

Legal Studies Key Ideas

SACE Stage 2

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This CD provides recommended answers to the questions in the “Legal Studies Key Ideas” text book. Where the answers are straightforward the reader is directed to the specific page to find the answer. It also includes a rewrite of Chapter 22 to address the main proposed changes to family law in the Family Law topic. It concludes with recommended teaching resources.

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TOPIC 1 THE AUSTRALIAN LEGAL SYSTEM

Chapter 1 The Functions of the Law

Focus Questions Page 4

1 What is a law? Give examples.

Rules set by government agencies which have the force of law
See page 4 top

2 What is the difference between a legal rule and a non-legal rule? Give examples from your own experience.

Legal rules – enforceable by courts eg criminal law
Non-legal rules – not enforceable by courts eg sporting rules
See page 4

Focus questions Page 7

1 What is social cohesion?

A state of society where the vast majority of the citizens obey the law and respect the rights of other people. When disputes occur they are predominantly resolved in accordance with law.

2 How does the law protect values and rights?

By statute law and case law prescribed acceptable standards of behaviour where a legal consequence results for a breach. Eg a person who commits the crime of larceny (ignoring the rights to private ownership of property) can be sanctioned by a fine or a period of imprisonment.
See pages 5/6

3 What is the difference between an acceptable and unacceptable standard of conduct? Give examples to support your answer.

Acceptable conduct – socially condoned and/or lawful eg being polite
Unacceptable conduct – socially frowned upon (eg being rude) or unlawful (eg stealing)
See page 7

Focus Questions Page 8

1 How do laws accommodate the making and enforcement of laws?

Constitution Acts gives parliaments the authority to make statute laws
Parliament passes enabling Acts to create courts (which exercise judicial power to make case law) and to delegates law-making power to delegated authorities to make regulations

2 What roles do courts perform to achieve social cohesion?

Brings lawful conclusions to legal disputes
Creates case law to the extent necessary to resolve those disputes
See page 8

3 What are the roles of the institutions of government to make and enforce the laws and to resolve legal disputes?

Parliaments – make statute laws
Executive – enforce laws made by parliament and create regulations
Courts – adjudicate disputes by applying laws made by parliaments, executive and case law
See page 8

Focus Questions Page 9

1 Why do laws need to be changed?

To maintain social cohesion in response to changing values, technology and other variables.

See page 9

2 How can laws be changed?

Parliaments – enact new statutes or amend existing statutes

Executive – creates new regulations

Courts – depart from precedent ie changes precedents to ensure just outcomes occur

3 Give current examples of laws being changed to meet new circumstances and needs.

Smoking prohibition laws have been broadened gradually, ie more places and situations prohibit smoking eg most recent in 2004 – patrons not allowed to smoke with 3 metres of a bar in a hotel

Focus Questions Page 10

1 What is social progress?

The peaceful, orderly and lawful transition of society from one generation to the next so that social cohesion can be Achieved in the future.

See page 9

2 What laws are necessary to achieve social cohesion in the future?

See examples on page 10

3 Apart from the examples above explain how laws achieve social progress.

Economic laws that foster economic growth and prosperity ensure that the economy grows to provide employment for expanding population and produce more goods and services to improve living standards.

General Focus Questions Page 11

1 How do laws achieve social cohesion and social progress simultaneously?

Eg criminal laws prohibit physical assault so by protecting the health and safety of members of the community people are better able to participate in the community to care for themselves in the future.

2 What are the functions of law in Australia?

Dual role social cohesion and social progress

SOCIAL COHESION

Laws that protect rights and values

Laws that prescribe ASB and impose consequences for breaching them

Laws to create institutions of government to make law, enforce law and resolve disputes which arise

Laws that meet changes in values, technology etc

SOCIAL PROGRESS

Laws that facilitate social cohesion in future

Eg education laws

3 How do the institutions of government set acceptable standards of behaviour?

Parliament passes criminal statutes to prescribe unacceptable standards of behaviour and the sanction that will be imposed if breached. Eg drink driving attracts an automatic loss of licence, a fine and loss of demerit points.

Analytical questions Page 11

1 Do Australian laws adequately reflect the current values of the Australian community?

Can argue either way:

YES ARGUMENTS

Parliaments are elected bodies which democratically reflects the values of the majority.

People can represent themselves in courts to put their submission on laws in a value context.

NO ARGUMENTS

Minorities are disadvantaged by the parliamentary system eg Indigenous people.

Courts make case law predominantly from submissions put by the wealthier sections of the community.

2 Is it possible to make laws to preserve every value held by each member of the Australian community?

No, physically impossible.

Australia is no homogenous, so conflicting interests invariable exists

Eg Howard Government's industrial reforms in 2005 supported by business but opposed by trade union movement.

3 In what ways are Australian laws responsive to community concerns?

Parliaments – democratic institutions comprised of elected officials

Courts – make laws in response to legal arguments by parties

Councils – make regulations in response to rate-payers' needs and concerns

4 Australian laws are more concerned with achieving social cohesion than social progress. Discuss the validity of this statement.

Possibly true, consider the following:

Current laws allow exploitation of resources that causes pollution and environmental decay.

Laws foster the depletion of scarce resources eg fossil fuels

5 In what ways could laws give more focus to the achievement of social progress?

Greater emphasis on future impacts eg more stringent application of environment impact studies before approving economic development.

Constraints placed on current consumption of resources to guarantee a greater flow in the future. Keep in mind that as resources become scarcer it is likely that economic conflict will increase and so will legal disputes.

TOPIC 1 : THE AUSTRALIAN LEGAL SYSTEM

Chapter 2 Types of Law

Focus Questions Page 14

1 Outline the nature of the two sources of law.

Parliament and courts

See pages 12/13

2 Where did Australia's sources of law originate from?

Great Britain on settlement.

See page 12

3 What are the fundamental differences between the two sources of law?

Parliament – democratically made law

Courts – made by appointed judges who cannot be influenced by arbitrary factors

See Page 12/13

4 What authority allows executive bodies to make law?

Enabling Act passed by a parliament

See Page 13

5 Outline the jurisdiction of statute laws and case laws in Australia.

Both bound by geographical constraints eg State statutes and case law only have authority within the particular state

Statute law must conform with the principle of constitutional government

Case law can only be made to extent necessary to resolve a specific dispute.

See pages 12/13

6 What is meant by the statement, “parliament is the sovereign law-maker”?

Parliament's laws override all other types of laws

See Page 13

7 Clearly explain the legal relationships between statute law, case law and regulations.

Statute law overrides regulations and case law

See page 13

8 Under what circumstances can case law override statute law?

HCA's interpretation of the Australian Constitution when resolving a constitutional dispute in its original jurisdiction.

Focus Questions Page 15

1 Explain how and when British:

(a) statutes stopped having authority in federal law

1968 See page 15

(b) court precedents ceased being binding precedents on the High Court

1975 See page 15

(c) statutes stopped having authority in South Australia

1986 See page 15

(b) court precedents ceased being binding precedents on State courts.

1986 See page 15

Focus Questions Page 18**1 What is the fundamental difference between public law and private law?**

See page 16

2 What is international law, and why is it important to Australia?

See page 16, becoming more important as Australia broadens its global links in trade, commerce, tourist travel, diplomatic relations etc

3 What is constitutional law, and why is it Australia's most fundamental public law?

See Pages 16/17 – Fundamental source of all institutions which make laws

4 Give examples detailing where administrative law would be applied in Australia.

Australian Taxation Office assessing a person's tax return.

The Immigration Department determining the status of an illegal immigrant.

5 How and when is criminal law applied in Australia?

Enforced by executive agencies, predominantly the police, when a crime has been committed is likely to be committed.

6 What is contract law and why is it an important branch of law in Australia?

See page 17 – Forms the foundation of the private enterprise (capitalist) system

7 When and why would people look to the law of tort to protect their rights?

When a civil wrong (such as trespass, nuisance or negligence) has been committed against them.

Aggrieved parties want a civil remedy to "right the wrong" eg damages

Focus Questions Page 28**1 What is a crime?**

See pages 18/19

2 Why are crimes referred to as public wrongs?

Unacceptable behaviour that threatens general public standards and disturbs social cohesion generally,

See pages 16 and 18

3 How are crimes categorised and classified?

See pages 21/22

4 What is criminal liability?

A person can be legally prosecuted and incur a sanction for committing a public wrong.

5 What elements have to be proven to convict a person of a crime?Guilty mind (*actus reus*) and guilty act (*mens rea*)

See page 23

6 What are strict liability offences and why did parliament introduce them?

See pages 23/24

7 What forms can sanctions take?

See pages 26/27

8 Why are sanctions imposed?

See page 28

9 What is a civil wrong?

See page 22

10 Why are civil wrongs referred to as private wrongs?

Wrongs between private legal entities that do not involve the State or the interests of the community generally

See pages 16, 19 and 22/23

11 Briefly explain the two common types of civil wrongs in Australia.

See pages 22/23

12 What elements have to be proven to prove a case of negligence?

See page 24

13 What types of civil remedies are available for aggrieved parties in civil actions?

See pages 27/28

14 How are the concepts 'vicarious' and 'contributory' liability applied in civil law?

See page 25

15 How do citations vary between criminal and civil cases?

See pages 20/21

16 Compare the burdens of proof and standards of proof between criminal and civil cases.

See pages 25 and 26

General Focus Questions Page 29**1 Should Australia continue to persevere with two sources of law?**

YES ARGUMENT

They complement each other – strength of one can address the weakness of the other

See pages 238 to 240 for an article about how the two sources complement each other

2 Should Australian courts have the authority to resolve civil and criminal cases arising from the same incident simultaneously?

YES ARGUMENT

Will involve only one court appearance by the parties to the dispute, thereby saving individuals and the State additional expense.

Currently occurs in some inquisitorial systems.

NO ARGUMENT

Civil and criminal cases involve different standard of proof which may be difficult to reconcile at the same court hearing.

Would appear contradictory if the court found an accused person no guilty of the crime but liable to provide a civil remedy.

3 Should society condone a strict standard of proof in criminal cases particularly when there is growing public concern about an increase in the crime rate?

YES ARGUMENT

A person's liberty is at stake and every effort should be made to ensure that only guilty people are convicted.

Criminal guilt should be determined by law and merit in individual cases, not as a part of general public policy, because it is expedient.

4 What legal status should international law have in Australia?

Currently it has no legal force until incorporated into Australian law, by either statute or case law. In most cases, international law expressed in UN conventions can only be incorporated into Australian law by statute.

To give international law legal status without enactment would be tantamount to Australia handing over its sovereignty to foreigners. Doubtful whether the majority of Australians would accept this proposition.

TOPIC 1 : THE AUSTRALIAN LEGAL SYSTEM

Chapter 3 The Basis of Government in Australia

Focus Questions Page 31

1 What is the rule of law?

See pages 30/31

2 What essential elements must exist for the rule of law to exist in Australia?

See pages 30/31

3 How does the rule of law stand in contrast to arbitrary government?

Rule of law exists by government institutions exercising power as authorised by the people under the Constitution.

Arbitrary government means government agencies exercise power without reference to a Constitution and therefore the system is at the whim of those in control usually autocrats backed by military force.

4 How do parliaments and courts facilitate the rule of law?

See page 31

Focus Questions Page 34

1 What are the main features of Australia's constitutional monarchy?

See page 32

2 How does Australia's constitutional monarchy vary from the United States' republic?

CM has a divisive hereditary head of state who exercises executive power on the advice of an elected PM per the conventions of responsible government.

US republic has an elected head of state who exercises executive power directly.

See pages 33/34

3 What are the roles of the Governor-General?

See pages 33 and 97/98

4 How would the 1999 model of the Australian republic have changed our current system?

Australian would have an appointed head of state, not the British hereditary monarch.

The roles of the President would have been essentially the same as the current Gov-Gen.

5 Explain why the 1999 referendum failed.

See page 34

Focus Questions Page 38

1 What is the Australian federation?

A national system of government where law-making power is shared between a number of independent and autonomous states(6 in Australia) and one central government authority.

See page 35

2 Outline the main features of the Australian federal system.

See page 35

3 What is the doctrine of the division of powers?

See pages 35/37

4 What powers can the Commonwealth legislate in?

Specific powers which are exclusive and concurrent

See pages 36, 37, 91 and 92.

5 What powers can the states legislate in?

Residual powers and concurrent powers

See pages 37, 91 and 92.

6 What powers can the Territories legislate in?

See pages 37 and 93

7 Briefly outline three ways that the federal balance can change.

Constitutional alteration by referendum

Referral of powers

Co-operative federalism

Cwth using the external affairs power

HCA interpretation

See pages 156 to 164

8 Identify five Commonwealth and state powers that affect your life each day.

COMMONWEALTH

Taxation laws

Social security laws

Air traffic control laws

STATE

Road traffic laws

Criminal laws

Education laws

Focus Questions Page 39

1 What is the separation of powers?

See pages 38, 39, 96 and 97.

2 Outline the main features and roles of the three institutions of government in the separation of powers.

See pages 38, 39, 96 and 97.

3 Apart from road rules, give a practical illustration of how the separation of powers functions at the state or federal level.

