



2021 VCE Legal Studies external assessment report

General comments

The 2021 Legal Studies written examination was appropriately challenging, with a spread of questions requiring lower, medium and higher order thinking. Many of the questions required students to discuss or analyse key concepts, or apply key knowledge to stimulus material, which some students did not do. Some of the stimulus material required students to think carefully about the relevance of the material, and how to use and integrate it into their responses.

The following advice addresses some of the key skills assessed in the 2021 examination.

- Students should only respond to the task word in the question. For example, Section A, Question 1a. asked for an identification of two participants. Many students provided a description of the plea negotiation process or of the participants. This was not required to get full marks and has potential to waste time and impact the quality of answers later in the examination paper.
- Careful reading of questions is required to identify the different elements of each question. For example, Section A, Question 2 required an explanation of how the separation of powers acts as a check, and not an explanation of the separation of powers. As another example, the use of the words 'rather than' in Section A, Question 3b. required students to demonstrate some distinguishing feature between summary and indictable offences in their response. Further, students needed to address the words such as 'always' and 'rarely' in Section A, Question 6 for maximum marks.
- Some students did not analyse Section A, Question 4 and Section B, Question 1a. An analysis is more than an explanation, and requires students to examine facts, data or issues in detail, and draw out implications or identify components or elements. Words such as 'moreover', 'therefore', 'in contrast' and/or 'this can be seen' can be used to demonstrate an analysis as opposed to an explanation.
- Many questions in the examination required a discussion, but some students did not discuss. A discussion is more than an explanation; it is a multi-faceted response that considers limitations, restrictions, weaknesses, circumstances or potential reforms, depending on the question that is asked. Words such as 'however', 'a limitation', 'although', 'while' and 'despite' can be used to demonstrate a discussion as opposed to an explanation.

As to general examination technique:

- Students could write in the blank space below the answer lines, but not outside the black margins. If students continued their responses at the end of the booklet, they needed to correctly identify at the end of their response that their response is continued (for example, by writing 'PTO') and correctly label the response at the end of the booklet (for example, by writing 'Section A, Q1a. cont'd'). Improper or no labelling can risk a student's continued response not being identified. Students should not use asterisks, stars, acronyms (other than PTO) or other symbols to label their responses.
- Legible handwriting is important, as is paragraphing for longer responses.
- Students are encouraged to signpost their answers in the first sentence of each paragraph with words or phrases to indicate the type of point they are making.
- Students are encouraged to attempt every question, even if they are unsure about what to write. For example, many students left Section B, Question 1d. blank. Students are encouraged to use the reading time to break down the questions and identify key words that may enable them to obtain some marks. For Section B, Question 1d., the first words 'Evaluate the ability of the Commonwealth Parliament to

respond to the need for law reform' (which are words contained in Unit 4, Area of Study 1 of the study design) should have given an indication to students that they could write about the strengths and weaknesses of parliament in making law.

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 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.

Section A

Question 1a.

Marks	0	1	2	Average
%	2	25	73	1.7

This question was answered well. Many students were able to correctly identify two participants in the plea negotiation process, the two most common of which were 'the prosecution' and 'the accused'. 'The legal representatives for the accused' was also accepted.

'Victims' was also allowed as a possible response, because although they do not directly negotiate, they are generally consulted by the prosecution as to their views and therefore indirectly 'participate' in the broader process.

Students could have answered this question briefly, as demonstrated in the following example of a high-scoring response.

One participant in the plea negotiation process is the prosecution.

Another participant in the process is the accused.

Question 1b.

Marks	0	1	2	3	Average
%	13	21	35	31	1.9

This question was generally answered well, with many students able to identify one or more factors that make a plea negotiation inappropriate, which included the following:

- If the victims of the offence do not want the prosecutor to negotiate; for example, because they do not want the accused to plead guilty to lesser charges.
- If the accused has no legal representation and therefore lacks an understanding of the process or whether the evidence is strong.
- Plea negotiations have been criticised due to a lack of transparency given the negotiations are not disclosed to the public.

- If it is not in the public interest for there to be a plea negotiation (for example, there is substantial evidence to convict the accused, or there is some other reason that means a full trial is more appropriate).

Some responses confused plea negotiations with sentence indications. Other responses were not specific enough about plea negotiations to get full marks; others did not elaborate.

