**Student Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_ / 80 marks**

**LEGAL STUDIES  
  
Units 3 & 4 – Written examination**

PES

# 2018 Trial Examination 3

## Reading Time: 15 minutes Writing Time: 2 hours

**QUESTION & ANSWER BOOK**

**Structure of book**

|  |  |  |  |
| --- | --- | --- | --- |
| *Section* | *Number of questions* | *Number of questions to be answered* | *Number of marks* |
| A | 9 | 9 | 40 |
| B | 3 | 3 | 40 |
|  |  |  | Total 80 |

* Students are permitted to bring into the examination room: pens, pencils, highlighters, erasers, sharpeners and rulers.
* Students are not permitted to bring into the examination room: blank sheets of paper and/or white out liquid/tape.
* A calculator is not allowed in this examination.

**Materials supplied**

* Question and answer book of 20 pages.

**Instructions**

* Answer all questions in the answer book.
* All written responses must be in English.

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| --- | --- | --- | --- |
| *Section* | *Number of questions* | *Number of questions to be answered* | *Number of marks* |

Students are NOT permitted to bring mobile phones and/or any other unauthorised electronic devices into the examination room.

**SECTION A**

|  |
| --- |
| **Instructions for Section A**  Answer **all** questions in the spaces provided. |

**Question 1** (1 mark)

Define ‘codification’.

**Sample response**

Codification is where parliament passes legislation that confirms a precedent set by the courts.

**Question 2** (4 marks)

Explain how the separation of powers acts as check on the law-making powers of parliament.

**Mark Allocation**

* 2 marks for explanation of the separation of powers
* 2 marks for explanation of how this principle acts as a check on law-making

**Sample response**

Our legal system comprises three main powers – the legislative, executive and judicial powers. The legislative power is the power to make laws and is held by parliament. The executive power is held by the Executive Council (Governor-General and two ministers of the government) and has the power to administer the law. The judicial power is held by the courts (the High Court technically) whose role it is to apply the laws.

These powers are kept separate so as to avoid the abuse of power by one body holding more than one power. By being kept separate, if the legislative branch pass a law that infringes upon rights or is outside their jurisdiction, the judicial branch can declare the law ultra vires if the law is challenged in the court. This restricts the law-making power of parliament as they won’t make laws outside their jurisdiction.

**Question** **3** (2 marks)

Describe the role of Victoria Legal Aid in assisting an accused person.

**Mark Allocation**

* 1 mark – explanation of Victorian Legal Aid
* 1 mark – explanation of what it can offer an accused person

**Sample response**

VLA is a government-funded body that provides free legal information and education to all Victorians, with a focus on prevention and early resolution of legal problems. They provide legal advice and representation for people charged with criminal offences who cannot otherwise afford legal assistance and who meet their eligibility criteria, focusing on people who are disadvantaged or at risk of social exclusion.

**Question 4** (3 marks)

Describe **one** recent example of a recommendation for law reform by either one parliamentary committee or one Royal Commission.

**Marking Guide**

* 1 mark – description of one parliamentary committee
* 2 marks – one recent example of a recommendation for law reform from the chosen parliamentary committee

**Sample response**

One parliamentary committee is the Victorian Standing Committee on Legal and Social Issues. This is an ongoing committee that enquires into and reports on any proposal or matter concerned with community services, gaming, health, law and justice, and the coordination of government. In 2016 the Committee released their report into ‘end of life choices’. In this inquiry, the Committee investigated and considered the need for law reform in Victoria to allow individuals to make informed decisions regarding the management of the end of their own life. After extensive consultation with the community, the Committee presented its report which included a number of recommendations, such as the need to introduce laws to recognise advance care orders, provide more community services and improve the provision of specialist palliative care.

**Question 5** (6 marks)

Explain how the following features of the Victorian criminal justice system each uphold **one** of the principles of justice:

1. The presumption of innocence. (3 marks)

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| --- |
| **Marking Guide**   * 1 mark – explanation of the presumption of innocence * 2 marks – explanation of how the presumption of innocence upholds fairness   **Sample response**  The presumption of innocence is the concept that every person accused of a crime is presumed to be innocent until they have been proved guilty in a court of law, and as such they should be treated as though they are innocent.  The presumption of innocence upholds the principle of fairness which allows the accused impartial and just treatment before the law, requiring fair processes and hearings that are unbiased and without favouritism.  Fairness is upheld by imposing the burden of proof on the prosecution. The burden of proof refers to the party who has the responsibility of proving the facts of the case. In criminal cases the burden of proof rests with the prosecution. i.e. the prosecution has to prove the accused is guilty. |

1. The right of an accused to be tried without unreasonable delay. (3 marks)

**Marking Guide**

* 1 mark – explanation of the right to be tried without unreasonable delay
* 2 marks – explanation of how the right to be tried without unreasonable delay

upholds fairness

**Sample response**

The Human Rights Charter states that a person charged with a criminal offence is entitled without discrimination to a guarantee that they will be tried without unreasonable delay.