CWLTH PARLIAMENT

Makes laws to detain illegal immigrants

EXECUTIVE – IMMIGRATION DEPARTMENT

Administer the detention Centres

COURTS

Hears legal disputes re challenges to the detention of illegal immigrants

Focus Questions Page 45

1 Outline the structure and composition of the following parliaments:

- **Commonwealth Parliament**
See pages 39 to 44
- **South Australian Parliament**
See page 44
- **Northern Territory Parliament**
See page 45

2 What main traditions and practices have parliaments in Australia adopted from Britain?

See pages 43 and 44

3 How has the nature of the American Congress influenced the structure and role of the Australian Senate?

States' house of legislative review in a bicameral parliament
Equal representation from each State irrespective of size
Bills must pass through both chambers before assent can occur
See pages 41-42

4 Why does the voting system for Australian *lower houses* facilitate stable Executive Government?

Preferential voting in single-member electorates usually means only candidates from the two major political groups (Labor and Non-Labor) get elected so there is always a majority to form the Government and a minority to form the Opposition.
The majority party is able to govern for the term of the parliament. (3 years)

5 Why does the voting system for Australian *upper houses* lead to the creation of chambers hostile to the legislative programs of the Government?

Proportional voting system, which uses quotas, makes it possible for smaller (called minority) parties and Independents to gain a seat. As the larger parties lose seats so does their opportunity to gain a majority. Until Howard got a majority in the Senate in 2005 Governments have found it very difficult to command a majority in the Senate.

Practice has demonstrated that whenever a Government does not command a majority it finds it very difficult to pass its legislation in the form it wants.

Focus Questions Page 47

1 What are the respective legislative powers of the two Houses in the Australian Parliament?

Equal legislative powers except that supply must originate in the *lower house* and the *upper house* cannot amend it.
See pages 46/47

2 Outline the democratic roles of Australian parliaments.

See page 46

3 Why is the supplying role an important function of parliament?

Without the authority to collect taxes and spend money on public services no Government can function.
See page 46/47

4 What important role does the parliament perform in the separation of powers?

Scrutinises the other two arms of government

See page 47

Focus Questions Page 49

1 Explain the difference between direct and indirect democracy.

See page 48

2 What features must exist for Australia to adopt the principles of effective representative government?

See pages 48/49

3 Minority groups are not likely to be well represented in Australian Parliaments. Discuss the validity of this statement.

Particularly true in lower houses as they lack the ability to gain an absolute majority of votes in a single-member electorate.

Minority groups have had more success in *upper houses* because of the quota system in proportional voting.

Unless endorsed by a major political party people from minority groups (eg Aboriginal people) find it almost impossible to get elected.

Focus Questions Page 54

1 Explain the difference between executive power and executive government.

Executive power – authority or jurisdiction per constitutional rule

Executive Government – the body which is in Government power to govern the nation

See page 50

2 Who exercises executive power by constitutional rule?

Gov-Gen

See page 50

3 What are the relative roles of the Governor-General and the Federal Executive Council?

FEC is the official organ which advises the Gov-Gen

See page 50

4 Outline the structure and roles of the three arms of the executive power at the federal level.

See pages 50/51

5 What are constitutional conventions and why are they important?

Unwritten rules which prescribe how a Government is formed and exercises power

See pages 50/51

6 Explain how an Executive Government is formed in the Commonwealth.

See page 53

7 Outline important roles performed by governments in Australia.

See page 53

Focus Questions Page 56

1 What is responsible government?

See page 54

2 Under what conditions can a person become Prime Minister of Australia?

See page 53 and 54

3 Under what conditions is the Governor-General obliged to accept the advice of his or her Prime Minister?

See three conditions on pages 54 and 55

4 Outline the constitutional rules and conventions necessary for a government to be formed in the Commonwealth.

See page 51

5 What is meant by the term ‘chain of accountability’?

The link of accountability from the lowest employed person in the executive, who enforces the laws, to the people via the parliament. As an example, each is accountable to the higher authority:

Police officer - police sergeant - police superintendent - Police Commissioner – Minister for Police – Cabinet and Premier – Parliament – people!

See pages 55/56

6 Explain the difference between representative government and responsible government.

REPRESENTATIVE GOVERNMENT

Elected reps of the people (MPs) make laws on our behalf and are held accountable to the people at regular elections.

RESPONSIBLE GOVERNMENT

The Government is formed from the majority party in the lower house, and exercises power through the Gov-Gen, but is directly accountable to the parliament.

7 Why does the United States have a complete separation of powers?

US President is directly elected and cannot sit in the US Congress so the executive is separated from the legislative arm.

See page 33

Focus Questions Page 63

1 Explain, using examples, the differences between:

(a) courts of civil jurisdiction and criminal jurisdiction

In SA the Magistrates Court, District Court and Supreme Court all conduct hearings and trials in both jurisdictions

See pages 59 to 61

(b) courts of original and appellate jurisdiction

Original courts conduct hearings and trials in the first instance (see above) whereas certain courts decide cases on appeal eg Full Court of Supreme Court in civil

See pages 59 to 61

(c) courts of general and specialised jurisdiction.

MC, DC and SC exercise general civil and criminal jurisdiction, whereas all other courts only decide matters in narrow branches or areas of law eg Youth Court and criminal case involving juveniles under 18 years of age

See pages 59 to 62

2 What is Australia's highest court? Give reasons for this and state the jurisdictions it can sit in.

High Court, per Chapter 3 of Australian Constitution in OJ and AJ

See pages 55/56

3 What are the roles and jurisdictions of the following federal courts:

(a) Federal Court of Australia

(b) Family Court of Australia

(c) Federal Magistrates Court?

See pages 58/59 for an overview of all three courts

4 Explain the jurisdiction and roles of either the South Australian Magistrates Court or the NT Magistrates Court.

See pages 59/60 (SA) and page 62 (NT)

5 What factors should plaintiffs take into account when deciding which court to hear their case?

Whether the defendant is a 'straw person' ie able to meet any damages order of a court.

Strength of the case ie ability to succeed in court action because if plaintiff loses he/she may have to pay the legal costs of the defendant.

Cost of legal representation against likelihood of damages awarded.

The court jurisdiction and costs involved in taking action ie the higher the court the larger the application fee and greater the general legal and court costs.

Time and inconvenience.

May lead to loss of future amicable relationship with defendant eg neighbours, family, work colleagues

6 Outline the avenues of appeal within the South Australian court hierarchy.

MC to SC in matter of fact

MC to CCA in issue of law

MCD of MC to DC in issue of fact and to SC in issue of law

GCD of MC to SC in issue of fact, and FC of SC in issue of law

DC and SC to FC of SC (civil) and CCA (criminal)

Right of appeal by leave from FC of SC and CCA to FC of HCA

See page 58 and 61

7 Explain the avenues of appeal from a decision of a Supreme Court Justice in either South Australia or the NT.

South Australia and NT

SC to FC of SC to FC of HCA (by leave)

See pages 58, 61 and 62

Focus Questions Page 64**1 What is judicial independence, and why is it considered the cornerstone of the separation of powers?**

See page 63

2 How are judges appointed to and dismissed from the bench of a court?

See page 64

3 What conditions are placed on a judge in the performance of his or her judicial duties?

Cannot perform a legislative or executive function.

Cannot assist parties to collect evidence, prepare case or present it in court.

Cannot have an interest in the outcome of case (should disqualify himself)

Cannot sit in original and appellate jurisdiction in same case.

Must decide case solely on merits in fact and law, cannot apply or seek other arbitrary assistance or influence.

Must conform with general rule of law eg comply with doctrine of precedent, rules of statutory interpretation, treat people equal before law

4 What protections exist to preserve judicial independence?

See page 64

Focus Questions Page 66**1 What is judicial review and why is it important in Australia?**

See pages 65/66

2 How does the doctrine facilitate the rule of law?

Competent courts ensure legislatures and executive are complying with constitutional law by acting within their powers.

3 Why is the right of appeal important in Australia?

General protection of legal rights to ensure single judges in OJ conducted the hearing or trial according to law.

See page 65.

Analytical Questions Page 68**1 Which system is more appropriate for Australia, a constitutional monarchy or a republic?**

MATTER FOR ARGUMENT

See arguments for and against a republic on pages 169 – 170

2 How could Australia achieve a complete separation of powers, and should it?

HOW

Adopt the US styled presidential system where the President is elected by the people and cannot sit in Congress, nor can his Cabinet Secretaries.

MERIT

Matter for argument.

US President has far more powers than an Australian PM but still must work with Congress to pass legislation.

3 How can the Parliament become a 'rubber stamp' of the executive?

When Government commands a majority in the Senate eg Howard Government after July 2005 could develop this principle

4 Does the parliamentary system adequately represent all Australians?

YES ARGUMENT

If you believe the current voting systems for the two houses are fair and equitable, and MPs take accountability seriously.

NO ARGUMENT

Minority groups (eg Aboriginal people) are effectively disenfranchised as most unlikely that an Independent standing as an indigenous mandate would get elected.
Political parties in Government control the legislative process.

5 Present a case that Australia does not practice the rule of law.

People do not have equal access to the courts so equality before the law is not effectively being observed.

Parliaments and Governments can too easily erode fundamental rights eg proposal to detain suspected terrorists for extended period without being charged (abrogation of the presumption of innocence principle).

6 Should the constitutional conventions be codified into the Australian Constitution?

YES ARGUMENT

Makes parliamentary participants observe them.

Brings certainty to the constitutional system.

Prevents a recurrence of the 1975 crisis.

Consistent with other constitutional rules.

NO ARGUMENT

Reduces flexibility in the system to adapt to evolving circumstances.

Historically proven to be effective.

Australia has a stable political record so why change.

7 Does the Federal Government exercise too much power in Australia?

YES ARGUMENT

If it controls a majority in both Houses

Has very broad powers delegated to it eg putting illegal immigrants into detention centres

NO ARGUMENT

Merely acting within its constitutional powers which any citizen can challenge in the OJ of the HCA.

Directly held accountable at regular elections every 3 years.

8 In what ways is the constitutional division of powers causing problems in Australian society?

Causes fragmentation of laws between Cwlth and States.

Too many costly and inconvenient constitutional disputes in HCA.

States believe the external affairs power is being 'abused' by Cwlth to grab the States' residual powers.

9 Is the Federal Government really accountable to the Parliament?

YES ARGUMENT

If it does NOT controls a majority in both Houses and the Senate committee system can operate effectively.

NO ARGUMENT

Not accountable to HR as controls the majority.

Can stifle information to the parliament for effective scrutiny.

10 The Governor-General is a representative of the Queen. Discuss the validity of this statement.

Only in name, as the Gov-Gen cannot exercise any executive power on behalf of the Queen.

Gov-Gen can only act on the advice of his PM and responsible Ministers.

11 Why do Federal Governments find it difficult to get a majority in the Senate, and what are the implications of this?

Between 1981 and the October 2005 no Federal Government held a majority in the Senate largely because of the proportional voting system.

Between these dates the Senate was often hostile to the Government's legislative agenda and rejected (usually by amendment) many bills that the Government was displeased with.

Situation changed at October 2004 election because Howard Coalition Government gained a majority of one in the Senate wef I July 2005.

TOPIC 2 : CONSTITUTIONAL GOVERNMENT

Chapter 4 Constitutional development of the Commonwealth

Focus Questions Page 76

1 What is Australia's official name and how does it reflect the nature of its national system of government?

Commonwealth of Australia

Implies uniting of the independent Colonies for their 'common good'

2 Briefly explain the two most pressing reasons for the colonies federating?

See pages 73/74

3 Explain other reasons why the Australian colonies federated.

See pages 74 to 76

4 How have the reasons for federation been reflected in the Australian Constitution?

See pages 73 to 76

Focus Questions Page 84

1 List the major procedural steps leading up to federation in 1901.

See top of page 77

2 What was the Federal Council and why was it unsuccessful?

See page 78

3 What main roles did the Australasian Conventions perform?

See pages 78/79

4 What roles did ordinary Australians perform in the federation movement?

Voted for Colonial MPs to Colonial Parliaments which attended the 1891 Convention as delegates.

Stand as a representative for 1897 Convention and voted at those elections..

Participated in pressure groups eg federating leagues.

Participated at Corowa and other unofficial conventions.

Lobbied Colonial Parliament re amendments to the Constitution Bill.

Voted at Colonial referendum to approve the Constitution Bil.

5 What was the Corowa Plan and why did the Premiers' Conference adopt it?

See pages 79/80

6 Why were two referenda held in South Australia?

See page 81

7 What concerns did the British Government have with the Constitution Bill?

See page 82

8 When and where was the Constitution Act assented and proclaimed?

Assented by Queen Victoria on address of Imperial Parliament 9 July 1900.

Proclaimed by Queen Victoria on advice of Colonial Secretary on 17 September 1900.

See page 83

9 How was Australia governed prior to the first federal elections in March 1901s?

By a PM and Cabinet Ministers appointed by Lord Hopetoun (Australia's first Gov-Gen) pending elections later in year.

Higher Order Questions Page 85

1 Was federation a good idea?

YES ARGUMENT

Able to address all of the reasons for federation eg national security, free trade

NO ARGUMENT

All of the criticisms associated with federation:

Cwlth has assumed mantle as the superior federal partner by eroding the residual powers of the States.

Too many fragmented laws between different federal partners.

See evaluation of federal system on pages 154/155.

2 Why did federation occur when it did?

British influence.

Fear of invasion by European nations historically hostile to Britain.

Growing concern over inter-colonial trade barriers.