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

Plea negotiations may be inappropriate in determining a criminal case if the case is of such a nature that it is not in the public interest for the prosecution to negotiate. For particularly vile crimes, such as rape or murder, especially if they have been widely reported in the media, undergoing plea negotiations may be inappropriate, as society may prefer that such a severe case is properly dealt with by the justice system in court, rather than the fate of the accused being privately negotiated. Plea negotiations may also be inappropriate depending on the views of the victim. If the victim wants their 'day in court' and would prefer a jury to determine their case, then plea negotiations may be inappropriate because they would deny the victim this opportunity.

Question 2

Marks	0	1	2	3	Average
%	27	21	35	17	1.4

To obtain full marks, students needed to explain how the separation of powers acts as a check on the legislature (parliament) in law-making. To do this, students needed to explain how the judiciary and/or the executive can check parliament in their law-making; for example, by stating that the judiciary can declare a law made by parliament as invalid if parliament was acting *ultra vires*.

Many students instead provided an explanation of the separation of powers, without elaborating on how that separation checks the legislature in law-making. Stating the existence of the three powers and the fact that they are separate so that there is no abuse of power did not address the key word, 'how', in the question.

Some students confused the division of powers with the separation of powers. These responses did not score well.

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

The separation of powers checks parliament's law making by separating the legislative powers from the powers that administer the law (executive powers) and those that enforce the laws (judicial powers). Laws made by parliament must be confirmed by the Crown, who holds executive powers under the separation of powers, allowing them to refuse radical or inappropriate bills through denying royal assent, acting as a check on parliament. This extends to the role of the judicial powers under the separation of powers, in which the judges of courts such as the High Court can declare laws that infringe on rights such as express rights, including S. 116 (limited right to freedom of religion), for example, as invalid. This allows the separation of powers to act as a check on laws made by parliament.

Question 3a.

Marks	0	1	2	3	Average
%	3	15	48	35	2.2

This question was generally handled well, with many students able to provide an explanation of one role of Victoria Legal Aid (VLA) in assisting a person accused with this summary offence. The differentiating factor was the specificity of the explanation. Students who were able to use the material and explain in detail the

nature of the assistance (e.g. explain what type of information may be provided) were more likely to score highly. Responses about indictable offences or about VLA in general without any reference to the material did not score highly.

The more common roles explained were:

- the provision of legal advice (such as advice about their rights or the strength of their case)
- the provision of free legal information (such as information about the steps in the proceeding or their rights)
- the duty lawyer service at Magistrates' Court
- the provision of legal representation by way of a grant of funding.

Students could have also broadly described the role of VLA in providing legal aid, which includes the provision of legal information, legal advice and legal representation, as is demonstrated in the following example of a high-scoring response.

Victoria Legal Aid (VLA) may have the role of providing legal aid to a person accused of flying a kite in a public place, as is required under their statute. VLA can provide the person with information about kite flying laws for free on their website or in brochures. If the accused is viewed as "needing advice most", they could also provide them with specific legal advice, and could even provide them with a grant of legal representation for even more targeted advice if the accused can satisfy a means test which assesses their income and wealth levels (among other factors). Hence, by providing information, advice or representation, VLA can uphold its role to provide legal aid.

Question 3b.

Marks	0	1	2	3	Average
%	2	11	50	38	2.3

There were two key parts to this question that needed to be addressed to get full marks: first, students needed to refer to the section provided on page 5; and second, students needed to address the 'rather than' in the question, which required students to state why this was a minor offence instead of a serious offence. Some students did not do one or both of these.

The most common response was that the section refers to kite flying being an 'annoyance', which demonstrates that this is a minor offence as opposed to something more serious, such as serious injury to a person or serious damage to property. The second most common response was that because this section was in the *Summary Offences Act*, which lists minor offences, as opposed to the *Crimes Act*, this demonstrated that this was a minor offence. Both answers were correct.

The following is an example of a high-scoring response, which clearly addresses the 'rather than' in the question by referring to indictable offences.

Kite flying is a summary offence rather than an indictable offence as it is provided in the Summary Offences Act 1996, where the majority of summary offences are provided. In contrast, kite flying is not an indictable offence as the majority of these offences are provided in the Crimes Act.

Furthermore, kite flying is a summary offence because it is a minor criminal offence as is indicated through the nature of the crime which involves the 'annoyance' of another person, which is a relatively minor criminal offence as it is not causing substantial harm. Whereas indictable offences are serious criminal offences such as manslaughter and murder, therefore kite flying is not an indictable offence.

Question 3c.