This means that an accused is entitled to have their charges heard in a timely manner and delays should only occur if they are considered reasonable.

The principle of fairness means impartial and just treatment before the law, requiring fair processes and hearings that are unbiased and without favouritism.

Fairness is achieved as the accused person have the basic right to liberty and security and they are presumed innocent until proven guilty so they should not be held for an unreasonable amount of time while they are awaiting trial.

**Question 6** (4 marks)

Distinguish between judicial activism and judicial conservatism as factors that affect the ability of courts to make law.

**Marking Guide**

* 2 marks for explanation of judicial, activism and conservatism and the distinction
* 2 marks for explanation for how these factors affect the law-making ability of the courts

**Sample response**

When confronted with a novel case or an area of law not covered by a statute, judges are often called upon to make a determination that creates a law (a precedent) or to interpret a statute as the statute is unclear, ambiguous or the word has changed its meaning.

Judges may not always seek to make such a determination as they do not feel it is their role, as they are not elected. The unwillingness to make a decision that creates a law is referred to as judicial conservatism and some judges practise this as they believe it is not their role. They may comment that changes should be considered by parliament but not make an actual change themselves. This limits the ability of courts to make laws.

Alternatively, there are some judges who may take a more active approach and will make laws in these circumstances. This is judicial activism and occurs because judges feel parliament is slow to act and an issue needs resolution. This often occurs in controversial areas of law where parliament is loath to act as they fear voter backlash. This approach enhances the ability of courts to make laws.

**Question** **7** (4 marks)

Describe the responsibilities of legal practitioners in a civil trial.

**Marking Guide**

* Mark globally
* Students must limit their description to the trial phase of a dispute and not refer to pre-trial procedures
* At least two responsibilities should be described and some depth should be provided – a list of responsibilities is not appropriate and would likely score a maximum of two marks

**Sample response**

During a civil trial, it is the responsibility of the legal practitioners to represent their client and their case. They are responsible for the presentation of evidence to the court and presenting it in a manner that best supports their client’s case and achieves the result desired by their client.

The legal practitioner will provide an opening address outlining the case and their client’s position and present evidence that supports their claim. They will test the evidence and witnesses brought by the other party through cross-examination in an effort to ensure the burden and standard of proof is met.

They will follow all instructions given by the judge, including encouraging the parties to undertake mediation if the judge believes the dispute can be resolved outside a formal court environment. They will also provide their client with any settlement offers proposed by the other party and encourage settlement when appropriate.

**Question 8** (6 marks)

Using examples, analyse the influence of the media, including social media, in law reform.

**Marking Guide**

* Mark globally
* Students must provide a current example – either from traditional media or social media
* An analysis requires both sides of the issue to be referred to – how influential is media in law reform and how is media not influential

**Sample response**

The media can play a role in encouraging parliament to undertake law reform. Traditional media involves writing letters to the editor of a newspaper or calling talkback radio to place an issue in the public forum. This can create public awareness of an issue and increase support for that issue and alert parliament to the issue. By using the media, individuals and groups can demonstrate public support for their view.

The effectiveness of this type of media may be limited because the media do not always publish or broadcast the views of all groups or consider particular issues. This is true if the views expressed in the media reflect the views of vocal minorities. It is also possible that the argument may not be expressed well or persuasively.

Social media includes communicating information using a huge range of internet tools, applications and platforms, and over recent years the use of platforms (Facebook, Twitter, Instagram, Snapchat, LinkedIn) and bookmarking sites (Pinterest, Reddit, Delicious, Digg) have gained significant popularity.

Information regarding an issue can now be communicated by any individual or group to potentially millions of people almost instantaneously. This makes social media an important way for individuals and groups to provide awareness and gain support for an issue and hence law reform. Members of parliament, political parties, pressure groups and individuals can all take advantage of it.

However, the instantaneous nature of social media can make it very easy for a new issue to be posted and draw attention away from a previous issue.