Colonial pressure from prominent politicians and colonists generally.

Wanted to commence new federation on first day of new millennium.

3 Why was it almost impossible to draft a purely legal constitutional document for Australia in the 1890s?

Had to be 'sold' to the colonists at referenda, so had to be a readable and palatable document.

4 Explain why the Australian Constitution is referred to as a legal and a political document.

LEGAL

Because it outlines the constitutional rules of government

POLITICAL

Because it delivers some political 'favours' eg no State can have fewer than 5 MHRS, without this political provision Tasmania would not join the federation.

5 In what ways would the Australian Constitution be different if it had been drafted in the twenty-first century?

Would have addressed issues not on the agenda at the time, such as:

human rights, Aboriginal affairs, environmental issues, consumer protection issues,

international factors, codification of the constitutional convention and the republic issue.

TOPIC 2 : CONSTITUTIONAL GOVERNMENT

Chapter 5 The Australian Constitution

Focus Questions Page 89

1 Clearly distinguish between constitutional rules and conventions.

See pages 86/87

2 What conventions are necessary to allow the Prime Minister to be the chief adviser to the Governor-General?

See pages 54, 55, 89, and 97 to 99

3 How can the constitutional rules be changed?

By referendum process

See pages 108 to 110

4 What major features of Australia's legal system are expressed in the Preamble?

See page 87

5 Why are political rules important in the governance of Australia?

To give practical effect to all of the other rules, specifically the conventions of responsible government/See page 89

Focus Questions Page 93

1 How does the division of powers share legislative powers between the federal partners?

See pages 36, 37 and 91 to 93

2 What fundamental principles distinguish the powers held by the Commonwealth and the states?

Cwlth's powers must be enumerated in the Australian Constitution or as interpreted by the HCA when resolving a constitutional dispute.

3 What legislative powers can the Northern Territory exercise?

See page 93

4 What rules address conflicting Commonwealth and state laws?

Inconsistency rule in section 109

HCA pronouncement re judicial review

See pages 92 and 93

5 What are the purposes of the referral of powers and cross vesting legislation?

REFERRAL OF POWER

To voluntarily transfer State residual powers to the Cwlth

CROSS VESTING POWERS

Allows the States to apply federal laws in State courts

See pages 92 and 93

6 Why is the doctrine of judicial review important in the Australian federation?

Protection of the rule of law.

HCA determines whether parliaments or Governments in Australia have exercised their powers consistent with constitutional law.

Focus Questions Page 96**1 How does the division of powers protect state sovereignty?**

Cwlth can only exercise enumerated specific powers

See page 94

2 What specific protections are enumerated in the Constitution to protect the states?

See page 94

3 How can the federal law-making process protect state powers?

See page 95

4 What role does the High Court of Australia perform in protecting the legislative powers of the states?

Applied the doctrine of judicial review

See page 94

5 Why would the Federal Government be reluctant to use the referendum procedure to gain additional specific powers without discussing the issue with the states first?

The federal criterion states that a referendum must have the support of a majority of States. To gain that support it is logical for the Cwlth to seek State compliance, as experience has demonstrated that any referendum that threatens State powers without their support will fail. See pages 110/111

Focus Questions Page 97**1 How does the Australian Constitution accommodate the separation of powers?**

See pages 96/97

2 What are the principal institutions of government and their respective powers in the following chapters of the Australian Constitution:

(a) Chapter 1—legislative power?

(b) Chapter 2—executive power?

(c) Chapter 3—judicial power?

See pages 96/97

3 What principles determine how the three institutions of government exercise their functions?

Parliament – constitutional government and representative government

Government – responsible government

Courts – judicial independence and judicial review

Focus Questions Page 99**1 Where does the Australian Constitution refer to the Queen as the ‘head of state’ and Australia as a constitutional monarchy?**

Not mentioned. Implied.

2 What is the relationship between the Queen, the Governor-General and the Australian Prime Minister?

Queen appoints and dismisses Gov-Gen on advice of PM

Gov-Gen appoints PM re conventions of responsible government and section 64

Gov-Gen can dismiss PM re reserve powers in section 64 eg 1975 crisis

3 What powers and functions does the Governor-General exercise in Australia?

See pages 97 to 99

4 What are the reserve powers of the Governor-General and under what conditions could they be exercised?

Powers Gov-Gen can exercise not on the advice of PM

See pages 33 and 98/99

5 Is the Governor-General really the Queen's representative in Australia?

Only in name, as the Gov-Gen cannot exercise any executive power on behalf of the Queen. Gov-Gen can only act on the advice of his PM and responsible Ministers.

Focus Questions Page 102

1 From where does the High Court of Australia draw its authority?

Chapter 3 of the Australian Constitution

Original jurisdiction sections 75 and 76

Appellate jurisdiction section 73

See pages 57, 58, 101 and 102

2 How are Justices of the High Court appointed and dismissed and on what grounds?

See page 100

3 How many Justices sit on the Full Court and the Full Bench?

See page 101

4 Explain the two jurisdictions of the High Court. Give examples of cases the High Court is likely to hear in those jurisdictions?

Original jurisdiction – constitutional disputes between Cwlth and States

Appellate jurisdiction – criminal and civil cases on appeal

See pages 57, 58, 101 and 102

5 Why is the High Court referred to as a 'Guardian of the Constitution'?

Enforces its provisions to ensure parliaments and government exercise power consistent with it.

Focus Questions Page 104

1 What powers does the High Court have to interpret the meaning of the Australian Constitution?

Original jurisdiction in section 76 of the Australian Constitution

See page 101

2 How did the High Court find that judicial independence is an integral element of the separation of powers?

When deciding *Boilermakers case* in 1956

See page 103

3 Why was the *Adban* case heard in the original jurisdiction of the High Court?

Constitutional dispute where only the HCA has jurisdiction because it involved an interpretation of the Australian Constitution per section 76

See pages 103/104

4 What legal issue was put before the High Court in the Adban case?

Could the Cwlth enact legislation in contravention of an implied freedom of political communication in the AC to give effect to the principles of representative government. That is, was the Act invalid because the Cwlth Parliament exercised a power *ultra vires* the Constitution?

5 What implied constitutional right was created by the High Court in the Adban case?

Freedom of political communication

5 How could the Adban case decision be overturned or changed in some way?

HCA departs from its own precedent in another case using the disapproval mechanism. A referendum is conducted to amend the Australian Constitution to change the wording to effectively negate the decision. The decision will remain in the 'history books' (ie law reports) but will not longer have the force of law.

6 What were the constitutional, political and social consequences of the Boilermakers' Case of 1956?

CONSTITUTIONAL

People gained an additional constitutional right

POLITICAL

MPs can no longer expect the same degree of protection under the defamation law

SOCIAL

Makes representative government more effective and transparent

Focus Questions Page 107**1 Name the three ways that human rights and freedoms are protected by law in Australia.**

Constitutional law, statute law and common law

See pages 6, 7 and 104/106

2 Why did the framers of the Constitution believe a comprehensive list of constitutional rights was unnecessary?

See Bill of Rights argument on pages 167/168

3 Briefly describe three explicit constitutional rights enjoyed by Australian residents.

See pages 104 to 106

4 Use examples to explain how constitutional rights can be added to, changed or removed?

By referendum – never happened since federation

By HCA interpretation eg Adban case

Focus Questions Page 108**1 Why was the free trade provision in section 92 included in the Constitution?**

See page 73

2 How has the High Court changed the meaning of section 92?

See page 107

3 What would have been the constitutional, political and social consequences of the Bond Brewing case?

CONSTITUTIONAL

HCA defined the parameters more clearly of section 92 to prevent States from passing legislation to protect local industries

POLITICAL

Limits the political powers of State Governments to protect State industries

SOCIAL

Had an impact on the local beer market and State economy generally.

Had an impact on the environment per the container return system

4 How does the Commonwealth's exclusive powers over the external tariff complement Section 92, the free trade provision?

See page 107

Focus Questions Page 112

1 Why was section 128 included in the Australian Constitution?

A mechanism that facilitate democratic, orderly and well considered amendments to the Australian Constitution/

See page 108

2 List the stages necessary to successfully alter the Constitution.

Consultation stage

Parliamentary stage

Referendum stage

Post-referendum stage

See pages 109/110

3 What criteria are necessary for a referendum to be successful? Why have the criteria been structured that way?

See referendum stage on page 109

4 What specific mechanism is included in the Constitution alteration process to prevent one House of Parliament from obstructing the conduction of a referendum? Why was this provision included?

See parliament stage on page 109

5 Why are time limits placed on conducting a referendum?

See referendum stage on page 109

6 How many successful referenda have there been since federation?

By 2005, 8 of 44

7 What are the two main reasons believed to cause the Australian people to reject most referenda?

Lack of strong and united bipartisan support

Arbitrary intrusion into State powers

See pages 110/111

8 Outline other reasons why referenda have failed since federation.

See page 111

Analytical questions Page 113

1 Is the Constitution out of date?

YES ARGUMENT

Written in 1890s

Does not include matters of current concern eg human rights, environmental issues, international issues

NO ARGUMENT

Only 8 of 44 successful referendum changes suggest people are satisfied.

HCA has kept it alive and vibrant by its interpretations when resolving constitutional disputes.

Referral of powers, cross vesting powers, co-operative federalism and use of the external affairs powers have addressed many issues requiring an alternative approach.

2 What aspects of the constitutional system reflect the visions of the drafters of the Australian Constitution?

Continuity of the federation.

Democratic nature of Parliament.

Senate as an effective house of review.

General application of the division of powers.

Referendum procedure preventing impulsive change.

3 Why does Australia need a Constitution?

As a federation it would be impossible, impracticable and unworkable for the States and Cwth to exercise 'sovereign' powers simultaneously in the absence of a Constitution.

4 Should the sovereignty of the states be protected by the Australian Constitution?

YES ARGUMENT

This argument is premised on the importance of protecting the federal nature of Australia and the important role performed by the States as part of the decentralised law-making process.

NO ARGUMENT

This argument is premised on the abolition of the States, or at least a reduced role for them in the federal system.

5 Does the federal parliamentary process protect state powers?

Yes, but to a limited extent:

Political party system dictates that Senators vote on party lines, so party initiated legislation has passed the Senate which have eroded State powers. Eg Howard Government's control of the 2005 Senate will probably allow it to strip the States' of their industrial relations powers. This situation is more effective when the Government has control of both Houses.

6 Why has constitutional change proven difficult to achieve?

See reasons for failure of referendums on pages 110.111

7 How does the Australian Constitution foster the principles of:

None of these concepts are enumerated specifically in the Constitution.

(a) representative government?

Implied by reference to wording in the Constitution eg 'chosen by' in sections 7 and 24
And by HCA's decision in Adban Case 1992

(b) responsible government?

Exists per the conventions of responsible government

(c) judicial independence?

HCA has implied the existence of the principle of JI in the Boilermakers Case 1956

8 Why and how has the High Court been able to change the meaning of the Australian Constitution?

WHY

HCA has sole original jurisdiction to interpret the AC to resolve constitutional disputes. The High Court is the only court the people wanted to resolve constitutional disputes.

HOW

By giving meanings to specific words and phrases when deciding constitutional cases.

9 Why is the High Court of Australia an essential institution in the nation's constitutional system?

To independently acts as a 'guardian of the Constitution' and therefore a protector of the rule of law.

That is, the HCA stands between the people and their government to prevent the exercise of arbitrary power.

TOPIC 2 : CONSTITUTIONAL GOVERNMENT

Chapter 6 Australia's Global Links

Focus Questions Page 115

1 What is international law?

See page 114

2 How was Australia linked to the global community after federation in 1901?

See page 114

3 What roles did the Australian Government and Commonwealth Parliament perform in forging Australia's own foreign policy?

See the article referring to the enactment of the *Statute of Westminster Adoption Act 1942* on page 114

Focus Questions Page 116

1 What references to international law are in the Australian Constitution?

2 Why does the Australian Constitution not place a greater emphasis on international law?

See page 115

Focus Questions Page 119

1 Explain, by illustration, the roles performed by the following institutions of government in forging Australia's global links:

- (a) executive
- (b) legislative
- (c) judicial

See pages 116 to 118

2 What power does the executive use to sign and ratify international treaties?

Executive power per section 61 of the Australian Constitution

NOTE The **Parliament** uses the external affairs power to incorporate the obligations of UN treaties into Australian law if it does not have a specific power head of power.

See page 116

3 What power does the Commonwealth Parliament exercise in enacting legislation to incorporate the obligations in treaties into Australian law?

Any relevant specific head of power or the external affairs power if it has no such power.

5 What is the process of incorporation?

The enactment of legislation through the Cwlth Parliament to give the obligations in UN conventions legal force in domestic law.

6 (a) What basic legal principle did the High Court create in the Teoh case?

That the Federal Government must take into account the obligations it has signed in a UN convention even if those obligations have not yet been incorporated into Australian law.

(b) Why has the Teoh decision been criticised for being contrary to the separation of powers doctrine?

The High Court effectively placed the executive in a more superior position than the parliament, by implying that it could incorporate UN convention obligations without enactment.

7 What status does the High Court give customary international law?

It is persuasive when considering cases where the principles are relevant. In Mabo No 2 the High Court referred to international customary law regarding traditional native title ownership.