Marks	0	1	2	3	4	5	Average
%	20	16	17	23	16	7	2.2

This question required students to discuss one factor that could affect the ability of the criminal justice system to achieve fairness in relation to the summary offence. Factors such as costs, cultural barriers, language barriers, delays in the justice system, the ability of the accused to understand court processes, access to legal representation or the complexity of the criminal justice system could all have been used as a factor. Students could have also written about children in the justice system and the difficulties they confront when charged with a crime (given the nature of the offence of kite flying, it is probable the accused would be a minor), but very few did.

Some of the common errors made by students are as follows.

- Many students explained one factor, but did not discuss it. For example, cost is one factor that students could have discussed. Beyond explaining how the criminal justice system is expensive, students could bring into their discussion some consideration of whether costs would be expensive for a summary offence such as this (particularly when there are fewer hearings and processes involved than an indictable offence), or the use of VLA and duty lawyers that may assist in reducing costs. Points such as these can lift an explanation to a discussion.
- Some responses suggested that the lack of a jury in summary offences limited fairness, as did an overtly biased magistrate. These types of responses lacked a strong understanding of the workings of the criminal justice system and the concept of fairness.
- Some responses discussed the judge and the trial and pre-trial stages, and lengthy delays involved in gathering evidence, despite the question being about a minor offence of kite flying.

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

One factor that could affect the ability of the criminal justice system to achieve fairness in relation to the summary offence of kite flying is costs. In essence, there are significant costs associated with an accused defending a criminal charge, most prominently, the cost of legal representation. If an accused cannot afford legal representation in order to defend their charge, then they may not be able to understand the legal terminology and procedure used in the Magistrates' Court, meaning they may not have a reasonable opportunity to present their case, reducing fairness.

However, if an accused cannot afford legal representation they may be eligible for assistance from Victorian Legal Aid, who can provide them with legal advice and support to help them to put their best case forward, ensuring fairness. Secondly, the high cost of defending their case may lead the accused to plead guilty to the offence of kite flying, despite having possible legal arguments and defences, due to inadequate resources, potentially leading to an unfair outcome, reducing fairness. However, the Magistrate can explain legal terminology and procedures to a self-represented accused person, assisting them to have a reasonable opportunity to present their case, and meaning the accused is less likely to feel obliged to plead guilty due to inadequate resources.

Question 4

Marks	0	1	2	3	4	5	Average
%	20	9	23	29	15	4	2.3

This question required an analysis of the ability of sections 7 and 24 of the Australian Constitution to protect the Australian people. The question did not ask for a description of a case, or a description of those sections.

While those descriptions may have assisted students in developing an analysis, they alone could not achieve full marks.

Some of the points that could have been made are as follows.

- Sections 7 and 24 of the Constitution enshrine the principle of representative government; that is, that the Houses of Parliament are directly chosen by the people.
- High Court interpretation has further found that the Constitution contains an implied freedom to discuss political matters, derived primarily from these sections. Therefore, laws are invalid if they infringe on the implied freedom.
- The extent to which people are protected by the freedom is limited by its scope. Currently, the scope is such that it is limited to freedom of political communication (and not more broadly freedom of speech), though it is available at all times, not just during election time. High Court cases have also established that the freedom can be restricted where reasonable and necessary, and have developed a test (first, a two-limb, and now a three-limb test) to determine whether the law is validly restricting the freedom.
- The High Court has also held that the Commonwealth Parliament is limited in its ability to legislate to disenfranchise people from voting for members of the House. Although the Constitution leaves it to Parliament to determine the exceptions to the right to vote, it is limited in restricting those people who can vote. The protection is limited, however. The High Court has not found an express right to vote, and the Commonwealth can still disenfranchise a person from voting.

Although many students had a good understanding that sections 7 and 24 require the Houses of Parliament to be chosen by the people, some students were not able to develop their analysis. Those students limited themselves to explaining the sections, or providing a description of a case.