***Reference should be made to a specific issue during this analysis.***

**Question 9** (10 marks)

Discuss the significance of **two** High Court cases involving the interpretation of the Australian Constitution:

* One case interpreting sections 7 and 24, and
* One case which has had an impact on the division of constitutional law-making powers.

**Marking Guide**

* Mark globally
* Students must refer to two separate case – while the exact citation is not required students should be able to provide a reasonable summary of the facts of each case
* Students should allocate equal time and content to each case
* Students must be able to indicate why the case was significant

**Sample response**

The Constitution establishes the rules for the formulation of parliament and its operation. It provides sections detailing how members of parliament shall be elected, term limits on parliamentary sessions and eligibility of persons wishing to be elected.

There are two key sections of the Constitution in this area – s7 and s24. These sections establish the composition of and eligibility for election to the Senate (s7) and the House of Representatives (s24).

Because of the nature of the Constitution – it was drafted in the 1890’s and formalised in 1900 – there can be queries over sections of the Constitution, what various sections mean today and what was intended when a section was written. When a dispute occurs because of this, the High Court is required to interpret the section(s) and deliver a finding. This has happened with sections 7 and 24 when it was questioned whether these sections guaranteed a right to vote for Australians.

In the Roach case, Vicki Lee Roach was a Victorian woman of Aboriginal descent, who was serving a six-year term of imprisonment, having been convicted on five counts of offences that included burglary, conduct endangering persons and negligently causing serious injury. She challenged the validity of the 2006 amendments made to the *Electoral Act 1918* (Cth), by the passage of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). The amendments prohibited all prisoners who were serving a sentence of imprisonment for a Commonwealth, state or territory offence from voting in federal elections. Before the amendment, only those prisoners serving a sentence of three years or longer were excluded from voting. Thus, Ms Roach was excluded from voting. She challenged this law in the High Court.

The High Court held that the complete ban on prisoners voting was unconstitutional, as it was inconsistent with the principles of representative government. This principle requires that members of parliament be elected into office by the people they seek to represent. Sections 7 and 24 of the Constitution require that Senators and members of the House of Representatives be directly chosen by the people; therefore, there is a right to vote, that had been violated by this legislation. The 2006 amendment was declared invalid.

The outcome of the case had far reaching implications for the legal system in terms of recognizing that there is a constitutionally protected right to vote in Australia even if that right is limited. However, as Vicki Lee Roach was serving a prison term of longer than three years, and the original provisions of the *Electoral Act* were upheld, Ms Roach was still ineligible to vote in elections.

The Constitution also divides law-making powers between the federal and state parliaments via section 51. Again, this section and its 40 sub-sections have been questioned by individuals and states to determine if one government has acted outside their law-making area and as a result, the High Court, in its interpretation, has altered the division of law-making power. One such case is the Brislan case.

S51 (V) gave the Commonwealth Parliament the power to make laws about ‘postal, telegraphic and other like services.” When the Constitution was written, the post and telegraphs were the only means of communication. Subsequently, other forms of communication were developed, including the wireless (an early form of radio).

In 1905, the Commonwealth Parliament passed the Wireless and Telegraphy Act which required all owners of wireless sets (radios) to have a licence. The defendant was charged with having a wireless without a licence and she challenged the validity of the law, claiming the Constitution did not give the Commonwealth the power to make laws about wireless sets.

To resolve the dispute the High Court had to interpret the meaning of the words “like services” in S51(v). The High Court decided that a wireless was a “like service” and therefore, the Wireless and Telegraphy Act was valid. This case was significant as it meant that the Commonwealth gained a law-making power and what some may have considered a residual power (a power belonging to the States) was now a concurrent power (a power shared by both states and the federal parliament).

**SECTION B**

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| **Instructions for Section B**  Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.  Answer **all** questions in the spaces provided. |

**Question 1** (14 marks)

Arabella contracted Hank’s Heaters to install a hydronic heating system in her 2-bedroom apartment for $4,000. One week after installation, the heating system stopped working. Arabella contacted Hank’s Heaters, but they refused to either repair the heater or provide a refund, claiming that it was in full working condition after the installation. They have since refused to answer her calls. Arabella then contacted another heater repair company who have provided a quote of $1500 to repair the system.

Arabella wants to have this dispute resolved as quickly as possible, and have a final and binding resolution that Hank’s Heaters pay her $1500 compensation. However, she is concerned about the cost of pursuing her case as she is a single mother and only works part-time in order to look after her 2-year-old son.

Arabella has been advised that she could take the matter to either Consumer Affairs Victoria (CAV), the Victorian Civil and Administrative Tribunal (VCAT) or the Magistrates’ Court.