Focus Questions Page 121

1 What is national sovereignty?

A nation's independent and autonomous authority over its own constitutional and political affairs, free from the interference of foreign nations.

2 Why would the Australian community be fearful of surrendering its sovereignty to foreigners?

Australians would effectively lose ownership and control over its own law-making power and make domestic law subject to the arbitrary intervention of foreigners.

3 Illustrate how the Federal Government and Commonwealth Parliament have exercised power to protect Australia's sovereignty.

See the examples provided on page 120

Focus Questions Page 121

1 What is an international treaty?

See page 121

2 What are the fundamental differences between bilateral and multilateral treaties?

See page 121

Focus Questions Page 123

1 Clearly outline the relationship between the executive and the legislative arms in the treaty-making process.

The executive signs and ratifies treaties, the parliament incorporates the obligations into Australian law by enactment.

See page 122

2 What is the role of the Joint Standing Community on Treaties in the treaty-making process?

See page 117

3 What role does the judiciary perform in the treaty-making process?

No specific role in the actual making process, but the High Court could be petitioned to decide whether the incorporation of treaty obligations into legislation is constitutionally valid.

Focus Questions Page 123

1 Outline Australia's relationship with the international community for the first few decades after federation in 1901.

Australia's foreign policy was essentially decided by Britain. Australia used British embassies and High Commissions in foreign nations. Eg Australia never declared war on Germany in WWI, Britain was at war, so Australia was at war!

2 How could the *Colonial Laws Validity Act 1865* restrict Australia from developing its own foreign affairs' policies after federation?

Britain could pass legislation to override any Australian law attempting to create an independent foreign policy.

3 Why did Australia amend the Immigration Restriction Bill to appease Britain?

Australia acted as a compliant and subordinate member of the British Empire as it did not want to offend the 'motherland'. Good relations with Britain was seen as very important in diplomatic, trade and national defence matters.

4 How and when were the constitutional constraints removed from Australia to allow it to develop its own global links free from the interference of Britain?

When Australia passed the *Statute of Westminster Adoption Act* in 1942 to ratify the *Statute of Westminster*. It did this to remove the constitutional constraints so that Australia's Prime Minister, John Curtin, could bring Australian troops back from the Northern Africa campaign to protect Australia from Japanese invasion.

Focus Questions Page 124

1 (a) What is the Commonwealth of Nations?

(b) What benefits does Australia gain from being a member of it?

See page 124

2 Which obligations is Australia compelled to adopt as a member of the Commonwealth of Nations?

No binding obligations, other than the rules of membership.

See page 124

3 What constraints would Australia becoming a republic place on its membership of the Commonwealth of Nations?

No real constraints. The membership rules state that it must resign, and then apply for automatic membership.

See page 124

Focus Questions Page 125

1 What is a bilateral treaty?

See pages 124/125

2 Apart from the two preceding illustrations, give other examples of bilateral treaties that Australia has entered into.

Australia has entered into hundreds of bilateral treaties with other nations. The common areas include: international airline landing right, social security reciprocal rights and obligations, visa and travel arrangements, diplomatic relations and trade agreements.

3 Outline the benefits and obligations of Australia entering into a specific bilateral treaty.

OBLIGATIONS

Australia must comply with the conditions of the treaty just as two parties to a contract must comply with the terms in it.

BENEFITS

Confer diplomatic, cultural and economic benefits eg mutual landing rights allows Qantas to fly into other nations to earn revenue for Australia.

Focus Questions Page 127

1 What is the United Nations?

See page 125/126

2 What are the primary objectives of the United Nations?

See page 126

3 Apart from the International Court of Justice, outline the other four main organs of the United Nations.

See page 126/127

Focus Questions Page 128

1 Why does Australia enter into non-human rights treaties?

See pages 127 and 130

2 Apart from the two illustrations above, give two other examples of important non-human rights treaties Australia has signed and ratified.

International Labor Organisation, re acceptable standards of employment for workers
Environment conventions re gas omissions and the ozone layer

Focus Questions Page 131

1 What are the purposes of multilateral human rights treaties?

See the arguments for human rights conventions on page 130

2 What is the human rights treaty framework?

See page 128

3 How are the human rights treaties intended to be implemented in nations which sign and ratify them?

By incorporation in statutes enacted by parliament.

4 How does the United Nations monitor compliance of these treaties?

By the various human rights committees

See pages 129/130

5 Comment on Australia's compliance of the six human rights treaties it has signed and ratified.

See criticisms of human rights conventions on page 131

6 Outline an argument that Australia should sign and comply with human rights treaties.

Universal application of human rights to make international mobility safer and more secure for travellers.

7 Outline an argument that Australia does not need to sign and ratify human rights treaties.

Australia has a very good human rights record by international standards and is capable of protecting its own citizens rights by Australian constitutional, statutory and common laws.

Focus Questions Page 133

1 What is the role and jurisdiction of the International Court of Justice?

See page 132

2 What impact has the ICJ had on Australian law and Australian courts?

See page 133

Focus Questions Page 136

1 How was the International Criminal Court established?

See page 133

2 What is the role and jurisdiction of the ICC?

See page 134/135

3 How did the Commonwealth incorporate the Rome Statute into Australian law?

Enactment of specific enabling legislation.

See the top of page 134

4 How does the principle of complementarity apply with the ICC and Australian law?

Australian criminal law will complement the role of the ICC. Australia has first option to prosecute offenders under Australian law, but if it does not the ICC can undertake proceedings.

5 Briefly outline the nature of the crimes triable in the ICC.

See page 135

6 Outline the powerful position that will be performed by the Federal Attorney-General in Australia's relationship with the ICC.

The AG has to give permission for the prosecution of a citizen residing in Australia.

7 What is the relationship between the ICC and Australian courts?

Australian courts are generally bound by the decisions of the ICC if the principles upon which Australia agreed to be a signatory to the Rome Statute

Analytical questions Page 137

1 Why would critics comment that international law is a 'toothless tiger'?

UN has very limited executive capacity to enforce its decisions. The military forces it uses are soldiers from member-states, who only intervene in the affairs of other nations to the extent condoned by the Security Council. The UN has a general policy of not enforcing its policies by the use of force.

2 United Nation treaties have proved beneficial and annoying to Australian Governments. Discuss the validity of this statement.

See the arguments for and against the UN HR conventions on pages 130/131. Many people see them as excellent standards for Australia to apply in our domestic laws, while others see them as an interference in Australia's sovereign affairs.

3 The Joint Standing Committee on Treaties (JSCOT) is an effective mechanism to supervise the treaty making process. Discuss the validity of this statement.

According to general observations JSCOT has bipartisan support and the Government and Parliament have readily accepted their reports on the treaty making process.

4 What features distinguish international courts from Australian courts?

Australian courts generally only have jurisdiction over issues arising in Australia or where an Australian interest has legal standing. The jurisdiction of international courts does not stop at national borders.

Australian courts rigorously use the adversary system, international courts have a more inquisitorial role.

Judges to Australia courts are appointed, judges to international courts are elected.

5 Australia does not need to be a signatory to UN human rights treaties as it has an excellent human rights record. Discuss the validity of this statement.

While it could be argued that Australia does have an excellent HR record by world standards, Australia wants to be a proactive and responsible member of the global community so it feels politically, diplomatically and morally obligated to be a signatory to HR conventions.

6 Australia should not insist on genocide, crimes against humanity and war crimes being heard in Australian courts as they are of international concern and should be heard in the ICC. Discuss the validity of this statement.

They are applicable to Australia if the alleged offenders are Australian citizens. If Australia is willing to prosecute such offenders earnestly then it should be allowed to exercise its sovereignty and apply the principle of primacy. ie take the initiative to prosecute before ICC proceedings commence.

TOPIC 2 : CONSTITUTIONAL GOVERNMENT

Chapter 7 Rights of Indigenous People

Focus Questions Page 138

1 What are the three ways that European nations expanded their empires?

See page 138

2 What authority did the British Crown use to colonise Australia in 1788?

Doctrine of *terra nullius*

See page 138

Focus Questions Page 139

1 Why are there very few sections in the Australian Constitution about Indigenous people?

See page 138

2 What are the purposes of the following sections in the Australian Constitution:

(a) section 51(xxvi)?

(b) section 127?

See page 139

Focus Questions Page 140

1 How did the referendum change the following sections in the Constitution?

(a) section 51(xxvi)?

Removing certain words to make Aboriginal affairs a specific power of the Cwlth

(b) section 127?

Repealed it

See pages 139/140

2 Why did the Government sponsor the 1967 referendum?

See page 140

3 Suggest possible reasons why nobody wanted to write the ‘no’ case in the government pamphlet about the referendum.

Would be a most unpopular proposition for reasonable people to argue why a certain section of the community should be continued to be discriminated against.

Focus Questions Page 142

1 How were Indigenous Affairs administered at government level:

(a) prior to 1967?

(b) 1967 to 2004?

(c) after 2004?

See page 141

2 How has the nature of government agencies changed since 1967 to administer the affairs of Indigenous People?

Aboriginal People were given a greater direct and effective say in their own affairs. While ATSIC was a radical proposition to give Indigenous people a greater say in their lives the organisation was abolished by the Howard Federal Government in 2004 after years of complaints and general and financial mismanagement. Currently, in 2005, Aboriginal affairs is in a transition period until new arrangements are formalised.

See page 141

Focus Questions Page 144

1 How does federal and state legislation protect Indigenous people's legal, social and economic rights?

See pages 142/143

2 How is Indigenous cultural heritage protected?

See specific legislation on pages 142/143

Focus Questions Page 145

1 Why were the following government inquiries established?

- (a) **Royal Commission into Aboriginal Deaths in Custody**
- (b) **The *Stolen Children Inquiry*.**

See page 144

2 In what ways have these inquiries assisted Indigenous People?

RC into ADC exposed problems faced by Aboriginal people when confronted with Australian (and previously Colonial) law. Has led to more enlightened methods of dealing with Indigenous people who break the law.

The *Stolen Children Inquiry* was a great awakening for the white Australian community as it highlighted the injustices Aboriginal people faced in the past, and still face to some extent. As with the RC made the authorities and the community rethink policies regarding indigenous people.

Focus Questions Page 145

1 Outline the possible problems that Indigenous people face when involved in court proceedings?

Cultural alienation, lack of access, discrimination, feeling of hopelessness

2 Suggest other reforms to make the court system more accessible and relevant to Indigenous people.

Many States and Territories are introducing enlightened reforms to the court procedures used to decide criminal cases against Indigenous People. For example, the Port Adelaide Magistrates Courts conducts a 'Nunga Court' once a week. Other States operate similar alternative court sessions.

See page 145

Focus Questions Page 148

1 How was the doctrine of *terra nullius* endorsed by the Australian court system?

See *Milirripum v Nabalco Pty Ltd* at the bottom of page 145

2 Why did the *Queensland Coast Islands Declaratory Act 1985* prevent Mabo from pursuing his native title claim in the courts?

It extinguished any possibility of common law ownership that Indigenous people might like to claim over islands in Queensland as statute law overrides common law.

See page 146

3 What roles did the High Court perform in granting the Meriam People native title over their traditional lands?

The HCA heard two cases:

Mabo No 1 the HCA held that the Qld Act was inconsistent with the *Racial Discrimination Act 1975* and therefore invalid under section 109. This decision enabled Mabo and others to continue their native title claim

Mabo No 2 the HCA held in a land case in civil law in its appellate jurisdiction by special leave that the Meriam People did have a valid common law claim over their traditional lands, which the HCA called native title.

4 Why did the Commonwealth Parliament pass the *Native Title Act*?

To accommodate the lawful, orderly and effective administration and adjudication of native title claims in light of the Mabo No 2 decision, as the courts would be unable to hear them all separately as occurred with Mabo.

5 What impact did the Wik Case have on Indigenous people's land rights?

Enabled Indigenous People to claim native title rights over pastoral leases, even though the lease would survive any conflict between the two.

See page 148

Analytical questions Page 149

1 The High Court was the champion of the Indigenous people's struggle for land rights, not Australian parliaments. Discuss the validity of this statement.

There would be strong grounds for this argument as the Colonial, State and Cwlth Parliaments could have passed native title legislation at any time within their jurisdiction, but did not. This would have been the case because Aboriginal People are a minority section of the community and native title claims could threaten the interests of the majority of white Australians, namely farmers, miners and pastoralists.

The HCA, sitting as an independent authority, was not subject to political factors facing parliaments as it was bound to decide the case on its legal merits.

2 Can legislation adequately protect the rights, interests and welfare of Aboriginal People?

Legislation can only achieve certain goals, and even with law there is no automatic guarantee that discrimination against Aboriginal People will cease. To be effective legislation has to be complemented by appropriate social and government policies and a genuine will of the rest of the Australian community to give Aboriginal People a "fair go"!

TOPIC 2 : CONSTITUTIONAL GOVERNMENT

Chapter 8 A critical Analysis of the Constitutional System

Focus Questions Page 156

1 How does the federal system enhance the governance of Australia?

See the arguments for federation on page 155.

2 Why is federalism an unsatisfactory system for governing Australia?

See the arguments against federation on page 155.

3 Why was the Senate the ‘necessary price of a federation’?

The drafters of the Constitution realised that the smaller Colonies (like SA, WA, Qld and Tas) would be reluctant to join the federation if there was no mechanism in the parliament to constrain the power of the larger Colonies, NSW and Victoria. The Senate being comprised of an equal number of Senators was the solution to the problem as it gave the smaller Colonies the numbers to prevent the larger Colonies from using their numbers to pursue legislation in their own interests.