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

The High Court, through its interpretation of the Constitution, acts as a guardian of the Constitution. Ss 7 and 24 lay out matters relating to the Senate and House of Representatives, respectively. Both sections require members of parliament to be “directly chosen by the people”, enshrining in the Constitution a principle of representative government, wherein the parliament reflects the views and values of the majority of society. The implied right to freedom of political communication was first established in the 1992 High Court case of ACT vs Commonwealth, and was later clarified in a series of High Court cases, one of which was Lange vs ABC. In ACT vs Commonwealth, the High Court held that the Constitution explicitly established a democratic system through ss 7 and 24 requiring parliament to be “directly chosen by the people”, and they found an implied right to free political communication. Lange vs ABC took this further, by establishing that this right exists for all people at all times. In 1996, former PM of New Zealand, David Lange, brought defamation claims against the ABC for comments made about him on ‘Four Corners’. The ABC argued that they were entitled to free political communication due to ss 7 and 24, as well as the precedent set by ACT vs Commonwealth. The High Court found in favour of the ABC. This affirmed the right to freedom of political communication, but extended it to all people at all times, not just political parties prior to elections. This protected the Australian people by confirming their right to talk freely about matters of politics. However, the Lange case also recognised that limitations can be imposed on the expression of this right by parliament. The right to free political communication, whilst vital in ensuring representative government, is not a universal freedom to expression.

Question 5

Marks	0	1	2	3	4	5	6	Average
%	18	13	18	21	17	9	4	2.5

This question focused on the courts' role as lawmakers, and more particularly the factors or relevant principles that allow, as well as limit, the courts to make laws.

There were several points that could have been developed in response to this question, with responses that scored highly drawing on a selection of the following:

- Courts are independent and can interpret statutes and develop precedent free from political pressure.
- Courts of superior record, such as the Court of Appeal, are generally more able to develop precedent as they are only bound by decisions of higher courts.
- Lower courts have less flexibility in making law as they are bound by decisions of higher courts where the material facts are similar, though they can distinguish, and they may be able to assist in developing precedent through disapproving.
- Whether courts make law may depend on judges being 'judicially active' or 'judicially conservative'.
- Common law can be abrogated by parliament.
- Courts can only make laws when a case is brought before them, and there are limitations when bringing a case to court, such as the deterrence of costs and time, the need for standing, and the potentially narrow issues in dispute that require a determination of the court.

Some common errors were:

- Some students did not develop their discussion and limited their points to an explanation of the role of the courts in interpreting statutes and creating precedent.
- Some responses were too general and did not mention any of the names of the Victorian courts, despite the question focusing specifically on Victorian courts. To do this, students could have focused their points on courts such as the Court of Appeal and Supreme Court as superior courts of record, and the County Court and Magistrates' Court as lower courts (particularly when writing about binding precedent, or distinguishing and disapproving).
- Some students referred to distinguishing, disapproving, overruling and reversing in the same point, without appreciating the differences between the four of them in law-making.

The following is an extract from a high-scoring response.

One role of Victorian courts in law making is to create precedent. In this situation, a superior court can make common law in a case in which no current existing laws apply; allowing them to reduce inconsistencies in the legal system and provide certainty in the outcomes of cases. However, not all Victorian courts are able to do so, as only superior courts (Supreme Court trial division and Supreme Court of Appeal) have the power to do so. Judges in other lower courts are bound by binding precedent in most situations, and are restricted in their roles in law making.

Question 6

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	4	3	6	8	12	17	21	15	9	4	1	5.2

It was clear that many students are familiar with criminal sanctions and civil remedies, their purposes and their limitations. Many students were able to write about sanctions such as fines, imprisonment and community correction orders (CCOs), and remedies such as damages and injunctions.

Close reading of the question was required to ensure that it was addressed both accurately and comprehensively. In particular, the following should be considered as to what was required for full marks.

- The question required a contention or opinion as to whether the student agreed with the statement and to what extent. Students are encouraged to write their opinion at the start of their answer, with some depth if possible. For example, one student started their answer with '*I agree with this statement to a reasonable extent as while criminal sanctions and civil remedies are both able to achieve their purposes in some circumstances, they are equally both limited in doing so*'. This student has established a structure for the rest of their response about when sanctions achieve and don't achieve their purposes, and the same for remedies.

- The statement contained the words 'always', 'unlikely' and/or 'rarely'. These words demanded some attention in the response. For example, after writing about the recidivism rate, the availability of rehabilitation programs in prison and the underfunding in prisons, one student wrote '*For these reasons, criminal sanctions do not always achieve their purposes*', relating back to the statement in the question and the word 'always'. Many students did not do this.
- The task word was 'discuss'. A critical examination of sanctions and remedies and their purposes was required. For example, while imprisonment protects the community while the offender is in prison, is it an effective long-term protection given the recidivism rate? What happens once the offender is released back into the community and has not been rehabilitated? Many students spent too much time providing long descriptions and explanations of what sanctions and remedies are, and what purposes they seek to achieve, without engaging in a discussion of the statement.