1. Analyse two factors that Arabella should consider before initiating a civil claim. (4 marks)

**Marking guide**

* 2 marks for identification and description of the two relevant factors
* 2 marks for the analysis of each factor

**Sample response**

When considering initiating a civil claim a potential plaintiff must consider a range of issues. One such issue is enforcement. If Arabella was to take the matter to court there is no guarantee that a successful verdict will result in her receiving the compensation she is seeking. The defendant may be bankrupt, may refuse to pay or be based overseas where the court is unable to enforce the judgement.

A second factor is cost. To pursue the matter in the courts will require court fees and legal representation – costs that are significant and would likely be greater than the $1500 she is seeking. To use other resolution bodies such as CAV or VCAT will see reduced costs but these bodies will not be able to make an award that covers her costs.

1. Describe the main method of dispute resolution used by CAV. (2 marks)

**Marking guide**

* 1 mark - Description of the main method of dispute resolution used by CAV
* 1 mark – Depth of response

**Sample response**

Consumer Affairs Victoria (CAV) CAV is Victoria’s consumer affairs regulator. The role of CAV in resolving civil disputes is to conciliate disputes between consumers and traders and tenants and landlords.

Conciliation involves the use of a third party conciliator, who assists the parties to reach a decision. The conciliator listens to the parties, makes suggestions and assists them to reach a mutually agreeable outcome.

1. Advise Arabella about whether CAV, VCAT or the Magistrates’ Court is the most appropriate body to resolve this dispute. (8 marks)

**Marking guide**

* Mark globally
* Although the question requires students to give advice, the best approach is to look at the strengths and weaknesses of each resolution venue
* Students should also provide a statement as to which is the most appropriate venue

**Sample response**

In seeking to resolve this dispute, Arabella has a range of dispute resolution venues available to her. Two such venues are Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT).

Both of these venues seek to provide more timely, less formal and less expensive means of dispute resolution. CAV deals only with disputes between consumers and traders. They provide conciliation services between disputing parties and will assist in the resolution of the dispute without any cost. The conciliator (an independent third party) is usually a person with specialist knowledge in the area concerned. They are not able to make the decision on behalf of the parties, but listens to the facts, makes suggestions and helps the parties come to their own decision. They are able to suggest possible resolution options to the parties. The aim is for the parties to agree to resolve the dispute themselves – signing a terms of settlement at the end of the process which can become legally enforceable.

CAV conciliation services are generally conducted by phone and given the inability of Arabella to contact the supplier of the product this may not be the most appropriate venue for resolution. It also cannot compel parties to undertake conciliation and so this further limits the appropriateness of this venue.

This means Arabella could use VCAT. VCAT also has the power to hear this type of dispute but will charge a fee for listing the dispute. VCAT offers a number of resolution methods including mediation, compulsory conferences (generally using conciliation) and hearings. Hearings are a judicial determination service if the parties are unable to settle the dispute jointly using any of the other methods.

VCAT is an appropriate venue for the resolution of the dispute as costs are low – the parties do not have ongoing court fees and are not required to pay fees for lawyers as the parties represent themselves in most disputes. A decision at a hearing is binding and so Arabella can be confident of resolution if she has to use that method – it is only used if the other methods fail which can lengthen the process. It is also an appropriate venue as VCAT can order the trader to pay money (in this case $1500) or can order them to fix the issue directly.

If Arabella does not like the informality of VCAT then she can take the matter to court. The Magistrates Court will have jurisdiction over this dispute because of the amount of money been claimed. However, as the amount is less than $10,000, the court will direct the dispute to arbitration rather than a court hearing. This will reduce the cost to Arabella and allow her to receive a binding decision that can be appealed if the other party does not complete the remedy imposed by the court. The court is also able to make an award for costs so Arabella may have her legal fees covered. However, there are enforcement issues and costs that can deter Arabella.

As a result, VCAT is the best option for her as the cost is lower and a binding decision is possible.

**Question 2** (12 marks)

Theo, 28 years of age, was charged with assaulting and threatening to kill Julia, his wife at the time. Theo entered an early plea of guilty to assault and threats to kill after receiving a sentence indication from the court during plea negotiations.

After hearing submissions from both parties as to sentence, including a Victim Impact Statement from Julia, the County Court judge sentenced Theo to a Community Corrections Order (CCO) of two years, including 6 months of counselling and 100 hours of community work.

The maximum penalty for threats to kill is 10 years’ imprisonment and assault, 5 years.