Of course, the composition of the Senate, and the proportional voting system, have created problems for elected Governments who have persistently faced hostile Senates.

4 How has the Senate distorted the intentions of the federal system?

Could argue that the Senate has passed legislation that has eroded the powers of the States, keeping in mind that it was supposed to be a ‘States’ house of review’. This was evident when Labor Senators passed a raft of Bills to arrest income powers off the State during WW2. Of course, the contra argument to this is that the Senate was supposed to vote on legislation in from a ‘federal perspective’ and the taxation bill had th nation’s interests in mind, not individual States.

Focus Questions Page 164

1 Explain, using illustrations, how the following have affected the federal balance:

(a) referendum procedure

See pages 156/157

(b) referral of powers

See page 157

(c) role of the Senate

See page 158

(d) Concurrent powers.

See pages 157/158

2 What power enables the High Court to affect the federal balance?

In its original jurisdiction to resolve constitutional disputes per section 76 when it can give meaning to the Australian Constitution to do this. Many of its decisions have caused a change in the federal balance. See the various cases throughout this chapter.

3 How has the High Court changed the division of powers in the following cases?

(a) Engineers’ case

See pages 225 and 231

(b) Uniform tax case

See page 161

(c) Federal aid roads case

See page 161

(d) Tasmanian dam case

See page 162

(e) Brislan's case

See pages 163, 227 and 239

(f) Fraser Island case

See page 163

(h) Kable's case

See page 164

4 Why is the grants power a powerful weapon for implementing Commonwealth policy?

Cwlth can entice the States to pass certain legislation, and therefore implement prescribed government policies, to meet the requirements of the grant

5 What is unchallenged legislation and how has it affected the federal balance?

See page 159

Focus Questions Page 166**1 Why is there community debate over the High Court's powers?**

Essentially a concern that unelected judges command so much power to decide the state of the law in Australia, without being held directly accountable to the community for their decisions. This concern has sharpened in recent decades with so many controversial decisions being brought down by the HCA, such as the Tasmanian Dam case, Mabo decisions, Adban Case, Dietrich case and Ha Case.

2 Explain why it is necessary for the High Court to exercise its role as Australia's constitutional court and final court of appeal.

In a federation it is imperative that an independent and impartial court exists to resolve constitutional disputes, particularly between the two major federal partners –the Cwlth and the States. There is no other palatable alternative to perform this important constitutional role. Likewise, the has to be a final court of appeal in civil and criminal law, just as there is in all other nations.

3 Can the High Court be effectively supervised by the people and the other arms of government?**YES ARGUMENT**

People reserve the sovereignty to approve a referendum question to override any constitutional decisions of the HCA.

Parliaments can pass remedial legislation to override a HCA decision made in its appellate jurisdiction.

NO ARGUMENT

Referendums are too unreliable to be considered as an effective mechanism for the people to supervise the HCA.

Sovereign parliaments may have the democratic authority to supervise HCA constitutional decision, but not the constitutional authority to override them.

4 Explain why Justices of the High Court must be appointed and not elected.

See page 64

5 Does the High Court exercise too much constitutional power?

Read the arguments presented on pages 165/166. Beware, in the first edition the headings are the wrong way round.

6 What reforms could make the High Court more accountable for its decisions?

Very difficult to offer reforms that do not unduly interfere with the principle of judicial independence. Possible reforms could be:

A public review of each person's competence and legal views before appointment, similar to that which occurs for appointment to the US Supreme Court bench.

Increase the grounds for dismissal to include irrational decision making, although this would be difficult to justify or prove.

A majority of States must approve appointments to the bench.

Focus Questions Page 168

1 What is a *Bill of Rights*?

See page 167.

2 Why do supporters believe that it is the best method of protecting human rights?

Democratically decided by the people at a referendum.

Cannot be arbitrarily interfered with by parliaments or governments.

3 What United States experiences suggest Australia should be wary of including a *Bill of Rights* in the Constitution?

See problems associated with US gun control in the arguments against a Bill of Rights on page 168.

4 What influence will the High Court have over a *Bill of Rights* placed in the Constitution?

It will be subject to judicial interpretation.

Concern is that the HCA could interpret the Bill of Rights in a manner disapproved of by many in the community eg US Supreme Court held that capital punishment is not a harsh and unusual punishment.

5 Explain why you would support or oppose a referendum to include a *Bill of Rights* in the Constitution.

Matter of personal choice. Most people would elaborate one or two of the arguments provided on pages 167 or 168.

Focus Questions Page 170

1 Outline the arguments for and against an Australian republic.

See arguments on pages 169/170

2 From your own research state what model of republic was proposed at the 1999 referendum.

See page 34

3 What republic model do you think the Australian community would support?

The community appears divided between three models:

MINIMALIST MODEL

The 1999 referendum model where the head of state would be a President appointed by the Cwth Parliament, who would exercise powers in a similar manner as the current Gov-Gen.

ELECT THE PRESIDENT MODEL

The President would be elected by the people and would exercise similar powers as the current Gov-Gen.

EXECUTIVE PRESIDENT

The President would be directly elected by the people and perform a similar role as the US President. This model is a radical departure from the Westminster system which would make the executive truly separate from the legislature.

4 Suggest reasons for the failure of the 1999 referendum.

See page 34

TOPIC 3 : LAWMAKING

Chapter 9 Legislation

Focus Questions page 177

1 What factors constrain the nature and types of laws that Parliaments can make?

Constitutional government

Democratic factors

See top page 174

2 Give examples showing how the following have influenced the nature of legislation passed by parliament:

(a) Political parties

Party policies given legislative form eg industrial relation philosophy of the Liberal Party are reflected in the 2005 reforms

(b) Pressure groups

Lobby governments and parliament to enact specific legislation eg anti-smoking
Pressure groups lobbying to have smoking banned in public places

(c) Public service

Advise government on technical matters eg Treasury employees re taxation rates
In the federal budget

3 What is a mandate and how does it affect the type of legislation made?

See top page 175

4 What types of investigative committees are there in Australia and what roles do they perform in the law-making process?

Parliamentary committees – standing, select and reference committees consisting of elected MPs who review a specific subject area and report to parliament how to respond to specific bills being debated eg Senate committees

Investigative committees set up by governments with experts on them who report directly to the Government to assist it draft appropriate legislation eg Royal Commissions

5 Give reasons why parliament might pass complementary and remedial legislation?

See bottom page 176 and top page 177

Focus Questions page 180

1 What are the main differences between a public bill and private member's bill?

See bottom page 177 and top page 178

2 What are the main differences between an ordinary bill and a supply bill?

Supply bill – authorises the spending of Government money

Ordinary bill – bill about policy, not funding

See page 178

3 Outline the different types of public bills?

Public bills are either supply bills or ordinary bills

4 How can the vote on a bill be recorded on the floor of the parliament?

On-the-voices and divisions

See page 179

5 Outline the two fundamental ways that influence members in supporting or opposing a bill?

Political party rules or a conscience vote

See pages 179/180

Focus Questions page 187**1 In which House are most bills initiated? Why?**

Lower houses because most Ministers sit in them

2 Outline the Minister's role in making legislation.

Public consultation at all stages

Getting Cabinet approval

Overseeing the drafting stage

Steering passage of bill through parliament

Arranging for proclamation of Act

Administration of Act

3 Outline an essay plan of the main stages involved in making statute law.

Pre-parliament stage

Approval of Bill by Cabinet

Drafting by OPC

Parliament stage

3 readings stages in two Houses

Post-Parliament stage

Assent and proclamation

See flow chart pages 181-182

4 What is the purpose of the following stages?**(a) first readings**

Formality, reading of long title only, no debate

(b) second reading

Major debating stage after Ministers speech

(c) consideration in detail

Informal debating stage where amendments are debated and Minister quizzed

(d) third reading

Formality, conclusion to debating stage, usually little or no formal debate

5 Outline the Opposition's role in making legislation.

Scrutinising role in both Houses

Offers amendments to improve the Bill

Votes on Bills, contrary to public perception supporters of most public bills

6 How does the type of bill affects its passage through parliament?

Supply bill can only be initiated in *lower houses* and *upper houses* cannot amend them.

(Section 53 of the Australian Constitution)

Ordinary bills can be initiated and amended in either House

7 How does the type of bill affect its passage through parliament?

Senate cannot amend supply bills but can suggest amendments.

Senate can reject or block supply bills

All bills, except constitutional alteration bills, must pass through both Houses in the same form before being assented.

8 How does the making of legislation reflect the principles of:**(a) constitutional government?**

Parliaments cannot only enact legislation *intra vires* their constitutional powers

(b) representative government?

Elected MPs debate and pass bills and they are held accountable to the electorate regularly.

(c) legislative review?

Upper house in the bicameral parliaments review legislation proposed by the Government in the *lower house*. A bill cannot be assented until passed in both Houses in the same form.

9 Can the Queen's representative refuse to assent a bill? What is likely to happen if this occurs?

No, Gov-Gen represents a divisive monarch who can only exercise power on the advice of her parliament or Prime Minister and Government Ministers

Gov-Gen can refuse assent if he believes the parliament has exercised a power *ultra vires* the Constitution or the Bill has not properly passed through both Houses in the same form.

If the Solicitor-General advises the Gov-Gen that the Bill is within the parliament's constitutional powers and the Gov-Gen still refuses to assent it, he faces the possibility of removal by the Queen on the recommendation of the PM.

If a Bill has not passed both Houses correctly, then the Bill would return to the parliament and the problem would be addressed.

10 How does assent and proclamation occur?

Assent – a legislative matter where the presiding officers advise the Gov-Gen that the bill has passed both Houses in the same form so the Bill will be given the royal approval and becomes an Act.

Proclamation – The Act is transferred to the control of the relevant Minister in the executive arm. The Minister will decide when to have the Act officially commenced as a new law by its starting date published in the *Government Gazette*

11 Why are Acts not proclaimed immediately after assent?

See Page 187

Focus Questions page 189**1 What is the difference between a disagreement and a deadlock?**

A **deadlock** must meet the criteria in section 57 of the Australian Constitution

The Senate must twice reject the same Bill after twice being passed in the HR with a lapse of 3 months between each rejection.

A **disagreement** occurs when the Senate does not pass a public Bill in the form acceptable to the Government but the section 57 criteria have not yet been met.

2 What is a hostile *upper house* and what problems does it cause government?

A Senate where the Government does not have a majority and which wilfully and persistently refuses to pass public bills in the form the Government wants.

Governments get frustrated because the Senate is disturbing its planned legislative programme which it usually claims it has a mandate to do so.

3 How can a compromise and abandonment resolve a deadlock?

See page 189

4 How does a conference of managers operate in South Australia to resolve a deadlock?

See page 188

5 Why does South Australia not use the double dissolution mechanisms to resolve deadlocks?

SA Constitution Act makes no provision for a joint sitting and general election vary really change the composition of the two Houses.

Focus Questions page 191

1 What must occur before a deadlock occurs between the two Houses of the Commonwealth Parliament?

The Senate must twice reject the same Bill after twice being passed in the HR with a lapse of 3 months between each rejection.

2 Explain the double dissolution mechanism can be used to resolve deadlocks in the Commonwealth Parliament.

See the four stages outlined on page 190

3 What is a constitutional trigger and how can a Prime Minister use it to pass a bill without dissolving parliament?

It's a Bill which has meet the parliamentary deadlock criteria of section 57.

The PM can use it as a threat to the minority parties and Independents that he will call a double dissolution if they do not support the Government's bill. As all 76 Senators will be elected at the general election the quota falls and other minority parties and Independents have the opportunity to be elected which the incumbents are fearful of.

Focus Questions page 191

1 Comment on the effectiveness of section 57 to resolve deadlocks.

See page 191

2 Why is Mr Howard critical of the section 57 mechanism?

See page 191

3 What reforms are proposed to reform the double dissolution mechanism?

See page 191

Focus Questions page 192**1 Why isn't the double dissolution mechanism in section 57 suitable for resolving deadlocked supply bill?**

Government cannot govern for three months with supply, the time needed to meet the deadlock criteria. In 1975, when the Liberals blocked Whitlam's supply bills, the Government started to face financial constraints after only being denied supply for a month.

2 Explain how Sir John Kerr resolved the 1975 deadlock regarding the blocking of the supply bills.

Used his reserve powers in section 64 of the Constitution
See page 192

3 How did Prime Minister Whitlam unwittingly play a role in his own demise?

He amassed the constitutional triggers which met the section 57 deadlock criteria. Caretaker PM Fraser used them to have Kerr dissolve both Houses and call a general election. Of course, all triggers lapsed as the Liberal Government did not support them.

Focus Questions page 196**1 How can *upper houses* supervise legislation?**

Bicameral review

Committee system

Place a sunset clause in the Bill the Government is forced to accept

Quiz Ministers at Question Time

2 What are sunset provisions and why does parliament use them?

A section or part of an Act is designed to terminate after a prescribed period of time and it must be reviewed to be revived.

Used when matters are controversial or the outcomes are unsure and a test period is advisable.

3 Explain ways that parliaments can make Ministers accountable for the legislation they administer?

Per the conventions of responsible government Ministers are held directly accountable to the parliament. This can occur at Question time, during debates or by motions of no confidence.