Responses that scored highly engaged with both sanctions and remedies, and focused on specific purposes, without seeking to 'cover the field' and address all sanctions, remedies and purposes. In addition, some students tended to spend more time on criminal sanctions, leaving only a paragraph for remedies. Although there did not need to be equal weighting to both criminal sanctions and civil remedies, a response that was mostly on criminal sanctions and only a little on remedies could not achieve full marks.

Some of the points that could have been made are as follows.

- Sanctions
 - Whether or not a fine can achieve a specific purpose depends on the amount of the fine and the circumstances of the offender. For example, although a fine will punish many people financially, for a very wealthy offender a fine may not be much of a punishment. In addition, if a fine is not enforced, then it's questionable whether it sufficiently punishes or deters a person.
 - The recidivism rate (over 40% of prisoners return within two years) suggests that imprisonment is not an effective specific deterrent, punishment or rehabilitation, and arguably doesn't ultimately protect the people either. This may well depend on the prisoner, though, and the nature of the crime. There also needs to be further research to investigate what drives the recidivism rate (e.g. the nature of the offences, the types of prisoners).
 - There remains a problem of drugs in prison, with drug tests continuing to return positive in some prisons. This would suggest that rehabilitation for prisoners who have a drug addiction may not be achieved.
 - CCOs can be an effective method of rehabilitation and potentially deterrence. The flexible conditions that can be imposed allow for it to be tailored to the specific offence and offender.
 - Whether a CCO does achieve those purposes depends on various factors: the willingness of the offender to cooperate and participate in programs, the media attention brought to CCOs and their detrimental impact on general life (relevant to general deterrence), and whether the offender is a repeat offender or has underlying reasons for offending that are addressed as part of the CCO.
- Remedies
 - Whether or not the civil remedy is able to achieve a specific purpose depends on the type of remedy and the context of the civil wrong. For example, although damages will restore a plaintiff back to their original position if they have suffered financial loss, it is arguable that money may not restore a plaintiff who has had their reputation damaged due to defamation.
 - Where the loss is purely financial, arguably damages is an effective method of restoring a person back to their position. These types of losses include loss of earnings, loss of opportunity, loss of property and loss because of expenses such as medical bills.
 - In many civil actions, however, the loss is more than financial and damages will not be able to restore a plaintiff. Damages cannot, for example, undo personal or psychiatric injury, such as mental distress, anxiety and sleeplessness. In this case, they may be able to compensate the person for the loss. The court can engage in an exercise to estimate the loss where the loss is not capable of precise calculation.

- Injunctions depend on the action that is sought and the nature of the injunction. Mandatory injunctions are difficult to obtain, but if granted the defendant may fail to fulfil the promises, and therefore damages would be the more appropriate remedy.
- Other remedies are often more interlocutory in nature, but will not be 'final relief'. For example, an injunction to stop someone from terminating a contract does not address the issue that the person may not fulfil the contract, and so often injunctions with damages may achieve the necessary purposes.

The following is an extract from a high-scoring response.

Similarly, sanctions, like fines & imprisonment can act to punish offenders; fines by imposing a monetary penalty on the individual & imprisonment by fully revoking their liberty. These sanctions can both act as specific & general deterrents if they are severe enough, by conditioning the offender to alter their ways & sending a strong message to the community that criminal behaviour is not tolerated & will be met with consequences.

That being said, criminal sanctions are not without their limitations. Imprisonment, for instance, can subject people to negative influences of hardened criminals, undermining the changes that the offender will be rehabilitated from future offending. Victoria's high recidivism rate (44%) suggests imprisonment is rather ineffective at rehabilitating people. Similarly, if a fine or CCO is perceived as too lenient (e.g. if the fine is easily payable or the CCO is too short), then offenders may not be properly punished, & may also not be deterred from re-offending.

Section B

Question 1a.

Marks	0	1	2	3	4	5	Average
%	20	19	19	21	16	5	2.1

This question required two analyses: first, an analysis of **how** the Commonwealth Parliament has the power to incorporate international treaties; and second, an analysis of the **impact** of this power. Therefore, something more than a description was required. Reference to the stimulus material was required.

Some of the points that could have been made are as follows.

