on courts when overcoming it – courts have to wait for a case to come before them and are bound by precedent.

Higher-scoring responses were able to understand that the court's role as a law-maker is complementary to parliament's supreme role as law-maker, and that the court cannot possibly stand in the shoes of parliament when making laws. Therefore, the courts, because of their very nature as dispute resolvers, will always be limited in their ability to overcome the limitations of parliament.

The following is the beginning of a high-scoring response.

To some extent courts are able to overcome the limitations of parliament in making laws. In doing so, it needs to be recognised that courts are complementary to the parliament in its law-making process, and is not simply an alternative to make laws. Therefore, the courts will always be limited when it comes to making laws.

One limitation of parliament in law-making is its inability to foresee future circumstances and cater its laws to cover them. That is, when drafting and passing legislation, parliament cannot possibly know of every possible situation that the law may cover. Courts are able to overcome this by utilising their ability to interpret statutes. This allows the courts to fill in the gaps of legislation, or determine whether it does or does not cover a certain situation. This was seen in the Kevin and Jenifer case where the Court needed to interpret the word 'men' in the Marriage Act to see if it included those who had undertaken post-operative sexual transformation. When parliament passed this statute, it is likely that it did not know at the time the possible medical advancements that would allow a person to change sex. Therefore, the courts to some extent are able to overcome this limitation by expanding statutes to include circumstances not originally dealt with by parliament.

However, courts are hindered when interpreting statutes. The courts have to wait for a case to come before them. That requires someone with standing to have a legal issue, and requires that person to willingly make an application to court. Courts cannot interpret statutes unless a case is before them. Given the high costs, time and stress involved with taking matters to court, it can be such that a court may not get the opportunity to 'fill in the gaps'.