4 How does the parliamentary committee system supervise legislation?

MPs sit on committees to investigate specific issues outside of the chamber and report back to the parliament how to proceed on a bill.

See page 193/194

5 How can the Ombudsman supervise legislation?

See page 195

6 What are administrative tribunals and what roles do they play in supervising legislation?

Non-judicial adjudicating bodies which act as screening bodies to try and resolve disputes before court proceedings

See page 194

7 Explain the roles of superior courts in supervising legislation.

HCA and the doctrine of judicial review and statutory interpretation

See page 195

Focus Questions page 200

1 Why should residents be generally pleased with the parliamentary process to make laws in Australia?

Democratic involvement of the people through elected representatives
 Can be a member of a political party and stand for parliament
 Open democracy – can view proceedings
 Can petition and lobby parliament
 Can challenge the validity of legislation in HCA

2 What role did the people play in deciding what powers the parliaments could exercise?

Colonists voted at referendums in 1899 to approve the Australian Constitution Bill which prescribed the powers that parliaments could exercise.

3 Why is legislation preferable to case law in the areas of motor vehicle regulation and road traffic control?

Comprehensive (broad area) lawmaking
 Can be made prospectively to address likely problems that could arise
 Able to seek the advice of experts

4 How can individuals play an effective role in law-making?

Vote responsibly at regular elections
 Can be a member of a political party and stand for parliament
 Lobby parliament as an individual or a member of a pressure group
 Petition parliament, Government or MP

5 What important roles do political parties perform in the legislative process?

Accommodates stable government – Two major political parties means there is always a majority Government party and an Opposition.
 Allows ordinary people with common views to achieve ultimate outcomes
 Ensures majority decisions occur so parliament can function effectively.
 Accommodates the accumulation of resources so ordinary people can present an effective electoral platform

6 What is parliamentary privilege and how does it enrich the legislative process?

MPs cannot be sued for statements made in parliament.
 Fosters free, frank and open debate so that all issues are aired to make good laws.

7 What difficulties do minority groups face in Australia's system of representative government?

Almost impossible to get elected unless endorsed by a major political party.
 Parliament's decisions are based on majority votes which normally reflect the interests of the majority

8 What are parliaments reluctant to pass controversial legislation?

Because parliaments are comprised of major political parties which are fearful of electoral backlashes against unpopular issues

9 What major weaknesses are identified in Australia's federal system regarding law-making by the federal partners?

Fragmentation of laws – ie different education systems in each state
 Duplication of laws
 Over-representation and cost of big government
 Buck-passing and inter-government blame-shifting when areas of responsibility are blurred.
 Conflicting statutes which lead to periods of uncertainty until resolved by the HCA

10 How do political parties weaken the effectiveness of representative government?

Argument that MPs cannot truly represent their individual electorates as they are bound by party rules.

Elected members of political parties can be dominated by people in the party machine who are not elected MPs and therefore not held accountable

11 How can parliamentary privilege be abused?

When people's reputations are tarnished without careful examination of the evidence or the matter is not in the public interest in the first interest.

TOPIC 3 : LAWMAKING

Chapter 10 Delegated Legislation

Focus Questions Page 205

1 What is a delegated authority?

See page 202/203

2 From where do delegated authorities get their power to make delegated legislation?

Parent or enabling Acts

See page 202

3 Explain how the Governor exercises his/her power to make delegated legislation.

See pages 202/203

4 What are the common types of delegated legislation?

See the top of page 204

Focus Questions Page 206

1 How does delegation improve the efficiency of parliament?

Relieves its workload and places law-making power into the hands of experts in the particular field.

See pages 204/205

2 Why are unelected government agencies delegated the power to make regulations?

Relieves its workload and places law-making power into the hands of experts in the particular field.

See pages 204/205

3 How does delegation improve the democratic law-making process?

Decentralise law-making power to local councils who have elected members to make laws that reflect local needs

See page 205

4 What advantages do regulations have in emergency situations?

Can be made quickly and without disruption.

See page 205.

Focus Questions Page 208

1 What laws govern the making of regulations in South Australia?

Parent or enabling Acts and guidance legislation, principally the *Acts Interpretation Act* and *Subordinate Legislation Act* in SA.

See page 207

2 In which branch of government are regulations made?

Executive

3 What is an enabling or parent Act and why is it necessary?**WHAT**

A statute that delegates law-making power to a delegated authority which operates in the executive arm.

WHY

Parliament is the sovereign law-making body which must authorise delegation, otherwise delegated legislation does not have the force of law.

4 Who formally drafts regulations and how does that agency perform its role?

See the Drafting Stage on page 207

5 What role does a Minister or Cabinet play in the making of regulations?

See the confirmation and proclamation stages on page 208

6 When does a regulation become a law?

See the proclamation stage on page 208

7 Why must regulations be tabled in parliament?

Parliament, as the sovereign law-making body, delegated the power

Focus Questions Page 211**1 Why is supervision of delegated legislation necessary?**

Like all human-made institutions it is not perfect and needs continual review and up-dating,

To ensure that it is meeting its intended objectives.

To ensure that it is not unduly infringing human rights.

2 How can parliament limit the delegated power of a delegated authority by enactment?

Amend the enabling Act and prescribe specific constraints.

See page 209

3 Clearly outline the important roles performed by the parliamentary committee system and the disallowance process.

See pages 209/210

4 How can Ministers be supervised in parliament concerning delegated legislation?

Question time, Grievance debates, normal debates and through the committee system.

5 What roles do administrative tribunals perform?

Similar to the supervision of legislation. See page 194

6 In what ways do courts supervise delegated legislation?

See pages 210/211

Focus Questions Page 213**1 What benefits does the regulatory process offer the South Australian Parliament?**

Relieves its workload, places law-making into the hands of experts and allows for the decentralisation of law-making power to be given to elected Councils.

See pages 204/205

2 What benefits does the regulatory process bestow on citizens?

Gives them greater access to the elected officials at Councils who make regulations for local areas.

Community groups can directly lobby the Government agencies which make regulations, eg fishers lobby the Dept of Primary Resources, instead of Parliament.

3 What major criticisms are aimed at parliaments for delegating power to delegated authorities?

See page 212

4 Give possible reasons to explain why small business is critical of regulations.

Adds to “red-tape” (ie laws regarding business activity) and therefore the costs of conducting business.

5 How can delegated legislation foster greater community participation in law making?

Community groups can interact directly with delegated authorities more effectively than MPs or Ministers of Government.

Rate-payers have closer contact with elected Council members.

Analytical Questions**1 Should parliament delegate law-making power to unelected government agencies?**

Yes, if they want to relieve their workload and have experts make regulations that are relevant, safe, timely and appropriate.

Parliament reserves the authority to disallow a regulation after tabling.

2 Is delegated legislation necessary?

Yes, if the various reasons for delegated legislation are taken into consideration.

Eg Parliament is simply unable to pass a statute quickly enough to meet an emergency situation and MPs lack the expertise to make appropriate laws in technical areas.

3 What alternatives are there to delegated legislation?

Yea, but they have been rejected in favour of this alternative. As the reasons expound, parliament simply cannot make laws to cover specific details nor has it the expertise to make appropriate laws in a range of technical areas.

4 The disallowance mechanism is only effective in hostile *upper houses*.**Discuss the validity of this statement.**

Essentially correct, as the Government members would be expected to support their Minister who approved the regulation. Disallowance would, therefore, be less likely in an *upper house* in which the Government has the majority.

TOPIC 3 : LAWMAKING

Chapter 11 Case Law

Focus Questions Page 215

1 In what two ways can judges make case law?

Judicial pronouncement and statutory interpretation

See page 214

2 Why do courts have the power to make case law?

To exercise judicial power to resolve every conceivable legal dispute brought before them for adjudication. When judges were first commissioned they were given the authority to resolve all disputes, and create as much law as necessary to do it.

3 Briefly explain how a branch of law is created.

A novel case comes before the courts.

A judge creates a legal principle to resolve it which becomes a precedent.

This precedent is the “first brick in the wall” of the new branch of law.

As new cases of a similar nature arise the precedent is broadened to resolved the dispute.

Over time a whole body of law evolves.

This is essentially how all branches of law (such as the law of contract and negligence) evolved.

See page 215

Focus Questions Page 215

1 What elements does a judge’s decision include?

See pages 215

2 What are the differences between:

(a) **issues of law and issues of fact**

See page 215

(b) *ratio decidendi* and *obiter dictum*?

See pages 215/216

3 What status do *ratio decidendi* and *obiter dictum* have in the case law making process?

See pages 215/216

4 What is the principle of *stare decisis* and why is it used to make case law?

See page 216

5 What is the doctrine of precedent and how does it enhance the application of case law?

See page 217

6 What is the relationship between the principle of *stare decisis* and the doctrine of precedent?

See pages 216/217

7 Explain, with examples, the differences between a binding precedent and a persuasive precedent.

Remember, every precedent has binding and persuasive status. Eg a Supreme Court precedent is binding on lower courts but persuasive to other precedents.

See page 217

Focus Questions Page 219

1 What must occur before the case law-making process can commence?

A dispute must come to the courts for adjudication

2 Briefly outline the stages in the case law-making process.

See the chart on page 219

3 What are the roles of the following in the case law-making process:

(a) the parties in the dispute

Argue their cases before the judge by presenting legal argument

(b) the trial judge

Listens to legal submissions from the parties and then decides the state of the law
When writing the judgment. Obligated to follow binding precedents and consider persuasive precedents.

(c) the other arms of government—executive and legislative

No direct role in a specific case, but Parliament may have passed legislation prescribing
What type of law can be applied.

(d) appellate courts?

Review the precedent created in the original court. Can uphold the case law, reverse it in total or change it in some way.

4 When does case law become ‘settled’ in Australia?

When endorsed by a superior appellate court, either the Full Court of the Supreme Court or the Full Court of the High Court.

Focus Questions Page 223

1 What was the state of the law regarding the sale of soft drinks to consumers prior to *Donoghue v Stevenson*?

Doctrine of privity per the law of contract

See page 220

2 What limitations did this law provide consumers?

Remedies only applied to the parties to the contract, not necessary consumers who are not a party.

See page 220

3 Briefly outline the facts leading to the *Donoghue v Stevenson* case.

See page 220

4 What was the main legal issue put to the House of Lords for it to consider?

See page 220

5 What authoritative cases did the court consider? In what ways did they:

(a) support Mrs Donoghue’s case

George v Skivington 1869

See page 221

(b) support Mr Stevenson's case?*Winterbottom v Wright* 1842

Page 221

6 What was the decision of the House of Lords? Briefly explain who won the case and the three main elements now necessary to establish a case of negligence.

See page 221

7 Clearly explain the *ratio decidendi* of the House of Lords with respect to the following concepts:**(a) duty of care principle****Mr Stevenson had an obligation to wash his ginger beer bottles so that they did not contain snails that could injure other people****(b) legal neighbour principle**

Mrs Donoghue was a consumer, who was a person his ginger beer was likely to injure that he should have thought about when washing his bottles.

(c) causation

There must be a direct link between the breach of the duty of care and the injury caused. In this case Mrs Donoghue was caused to get sick because of Mr Stevenson's failure to honour his duty of care.

(d) reasonable person test

A mythical test, conducted by a court, to see what a comparable responsible manufacturer would have done if placed in Mr Stevenson's position.

(e) foreseeability

To be liable to provide a remedy to Mrs Donoghue it had to be predictable to a reasonable person that a consumer could be injured by a manufacturer not washing his bottles and allowing a decomposed remains of a snail to come out of it.

8 Outline the legal and social consequences of the *Donoghue v Stevenson* case.**LEGAL**

Set a binding precedent for lower courts to adopt.

Commenced a whole new branch of law – the law of negligence.

SOCIAL

Would make manufacturers adopt better quality control methods.

Could lead to more civil actions.

9 How did the following cases develop the law of negligence:**(a) *Grant v Australian Knitting Mills* 1936****(b) *Hedley Byrne & Co Ltd v Heller & Partners* 1963****(c) *Jaensch v Coffey* 1984?**

See pages 222/223

Focus Questions Page 224**1 Why do judges need to interpret statutes?**

See page 224

2 Why does parliament give courts broad discretionary powers?

See page 224

3 Explain three factors which makes the interpretation of statutes difficult.

Ambiguity of the English language.

Changing variables, such as community values and technology

The statute does not clearly cover all possible contingencies.

Focus Questions Page 227

1 Explain the three common law rules of statutory interpretation.

See page 225

2 What rule of interpretation was used in the following cases? Give reasons for your answers.

(a) *R v Ann Harris 1836*

See page 226

(b) *Brislan's case 1935*

See page 227

(c) *Bassell v McGuinness 1981*

See page 226

(d) *Adler v George 1964*

See page 225

2 What are the canons of construction? Use an example to illustrate your answer.

See page 226

3 How is the doctrine of precedent applied in constructing statutes and why is it important?

See page 227

Focus Questions Page 229

1 What rules guide judges in the principal act being constructed?

Object and definition sections.