- The external affairs power has been interpreted as enabling the Commonwealth to pass legislation to honour obligations found in international treaties.
- This process involves enacting legislation in Australia after the treaty has been signed and ratified. The signing of the treaty alone, or its ratification, will not import treaty obligations into treaty law, and so the Commonwealth does not have outright power once it has signed a treaty. This is noted in Source 1.
- The High Court is often required to consider whether the legislation is *bona fide* and whether the legislation does in fact 'give effect to' the obligation.
- High Court interpretations of this section over the years have arguably expanded the power of the Commonwealth, while decreasing the powers of the states, with previous judges commenting that it could give the Commonwealth unfettered power. It does not, however, mean the Commonwealth 'takes' the power from the states. It means that the Commonwealth can legislate with respect to a specific treaty obligation, and the states will continue to retain that power (this is where a strong analysis may take place).

Cases such as the Tasmanian Dam case could have been used to develop the analysis, particularly in relation to demonstrating the impact of the power.

While students appeared to understand the external affairs power and the effect of international treaties, very few were able to analyse, and many did not address the source material. Some students wrote primarily about human rights and the Mabo case, but this was off topic for the purposes of this question.

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

The Commonwealth Parliament has the ability to incorporate international treaties into Australian law through the external affairs power. The external affairs power has increased the power of the Commonwealth Parliament, as the High Court has given a broad interpretation to the external affairs power to mean that it enables the Commonwealth parliament to pass legislation to give effect to any obligations under an international treaty signed by the Commonwealth government. This has enabled the Commonwealth Parliament to “specifically incorporate into Australian law”, obligations in international treaties. For example, in the Tasmanian Dam case, the High Court held that the external affairs power enabled the Commonwealth Parliament to pass legislation in areas of residual law-making power when enabling obligations under international treaties signed by the Commonwealth government, thus, increasing the power of the Commonwealth Parliament, by enabling them to legislate in an area that was previously left exclusively to the states. However, the impact of the external affairs power is limited as the Commonwealth Parliament cannot use the external affairs power to legislate beyond what is in the treaty. For instance, if the Commonwealth government signs a treaty relating to racial discrimination, this cannot be used to allow them to legislate about religious discrimination.

Question 1b.

Marks	0	1	2	3	4	5	6	Average
%	16	10	15	22	20	11	6	2.8

This question was generally answered well, with many students able to demonstrate an understanding of judicial activism and its strengths in the law-making process, with reference to the Mabo judgment. Many students addressed matters such as the development of common law principles in the context of changing social views and values, particularly with respect to land ownership.

Some of the points that students could have made are as follows.

- The term ‘judicial activism’ describes the willingness of judges to consider a range of social and political factors, including community views and values and the rights of the people when interpreting the law and making decisions. This may include the rights of First Nations people, as per the Mabo judgment.
- Judicial activism allows judges to broadly interpret the law, and not feel restrained when interpreting statutes or developing common law principles. This is arguably a more efficient method of developing the law, rather than the courts believing that law-making should be left to parliament.
- Judges are politically independent and can make decisions free from concern about re-election, enabling them to make decisions about politically sensitive matters such as native title without fear of political repercussions.
- Active judges could arguably be more willing to abolish ‘bad law’ or precedent, such as the common law principle that Australia was *terra nullius*.

Some students were unable to provide two distinct reasons (strengths) and repeated the same reason.

The following is an example of a high-scoring response, which demonstrates two clear reasons as to why judicial activism is a strength.

One reason judicial activism is a strength is because it can lead to courts making more decisions which alter the law in ways that it wouldn’t otherwise. The activist approach adopted in the Mabo case, in 1992 for instance, was what led to the abolition of the outdated & incorrect “terra nullius” principle. It was because of the judge’s creativity and ability to go beyond the law and consider the original land rights of Indigenous Australians before the British arrived in Aus that this precedent could be abolished.

Another strength of judicial activism is that it can also prompt Parliament to change the law, for example, by highlighting gaps or problems in legislation. As seen in the Mabo case, the HC Justices alerted Parliament to recognise the land rights of Indigenous people. This would not have been possible if an activist approach had not been adopted as a conservative judge, would have simply read and applied the common law as it existed. The activism demonstrated in the Mabo case subsequently prompted Parliament to codify the decision with legislation such as the Native Title Act.

Question 1c.

Marks	0	1	2	3	4	5	6	7	Average
%	18	14	16	16	13	11	7	3	2.7

This question required students to consider the use of the courts in being able to influence legislative change, using the Mabo case as an example in relation to each one of the points they made.