The offences relate to an incident that occurred 18 months ago. At the time, Theo and Julia had separated and were involved in a legal battle over the custody of their child in the Federal Circuit Court. The court had ordered that the child would live with Julia and would spend a total of four hours per week with Theo – two periods of two hours each.

Theo has no prior convictions and has been in full-time employment as a mechanic since he left school. He has remarried and his second wife is currently pregnant with their first child. He also expressed remorse for his actions.

In her victim statement, Julia, claimed that, since the offences, she has lived in fear for her life. She has had to move to a new house and sell her hairdressing business because she fears that Theo would carry out his threats. She suffers from post-traumatic stress disorder and sees a psychologist.

1. Outline the purposes of plea negotiations. (2 marks)

**Mark Allocation**

* 1 mark – the purpose of plea negotiations
* 1 mark – depth of response – e.g. other key features, purposes or appropriateness

**Sample response**

Plea negotiations are discussions between the prosecution and the accused about the charges against the accused. These can take place in relation to both summary and indictable offences. Plea negotiations involve the prosecution offering incentives to the accused in return for a guilty plea. The incentive may involve the prosecution forgoing a more serious charge such as murder in exchange for the accused pleading guilty to manslaughter. Alternatively, where the accused has been charged with multiple offences, the incentive may involve the prosecution offering to drop a number of charges in exchange for the accused pleading guilty to the remaining offences.

Plea negotiations are conducted without prejudice. This means that any offers made by either party during the negotiations cannot be used against them at trial if the negotiations fail. One purpose of plea negotiations is to achieve the timely determination of a criminal case by eliminating the need for a full trial. Another purpose is to ensure a plea of guilty to a charge that adequately reflects the crime that was committed.

1. With reference to the factors considered in sentencing, discuss the appropriateness of the judge’s sentencing decision in this case. (5 marks)

**Mark Allocation**

* Mark globally
* Students must refer to the mitigating factors in the scenario
* Students must discuss which requires statements as to why the sentence was or was not appropriate

**Sample response**

In determining an appropriate sanction, a judge can consider a number of factors – aggravating factors, mitigating factors and a Victim Impact Statement.

In this case, Julia provided a Victim Impact Statement that would detail how the crime has impacted her and possibly her son. The statement may outline any medical issues arising from the crime, any stress or anxiety experienced after the event and any other ways the crime has impacted her. The judge would consider these factors when deciding the sanction.

Theo is also likely to have provided some facts in mitigation – factors that seek to reduce the severity of the sanction imposed. The fact that he was a first time offender, gainfully employed since secondary school and has a new family. His guilty plea and feelings of remorse would also factor into the decision of the judge.

The sanction imposed is therefore considered appropriate for Theo as he is able to continue to work, provide an income and support for his new family and the CCO may require him to seek support for his anger issues.

However, given Julia’s issues there is an argument that she is still a victim as she has had to move house, sell her business and suffers from anxiety that requires treatment. It is likely to not be an appropriate sentence as Julia would argue she has suffered more than Theo.

1. Discuss the extent to which a Community Corrections Order (CCO) is able to achieve its purposes in this case. (5 marks)

**Mark Allocation**

* Mark globally
* Students describe a CCO
* Students should link CCOs to at least one purpose of sanctions
* Students must discuss which requires statements as to how CCOs achieve the purpose identified and how they may not achieve the purpose

**Sample response**

A Community Corrections Order is a supervised sentence served in the community that includes

special conditions, such as treatment of the guilty party and unpaid community work for a number of hours.

A CCO is a non- custodial sentence, allowing the guilty party to continue to work and interact with their community as normal. These orders give offenders the opportunity to stop their criminal behaviour and undergo treatment or take part in educational, vocational or personal development programs such as anger management course and drug or alcohol rehabilitation programs.

A main purpose of CCOs is to rehabilitate the offender, as they are often required to undertake courses or programs that deal with the behaviour or conditions that led to the crime. As such, they can be successful as the offender learns from their mistakes. They also learn about giving back to the community through the unpaid community service they have to perform.

However, there can be occasions where rehabilitation will not be successful. This is because the programs and unpaid community work will not replicate the circumstances that led to the criminal act and so the offender may not actually learn from the course. There is also the possibility that the offender only partakes in the programs to have the matter closed rather than learn to control their behaviour.