See page 228

2 How do parliaments use *Acts Interpretation Acts* to guide courts in their interpretation of statutes?

See pages 228/229

Focus Questions Page 232

1 How do courts use the following mechanisms to supervise case law:

(a) **reversal**

See page 230

(b) **overruling**

See page 230

(c) **disapproval**

See pages 230/231

(d) **distinguishing?**

See page 230

2 What is remedial legislation and why do parliaments pass them?

See pages 231/231

3 How can parliament assist courts to make good law?

Passes guidance legislation, such as:

Acts Interpretation Act

Specific rules in legislation, such as the requirement that courts use the law of negligence when considering cases concerning straying animals (*Wrongs Act Amendment Act 1983*)

Focus Questions Page 236

1 The following features bring great strengths to the case law system. Explain what they are:

(a) principle of *stare decisis* and the doctrine of precedent

Consistency, uniformity and predictability – and therefore justice!

(b) judicial independence

Cases decided solely on the merits of the case by the evidence presented to the judge and the legal submissions of Counsel, not arbitrary factors.

(c) judicial discretion.

Parliament intentionally gives judges the authority to apply “general” words in statutes appropriately to meet each specific case to bring about just outcomes.

2 What weaknesses should the community be aware of regarding the features above?

Doctrine of precedent if rigidly applied can ingrain injustices in case law.

Judicial independence bars judges from seeking external expert advice that could be invaluable in assisting them reaching an appropriate judgment.

Judges may lack the technical or other competence to appropriately use their discretionary power.

3 Why should the community support the doctrine of judicial review regarding the case law-making process?

Allows for the objective scrutiny of an original court’s decision by a greater number of legal minds to ensure that the decision was reached using the appropriate legal principles and logic.

4 Do the strengths of the case law system outweigh the weaknesses?

Obviously yes, otherwise Australia would have discarded the system years ago.

Analytical questions Page 237

1 Should judges make law?

See the arguments in Chapter 12 on pages 245/246

2 Are judges too rigidly bound by the doctrine of precedent?

Not if the principle of departure are applied appropriately. Depends on the conservatism of the bench.

3 Should judges be allowed to make broader principles of law, not just those to resolve a dispute before them?

YES ARGUMENT

Places law-making into the hands of experts.

Allows laws to be made free from arbitrary external factors, such as political expediency.

NO ARGUMENT

Would essentially be making judges sovereign law-makers in competition with elected parliaments, a position that are not held accountable to perform.

4 Judges do not make law, they only apply it.

Discuss the validity of this statement.

A nonsense statement often peddled by conservative judges.

Clearly judges create case law as the decisions of the High Court in the Mabo No 2 and Dietrich cases demonstrates.

5 Case law is made by a privileged club of judges and lawyers from which members of the general community are excluded.

Discuss the validity of this statement.

YES ARGUMENT

Australian judges are predominantly white Anglosaxon males from middle class backgrounds. The minority of judges are women (in 2005 there was no female High Court Justice) and very few from other minority groups, such as Aboriginal People or from Asian backgrounds.

NO ARGUMENT

It may appear that judges are a privileged club but in reality judges must be appointed from the most qualified and experienced members of the legal profession, which is open to all sections of the community who get a law degree, pass the Bar examination and demonstrate distinguished service in the profession at the Bar.

TOPIC 3 : LAWMAKING

Chapter 12 A Critical Analysis of the Different Modes of Lawmaking

Focus Questions Page 240

- 1 Explain three ways that statute law and case law complement each other to achieve social cohesion.**

Select any three ways from those supplied on pages 238 to 240

- 2 Explain how case law made by independent judges complements statute law made by elected parliaments.**

Judges can interpret statutes to bring about just outcomes in specific cases. See the *McGuinness Case* on page 239.

- 3 What role does statute law perform to address bad case law?**

Parliament can pass remedial legislation. See the example on page 176

- 4 Give three examples from your own experience where statute law complements case law.**

FAMILY LAW

The Family Law Act 1975 prescribes the rules that must apply when determining residence and contact orders, the Family Court applies those principles to specific cases.

DEVELOPMENT LAW

The *Development Act* prescribes the general rules, but the courts must apply them to specific development situations.

ROAD TRAFFIC LAW

The *Road Traffic Act* prescribes the offence of dangerous driving, but a court would have to decide whether the particular driving conduct is dangerous per the Act.

Focus Questions Page 242

- 1 How does the federal system affect the relationship between statute law and case law?**

State statute and case law only apply within the State's borders.

Federal statute and case law applies nationally.

When a conflict applies between a valid federal statute and a valid State statute, the former prevails to the extent of the conflict.

Federal case law made in the High Court prevails over state case law per the doctrine of precedent. Ie the High Court can reverse or overrule state case law.

- 2 Outline the direct and indirect roles performed by statute law in the creation of case law.**

INDIRECT ROLE

Statutes create courts and grant them judicial powers which judges can exercise to make case law.

DIRECT ROLE

Statutes instruct courts how case law must be made. For example: *Acts Interpretation Act* stipulate how statutes must be interpreted.

3 How is case law used to supervise statute law?

Statutory interpretation

High Court's case law created by interpreting the Constitution can be used to invalidate statutes.

See page 195

4 How is statute law used to supervise case law?

Remedial and complementary legislation

See page 232

5 Identify three relationships between statute law and case law evident in your daily affairs.

Interpretation and application of the *Road Traffic Act* daily in Magistrate Court

Interpretation and application of the *Immigration Act* re illegal immigrations on TV almost daily.

Knowing that the case law elements of a valid marriage are incorporated in the laws required to create a valid marriage per the *Marriage Act 1961*.

Focus Questions Page 244**1 Which type of law evolved first in Britain?**

The edict of Kings was first, then judge-made-law.

2 What types of law were used on British settlement in the eighteenth century?

British received law – as much statute law and case law as required.

3 What similar constraints does the federal system place on statute law and case law?

Both types of laws only apply within each specific State's borders

Both are subject to constitutional law.

4 Explain how statute law and case law are both subject to judicial review.

STATUTE LAW

The HCA can declare statute law invalid if a parliament exercised a power *ultra vires* the Australian Constitution

CASE LAW

Appellate courts can reverse a precedent created by an original court on appeal.

5 Why is case law inappropriate for regulating traffic and motor vehicle standards?

Judges can only make case law after a case is brought to them for adjudication. Traffic law must be made comprehensively in advance by elected parliaments geared to make this type of law on advice of experts.

6 What distinguishes the timing of making statute law and case law?

Statute law can be made at any time, case law cannot. Judges can only make case law when a dispute is brought before them for resolution.

7 Is case law subject to the demands of democratic principles?

No! Judges cannot be influenced by arbitrary external factors, such as democratic pressures, when deciding cases.

8 Explain the sovereignty in both statute law and case law.

Statute law overrides case law when a conflict occurs. The only exception is the case law created by the High Court when it interprets the Australian Constitution.

Focus Questions Page 247**1 What principles and rules support the proposition that judges should be allowed to make case law?****SOVEREIGNTY OF PARLIAMENT**

Parliament enacted statute law to create courts and delegated them with judicial power with the authority to make case law to the extent necessary to resolve disputes.

Parliaments reserve the authority to pass remedial legislation to override case law.

COMMON LAW

Historically courts have been allowed to exercise the general principles of the common law to create rules to resolve legal disputes.

2 How can the short-comings of the case law making process be adequately supervised?

By remedial and guidance legislation passed by parliament.

See page 232 re remedial legislation and page 229 re *Acts Interpretation Acts*

3 Why wouldn't society want to rely on judges to make all of the laws?

Cannot make comprehensive, broad letter law to predict future conduct so that laws can be made to accommodate it.

Judges cannot seek external expert advice to make appropriate law.

Judges are not held accountable as are elected parliaments.

4 What strengths and weaknesses does the doctrine of precedent bring to the case law-making process?

See the strengths on page 233 and weakness on page 234

Analytical questions Page 248**1 Why should Australia persist with two sources of law?**

See pages 238 to 240 regarding the important complementary role they perform.

2 Australia should combine its laws into one codified system.**Discuss the wisdom of this proposal.**

This codified approach to law-making applies in nations which adopted the Roman codified legal system, of which most European countries are examples.

Australia has not historically followed this path and it would be very difficult to radically change to this type of system overnight.

3 Should judges be allowed to make law?

See the arguments on pages 245 and 246

4 Should elected parliaments be the sole law-making bodies in Australia?**NO ARGUMENT**

Judges are necessary to interpret statutes to create case law to bring about just outcomes to specific cases.

High Court must have the power to create constitutional case law to supervise the exercise of power by parliaments and governments.

Parliament simply unable to make laws to cover every conceivable possibility that may arise.

This is why parliaments allow judges to create and develop the laws of contract, trespass, nuisance and negligence.

5 Statute law should override case law in every instance.

Discuss the wisdom of this proposal.

NO ARGUMENT

High Court must have the power to create constitutional case law to supervise the exercise of power by parliaments and governments. This is only effective if this case law overrides statute law.

6 Parliament has the ultimate say over the state of law in Australia.

Discuss the validity of this statement.

This is not a valid statement as no parliament in Australia can override the case law created by the HCA when it sits in its original jurisdiction to interpret the Australian Constitution to resolve constitutional disputes.

TOPIC 4 : JUSTICE SYSTEMS

Chapter 13 Justice Systems

Alternative Dispute Resolutions

Focus Questions Page 254

1 Why are self-help, conceding and abandoning a claim and consensus referred to as alternative dispute resolutions?

They do not involve court order to bring about a finality to a dispute.

2 What is self-help and why should it be employed with caution?

See page 252

3 Under what conditions would ordinary citizens concede or abandon a claim?

CONCEDE A CLAIM

When liability could be proved by the plaintiff in a court.

When the costs of defending a claim outweigh the benefits.

ABANDON A CLAIM

The defendant is a 'straw person' and has no assets to meet a damages order.

To maintain amicable relations with other people, such as neighbours.

The costs of pursuing a claim are too prohibitive for the risk involved.

The matter is trivial.

4 What is consensus and why is it a preferred method of resolving a private dispute?

See pages 253/254

5 How can the DPP use the consensus model in criminal proceedings?

Plead bargaining

See pages 253/254

Focus Questions Page 257

1 What is mediation and why is it the preferred model of third-party intervention to resolve a dispute?

See pages 254/255

2 How can the Ombudsman assist parties to resolve a dispute?

A Cwlth and State Ombudsman can investigate complaints made by ordinary citizens against the decisions of government agencies at no cost. The Ombudsman can negotiate with those agencies to resolve the dispute if a solution is lawfully possible.

3 What is conciliation and how is it applied by government agencies?

See page 255

4 What two forms can arbitration take?

Institutionalised and independent arbitration

See pages 256/257

5 What is independent arbitration and how does it operate?

See pages 256/257

6 Outline the advantages of people using ADR mechanisms as opposed to litigation in the courts.

Less expense

Quicker resolution

People in dispute have greater personal control and ownership of the outcome.

Choice

Reasons for Court Hierarchies

Focus Questions 259

1 What is a court hierarchy?

See page 257

2 How does court hierarchy accommodate the following features of Australia's judicial system:

(a) right of appeal

See page 258

(b) application of precedent?

See page 259

3 What administrative efficiencies does a court hierarchy present the community in the resolution of disputes?

See page 259

4 How does a court hierarchy offer litigants a choice and what are the advantages of this?

See page 259

5 How are courts able to specialise in a court hierarchy?

See page 259

The Adversary System

Focus Questions Page 264

1 What is the difference between evidence and fact?

Witnesses give testimony (evidence) in court

Judges and/or juries are the determiners of fact ie construct their versions of the facts from the conflicting evidence presented at a trial

2 What is the role of evidence in court proceedings?

To assist the determiners of fact –judges and/or juries – to make a verdict of guilty or not guilty at a criminal trial or a judge to determine liability at a civil trial.

3 Why are there strict rules of evidence in the adversary system?

To give both parties to a legal dispute at a court hearing or trial a fair and equal opportunity to present their case by the calling and examination of witnesses.

Prevents the presentation of unreliable and irrelevant evidence.

Protect the rights of the accused, witnesses and victims

4 What is the difference between admissible and inadmissible evidence?

See page 262

5 Explain how a witness is examined at a trial.

Key concepts – sworn testimony, oral (*viva voce*), interrogatory style, examination-in-chief, cross examination and re-examination.

See page 263

6 Why is judicial review important in preserving the rules of evidence?

So appellate courts can decide if original court judges correctly applied the rules of evidence so that the accused in a criminal case, or litigations in a civil dispute had a fair trial and justice was done.

Focus Questions Page 267**1 What is an adversary?**

An enemy or opponent.

In the justice system it is the two opposing parties to a legal dispute.

2 Which three essential elements must exist for the adversary system to function in South Australia?

See page 260

3 Briefly explain the roles of the judge and the parties to a criminal dispute in the adversary system.

Judge – See pages 261, 284, 285 and 300

4 What is the difference between the burden of proof and the standard of proof in the adversary system?

See pages 25/26

5 Why are the standards of proof different in civil and criminal law?

The criminal standard of BRD is intentionally more difficult to meet because of the consequences to the accused if he is convicted. The person stands to lose basic personal freedoms by a period of imprisonment. The community wants to ensure only guilty people are convicted.

By contrast the State has an interest to maintain social cohesion so it wants to bring all civil disputes to a finality, so the balance of probabilities is designed to achieve this.

6 Briefly explain five rights an accused person is entitled to when charged and prosecuted of committing a serious criminal offence.