Many students were able to write about the benefits of using the courts to influence law reform, such as the ability to influence changes, as in the Mabo case, and bringing media attention to important issues. The differentiating factor was the ability of students to discuss. Therefore, students should have also considered limitations or restrictions such as costs, time, standing and the supremacy of parliament. Students could have also considered limitations such as precedent, judicial conservatism and the stress and inconvenience of initiating and progressing a court case.

Many students chose to write about other methods of influencing law reform, such as petitions and demonstrations. This is not what the question asked, and therefore these responses did not score well. Some students did not refer back to the Mabo case or limited their points to a description of what happened in that case, rather than how it can be used to demonstrate the use of the courts in influencing law reform.

The following is an extract from a high-scoring response.

One way individuals may successfully influence law reform through courts is by bringing a case to the court. As seen in the Mabo case, the High Court would not have been able to abolish the terra nullius principle had an individual not brought the case in the first place. The outcome of this case demonstrates how by bringing a case to court, individuals can both have common law changed & prompt parliament to change the law too. For instance, it was following the Mabo case that Parliament was encouraged to codify the Mabo decision with the Native Title Act, recognising the land rights of Indigenous Australians.

However, a weakness of using courts is that individuals must have time, money & standing to bring a case. This can prevent some people from bringing cases, as not everyone has the financial resources, special interest in the issues of the case, or the luxury to endure the time it will take to see the case through. This can mean that in some instances, using courts isn't always the best way for individuals to influence law reform.

Question 1d.

Marks	0	1	2	3	4	5	6	7	8	Average
%	29	13	13	12	11	9	8	4	2	2.5

Many students did not attempt this question or did not respond accurately or comprehensively to the question that was asked.

To achieve full marks, students needed to consider the strengths and weaknesses of the Commonwealth Parliament being able to change or make laws as a result of court decisions and come to an overall judgment or conclusion about this ability. Students also needed to consider the relevance of section 109 of

the Australian Constitution, in that laws made by the Commonwealth Parliament can limit the operation of state laws if they are in conflict.

Some of the points that could be made are as follows.

- Strengths
 - Parliament can codify common law decisions such as the Mabo decision. It can also abrogate common law principles. This is because it is the supreme law-making power; it can make or change any law within the scope of this power (though it cannot change the Constitution).
 - Parliament can be quick in law-making, as seen in more recent times with pandemic-associated law reform.
 - Parliament is elected by the people and is expected to represent the views of the people in law-making. It can also gauge people's views through social media, consulting with electorates and utilising its committee system.
 - Parliaments can also engage law reform bodies such as committees to investigate complex issues and report back to it.
 - The bicameral structure allows for greater scrutiny of bills and debating/amendments of those bills.
- Weaknesses
 - Parliament can be slow to act, particularly in areas of political sensitivity, due to election pressures.
 - There can be a hostile upper house, as is the case now, which can block necessary law reform or result in watered-down bills as a result of negotiations with the crossbench.
 - Parliament is only sitting during specific times of the year, which can slow the law-making process.
 - There are a number of pressures on parliament that can influence its decision-making, such as business or union pressures. Parliament may be reluctant to change the law if those pressures mean they may risk not being re-elected.
- Effects
 - If Commonwealth Parliament enacts law, state laws are invalid to the extent of any inconsistency. However, this only comes into effect if challenged in the High Court. If it is not challenged, the state laws would continue to operate until challenged.
 - Arguably, there could be no effect if there are no state laws covering the same field.

Many students did not evaluate, which was what the question asked them to do. These students limited themselves to a description of Mabo and/or the role of the Commonwealth Parliament in responding to the judgment in that case, and/or a description of the Commonwealth Parliament generally. Many students did not refer to the Mabo judgment in their response. Other students did not address section 109 of the Australian Constitution.

Students should read the question carefully to identify key words and should break up the question and identify the individual parts they are required to respond to.

The following is an extract from a high-scoring response that clearly provides a strength of a rubber stamp Senate, as well as a weakness.

The Commonwealth Parliament can effectively respond to the need for law reform if there is a majority government, and a "rubber stamp" Senate. In this case, the government will be able to pass legislation without the need to debate the merits of the law with other parties, resulting in law reform which is efficient. However, this law reform is less likely to be scrutinised, as the government would not need to debate the bill with any other parties, resulting in a law that may not reflect a wide range of views. Furthermore, if there is a hostile Senate the government will have to convince the opposition and minor parties to support law reform, potentially delaying or diluting this reform.

Question 2a.