**Question 3** (14 marks)

**Source 1**

Section 8(1) of the Infertility Treatment Act 1995 (Vic)

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| --- |
| **Section 8(1)**  Provided that, to be eligible to undergo infertility treatment a woman must either be:   * be married and living with her husband on a genuine domestic basis or * be living with a man in a de facto relationship. |

**Source 2**

Section 22 of the Sex Discrimination Ac 1984 (Cth)

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| --- |
| **Section 22**  Provides that it is unlawful, for a person who provides goods or services, to discriminate against another person - on the ground of the other person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding – by refusing to provide the other person with those goods or services. |

**Source 3**

McBain v Victoria 2000 Federal Court of Australia

|  |
| --- |
| **Facts**  Dr McBain wanted to provide infertility treatment (IVF) to Ms Meldrum, who was a single woman not living in a de facto relationship. He sought a declaration from the court that section 8(1) of the Victorian Act was inconsistent with section 22 of the Commonwealth Act, and therefore, under section 109 of the Commonwealth Constitution, the Victorian Act was invalid to the extent of the inconsistency.  **Held**  The court held that infertility treatment is a “service” within section 22 of the Commonwealth Act and that Dr McBain was precluded, by the Victorian Act, from providing the service to Ms Meldrum because of her marital status. Therefore, the Victorian Act is inconsistent with the Commonwealth Act, and is invalid to the extent of the inconsistency. |

1. With reference to this case**,** explain **one** reason for and **one** effect of statutory interpretation. (4 marks)

**Mark Allocation**

* Award two marks for explanation of the reason
* Award two marks for the effect of statutory interpretation
* Must refer to the case provided

**Sample response**

Statutory interpretation is when a judge will interpret a word or phrase in a statute in order to resolve a dispute.

Statutory interpretation is often required because two different statutes are inconsistent in their meaning of the same word or phrase or provide a conflict. That is the reason why interpretation was needed in Dr McBain’s case. On the one hand, he was not able to provide a service to the patient because of a Victorian Act as she was not married or in a de facto relationship. However, the Commonwealth Act made it illegal for him to discriminate against the patient because of her marital status.

The effect of the interpretation was that meaning is given to a word or phrase or an inconsistency between statutes is clarified and a precedent is set that must be followed in all similar cases.

1. With reference to this case, discuss the significance of section 109 of the Australian Constitution (5 marks)

**Mark Allocation**

* Mark globally
* Students must explain the role of s109
* Students must refer to the case
* Students must make a statement regarding significance

**Sample response**

Section 109 of the Constitution is provided to deal with situations where state laws and Commonwealth laws are inconsistent on an area of concurrent powers. Section 109 was relevant in this case as there was a conflict between a Victorian law and a Commonwealth law.

Section 109 provides that in situations such as this, if there is a dispute between two laws then the Commonwealth law will override the state law to the extent of the inconsistency.

The inconsistency here was that the Victorian law would not allow IVF to be provided to a woman not married or in a de facto relationship while the Commonwealth law made it illegal to discriminate against a person due to their marital status.

The conflict existed because there were two areas – IVF (a residual power) and discrimination (a concurrent power). Section 109 is significant because it provides a mechanism for the resolution of such conflicts and law-makers can consider this section before passing laws to avoid future conflicts.

1. With reference to this case, discuss the ability of individuals to influence law reform through the courts. (5 marks)

**Mark Allocation**

* Mark globally
* Students must refer to law reform
* Students must refer to the case

**Sample response**

Law reform is often needed because the current law is not meeting the requirements of society. On occasions parliament is reluctant to act because the area concerned is deemed controversial and members of parliament may face voter backlash if a change is made.

In circumstances such as this, a party may seek to have the law changed by challenging the existing law through the court system. Hoping the courts will make a decision that changes the current law. Courts are often able to make these changes as they can apply the current views and values of society to what may be an outdated law – this case is an example whereby an older view of who should be a parent (married woman) no longer fits with society’s current views. Parliament may not have seen the need to act and so the law remained unchanged.

However, courts are limited in their ability to make such reforms to the law.

In the first instance, a person of standing is required – that is a party affected by the law who is willing to take the matter to the courts. This is not always easy because while Dr McBain was affected (and therefore had standing), there is a cost to legal proceedings and this can be prohibitive.

Secondly, there needs to be a judge (or justices) who are willing to act in this area. Judicial conservatism can restrict the ability of courts to make laws.

There is also the possibility that parliament may disagree with the ruling made by the court and pass a law abrogating the precedent.

Therefore, it is possible for courts to be a source of law reform but there are restrictions placed on their ability to influence such reforms.

**END OF QUESTION AND ANSWER BOOK**