Marks	0	1	2	3	4	5	6	Average
%	5	4	12	22	28	19	9	3.6

This question required an explanation of two factors that Dani and Sunny (the potential plaintiffs) would have to consider before initiating a civil claim against the builder. The five factors listed in the study design are costs, negotiation options, limitation of actions, scope of liability and enforcement issues.

The key differentiating factor was the use of stimulus material, with students needing to give more than just the names of the parties to demonstrate their ability to apply the material. For example, while negotiation options could be a factor to consider, students should have picked up that Dani and Sunny have already attempted negotiation through Domestic Building Dispute Resolution Victoria (DBDRV) and that negotiation failed to resolve the dispute. Therefore, while Dani and Sunny can still consider negotiating, it may be best to negotiate through a facilitated mediation at the Victorian Civil and Administrative Tribunal (VCAT).

While the question was generally answered well, some students did not use the stimulus material, or used it in a limited way, which meant they could not be awarded full marks.

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

One factor that would have to be considered is enforcement issues. Dani and Sunny should consider if the defendant – the builder – will actually pay the damages they may be seeking to cover the defects the builder has not rectified. The builder has continued to ignore the report and insist there are no defects, so it sounds as though he may be unwilling to compensate Dani and Sunny as he believes he has done nothing wrong. Dani and Sunny should consider whether it is worth initiating a claim if it will be very difficult to enforce the builder to compensate them. A second factor to consider is costs. Dani and Sunny would have presumably spent money on their new house and although their financial situation is not mentioned, they should consider whether they can afford to pursue legal action against the builder through to its conclusion as they may not have the means, considering there are many costs involved with dispute resolution such as legal representation.

Question 2b.

Marks	0	1	2	3	4	5	6	7	8	Average
%	10	8	11	15	19	15	13	6	2	3.7

Similar to Section A, Question 6, this question required students to provide an opinion (preferably given at the start of their answer), with reasons given to support their opinion. The nature of the statement was such that students needed to consider the benefits of VCAT in resolving this dispute as opposed to Consumer Affairs Victoria (CAV); therefore, some comparisons ought to have been made as part of the discussion.

Given the nature of the dispute, it was clear that VCAT was a better option. CAV provides a conciliation service, which is voluntary in nature in that the parties do not have to participate. CAV also has no powers to hold hearings or make a binding decision. Given the history between the parties, it is apparent that Dani and Sunny may require a binding decision through VCAT.

Some students limited themselves to writing about the binding nature of VCAT and the inability of CAV to make binding decisions. Other points that could have been made were:

- VCAT is a dispute resolution body set up to hear building and construction disputes, among other civil and administrative matters, while CAV is a regulator and complaints body set up to ensure that businesses comply with consumer law and provide limited conciliation services.

- Dani and Sunny require a dispute resolution body with jurisdiction to hear this dispute. VCAT has jurisdiction to hear building and construction disputes, among other things. There is a potential counterclaim here, and CAV would not be able to accept a complaint from the builder.
- VCAT can make binding decisions and make orders (such as an order for a permanent injunction), which means the builders would have to rectify the defects identified in the inspection report to fulfil their obligations in the building contract. CAV seeks to resolve disputes by obtaining voluntary compliance through conciliation. However, an attempt at conciliation through DBDRV has already failed. Relations between the parties in this dispute have deteriorated to the point they are refusing to cooperate with each other, meaning enforcement may be needed in this scenario.
- VCAT is an experienced third party with expertise in resolving disputes / subject matter for building disputes. This is suitable for Dani and Sunny, as they have been waiting to move into their new house.
- VCAT is generally cheaper than hearing the matter in court, as the cost of extensive preparation and pre-trial procedures can be avoided. This may suit both Dani and Sunny as well as the builders, as they are still waiting to be paid for the work they have done so far.

The following is an extract from a high-scoring response.

However, VCAT is likely to be the more appropriate body to use. VCAT has the ability to offer a binding resolution to the dispute through their final hearing process, which would benefit Dani and Sunny as they wish for the builder to comply with their requests. CAV generally uses a conciliation process in which party cooperation is necessary, and hence this may not be appropriate because the builder is insistent that there are no defects. Since conciliation has already been attempted and failed, it is unlikely to be effective again.

Furthermore, VCAT offers a more formal setting through compulsory conferences and the final hearing, which would be more appropriate than the use of CAV's less formal over the phone process for this case, as the lack of cooperation from the builder suggests that he does not take informal discussions seriously.