See the lists on pages 281 and 285

7 How does the legal system guarantee that a person receives natural justice?

By judges being commissioned to administer the law at hearings and trials strictly in accordance with the rule of law and the merits of the case.

Parties have a right to present their own case to an independent judge (or jury in criminal trials).

Parties to a dispute are treated equal before the law.

All parties have their basic legal rights protected.

Dissatisfied parties have the right to appeal the decision of an original court to an appellate court for judicial review.

Analytical questions Page 269

1 Alternative dispute resolution mechanisms offer better opportunities for people to resolve their disputes than do the courts.

Discuss the validity of this statement.

VALID STATEMENT

Less expense, quicker, parties retain more ownership and control over the outcomes.

NOT A VALID STATEMENT

Courts can guarantee a legal outcome whereas ADR cannot ensure that.

2 Should disputes be kept out of the courts?

As a basic proposition – yes!

Reduces cost, inconvenience and anguish to the disputing parties if the courts are used as the primary dispute resolution mechanism.

Reduces cost to taxpayers and frees valuable court resources.

3 Why should alternative dispute resolution mechanisms be used with great caution?

Self-help can lead to unlawful retribution

Parties can be lulled into accepted outcomes created from an unfair bargaining position.

Often very limited legal remedies to enforce ADR made decisions

4 How can the court hierarchy facilitate the administration of justice?

PARTIES' PERSPECTIVE

Allows the avenues of appeal.

Application of doctrine of precedent brings consistency to application of case law.

Plaintiffs have some flexibility to choose appropriate court.

COMMUNITY'S PERSPECTIVE

Administrative efficiency (whereby lower courts decide most minor cases) reduces costs to the community of maintaining the court system.

5 Why can the doctrines of precedent and judicial review not operate without a court hierarchy?

Basic logic – co-ordinate powers (those of equal ranking) cannot compel each other to do anything. Must have ranked authority for the doctrine of precedent and judicial review to work.

6 Is trial by jury an essential element of the adversary system?

No! Juries only an option in criminal trials where a person is being prosecuted with an indictable offence in either the District Court or Supreme Court.

All other courts (eg civil courts) use adversarial methods in the absence of juries.

7 What can pervert the course of justice in an adversarial trial?

Any of the elements does not function properly. For example:

Judge acts partially or is corrupted

Legal counsel intentionally mislead the courts eg by presenting tainted evidence

8 If the adversary system operates perfectly, there would be no need for appellate courts.

Discuss the validity of this statement.

The justice system is managed by people who are notoriously fallible, so it is doubtful whether perfect justice is a reality.

There will always be two perceptions of what 'justice' is and how the law should be administered so the appellate process will always be an inevitable and integral part of the adversarial justice system

TOPIC 4 : JUSTICE SYSTEMS

Chapter 14 The Jury System

Focus Questions Page 217

1 What is a jury?

See page 270

2 What role does a jury perform at a trial?

See page 270

3 Do accused persons have a right to trial by jury in Australia?

See page 270

Focus Questions Page 276

1 Where are the jury lists drawn from?

SA Electoral Roll for the House of Assembly

2 Explain and illustrate the following terms applied in the compiling of jury lists:

- (a) **eligibility**
- (b) **ineligibility**
- (c) **disqualified person**
- (d) **excused person**
- (e) **deferral.**

These categories are itemised on pages 271 to 273

3 Briefly outline the vetting process in the compiling of jury lists.

See page 271 and 274

4 Why are specific people precluded from participating in the jury system?

To reflect the adage, '*justice must not only be done it must be seen to be done*'.

The *Juries Act* excludes many categories of people to remove any doubt about there is a construction of a competent and impartial panel of peers of the accused.

5 What are jury sections and what is their purpose?

Convenient groups of juries (usually 25) who assemble in the public gallery of a court room to be empanelled for a criminal trial.

6 Briefly outline the main steps in the empanelling process.

See page 275

7 Why are the DPP and defence allowed to challenge potential jurors?

To ensure that the jury represents, in their view, an impartial and objective cross section of the peers of the accused.

8 Why do some juries sit with up to 15 jurors?

See page 275

Focus Questions Page 277

1 What are the consequences of guilty and not guilty verdicts?

Guilty – accused found convicted and committed for sentencing

Not guilty – accused acquitted and released from the custody of the court.

Normally double jeopardy applies in both instances, but the *Criminal Law Consolidation Act 1935* allows the DPP to appeal a guilty verdict of a judge for a serious indictable offence.

2 What forms can guilty and not guilty verdicts take?

See page 276

3 What is a hung jury?

See page 276

4 What is the difference between a perverse verdict and an alternative verdict?

See page 277

5 What conditions are placed on juries reaching their verdict and the reasons for them?

Can only apply admissible evidence presented at trial and the law explained by the judge.

Cannot investigate own evidence and must apply the BRD standard of proof.

Cannot disclose reasons for verdict.

Must deliberate for at least 4 hours to bring down a majority verdict.

Murder and treason verdicts must be unanimous.

Analytical questions Page 277

1 Majority jury verdicts pervert the ‘beyond reasonable doubt’ standard of proof and should be abolished.

Discuss the validity of this statement.

YES ARGUMENT

It suggests the existence of ‘reasonable doubt’.

The HCA held in the *Cheatle’s case* (see pages 102 and 105) that only unanimous verdicts can be accepted for federal indictable offences to give effect to section 80 of the Australian Constitution re trial by jury.

NO ARGUMENT

Some people are timid souls and cannot convict because of the consequences of their decisions, others are reluctant to make certain decisions whatever the verdict.

To address the fickle nature of people and to bring finality to a criminal case to ensure justice is done experience suggests majority verdicts are just verdicts.

If there was general community disquiet about them they would have been abolished.

2 Should some sections of the community be excluded from jury service?

Clearly those who are unable to participate effectively, such as the mentally disabled and those who cannot speak English adequately.

In the interests of justice ‘being seen to be done’ people in certain professions must be excluded, such as police officers, prison officers and people with serious past convictions, or who are on parole or awaiting trial.

Judges, court staff and lawyers should be excluded because they are required to participate in the justice system to make it function.

TOPIC 4 : JUSTICE SYSTEMS

Chapter 15 Criminal Justice System

Focus Questions Page 285

1 What are the roles of the police and the DPP in the pre-trial stage?

See pages 281 to 283

2 What is a preliminary hearing and why is it conducted?

See pages 282/283

3 Briefly outline the preliminary hearing procedure.

See page 282/283

4 What options does a magistrate have after considering the prosecution's evidence?

See page 283

5 What legal rights does an accused have in this stage?

See the list on page 281

Focus Questions Page 288

1 Briefly explain how the adversarial system of trial prescribes the roles of the following at the trial:

- (a) **DPP**
- (b) **defence counsel**
- (c) **defendant**
- (d) **judge**
- (e) **witnesses**
- (f) **jury**

See the respective roles on pages 284/285

2 What legal rights does an accused person have at the trial?

See the list on page 285

3 What are the obligations of the DPP at the trial?

Discharge the burden of proof to prove to present sufficient evidence at the trial to prove the accused guilty in accordance of the standard of proof, beyond reasonable doubt.

Present all evidence to the court, including evidence favourable to the accused.

Examine witnesses in accordance with the rules of evidence.

Generally comply with the rules of procedure.

See the prosecution's case on page 286

4 How is a witness examined at a trial?

See page 263

5 What are the closing addresses and why are they necessary?

Final summary to the judge or jury of each parties' case in law and fact.

See page 287

6 What does the judge do in his/her summing up stage?

See page 288

7 What does the judge do once the jury delivers its verdict?

Accepts the verdict of the jury:

Discharges an acquitted person from the custody of the court

Commits a convicted person to a sentence hearing after considering a bail application.

See page 288

8 How does the double jeopardy doctrine apply after a jury's verdict?

The accused cannot be retried again if acquitted.

DJ does not apply if the accused is convicted as he/she would welcome the opportunity for a retrial if the verdict is quashed on appeal

9 Suggest reasons for mistrials occurring in criminal trials.

Jury falls below 10.

Jury hears significant inadmissible evidence that could make the verdict unsafe.

Hung jury decision ie no valid verdict could be reached.

A juror(s) attempt to solicit own evidence or seek outside advice.

Trial adjourned for a long period due for some reason.

Focus Questions Page 292**1 Why is the sentencing hearing separate from the trial?**

Sentencing hearing occurs whether a trial occurs or not.

Guilt has to be determined at a trial first, often with a jury as the determiners of fact.

Two distinct criminal processes so there is a clear demarcation between them – trials determine guilt and sentence hearings determine the sanctions.

2 Briefly outline the procedures of a sentencing hearing.

See pages 289/290

3 What factors are taken into account when the judge determines the sentence?

Submissions by both parties – DPP and defence Counsel

Legislation

Principal act prescribes the maximum penalty

Sentencing Act prescribes the factors that must be considered eg deterrent factors.

Past criminal records, retribution, remorse etc

Victims impact statement

4 Why is the right of appeal a fundamental feature of the adversary system?

To ensure that the accused received a fair trial ie judge conducted the trial according to law.

That the community's interests were protected by the correct administration of criminal justice.

5 Which courts can hear appeals in serious indictable offence cases?

Court of Criminal Appeal – by right (presuming grounds do exist)

Full Court of High Court – by leave

See page 291

6 What are the two categories of grounds upon which to lodge an appeal?

See page 291

7 What is the role of the appellate court?

Per the principles of judicial review to determine whether the trial judge conducted the trial according to law and the accused received natural justice.

That the jury's verdict was safe by ensuring it only heard relevant admissible evidence.

8 What options does an appellate court have?

See page 291

9 Should there be minimum sentences for specific offences?**YES ARGUMENT**

Removes discretion from the judge by making the court comply with parliament's instructions prescribed in criminal statutes. Eg drink driving sanctions and other traffic offences are determined in this way

NO ARGUMENT

Judges must be the sole determiner of the appropriate sanction so that each case's special circumstances can be taken into account and a just outcome ensure.

Mandatory sentencing brings too much rigidity to the system and could lead to injustices.

Focus Questions Page 294**1 Identify three court procedures that are different from trials for indictable offences.****INDICTMENT**

Information laid before Magistrate to place the accused into the custody of the court.

BAIL APPLICATION

Magistrates Court determines whether a defendant is held in custody on remand or released on bail

PRELIMINARY HEARING

Magistrate determines whether a prime facie case exist to commit the accused to trial in a higher court for an indictable offence.

SENTENCING HEARING

Judge determines the appropriate sentence after guilt is admitted or accused is convicted.

APPELLATE HEARING

Reviews the conduct of the trial judge to determine if the trial was conducted according to law.

2 Suggest reasons why most defendants plead guilty.

Save and/or embarrassment cost if guilt will be proved at a trial

In Magistrates Court to hasten the conclusion of the proceedings.

Matter relatively trivial and not worth defending.

3 What types of sanctions are usually imposed by a magistrate?

Fines

Good behaviour bonds

Community service orders

Loss of driving licence

Suspended sentences

Home detention

Analytical questions Page 294**1 Should judges be allowed to take a more active role in the trial to ensure that a just outcome occurs?**

Would threaten the principle of judicial independence.

Without a comprehensive review of the adversarial system could be *ad hoc* and inconsistently applied by different judges.

Radical departure from the adversarial rules that could jeopardise the conclusion of a fair trial if the judge's involvement is piecemeal an inconsistent.

2 To ensure a just outcome occurs, witnesses should be allowed to answer questions in the narrative style and be examined by the judge and jury. Are these proposals likely to lead to just outcomes?

May allow the disclosure of more evidence for the judge and jury to decide verdicts, but would be a radical departure from the current adversarial rules.

Would probably be opposed by the legal profession until a comprehensive review of the rules have been considered to accommodate it. Eg does the same rules apply with children as with adults?

3 How can the length and cost of criminal trials be reduced to improve the accessibility and efficiency of the criminal justice system?

Possible reforms:

Impose time restrictions on the examination of witnesses.

Reforms the pre-trial proceedings to remove examination of evidence not in dispute.

Limit trial by jury as they slow down the examination of witnesses' process.

Give judges greater discretionary powers to hasten proceedings.

TOPIC 4 : JUSTICE SYSTEMS

Chapter 16 Civil Justice System

Focus Questions Page 297

1 Why is the principle of finality a fundamental principle that every Legal Studies student can support?

See page 296

2 Why is the principle of procedural fairness fundamental to the resolution of any dispute?

See page 296

3 What are the advantages to the general community of the courts adhering to the principles of publicity and disclosure?

See page 296

4 Can you think of any instances when judges should not give reasons for their decisions?

Where personal privacy issues are at risk. Reasons could be given, but not including intimate personal details if there is not need for the public interest.

To protect business security arrangements eg banking arrangements which protect the financial security of customers.

Focus Questions Page 298

1 What is case flow management?

See page 297

2 Why do court jurisdictions adopt it?

See page 297

3 Briefly outline the case flow management model adopted by South Australia.

See pages 297/298

Focus Questions Page 300

1 How is a civil action instigated?

See page 298

2 What factors are taken into account by the plaintiff when deciding which court to lodge the case with?

Strength of the case ie ability to succeed in court action because if plaintiff loses he/she may have to pay the legal costs of the defendant.

Cost of legal representation against likelihood of damages awarded.

The court jurisdiction and costs involved in taking action ie the higher the court the larger the application fee and greater the general legal and court costs.

Time and inconvenience.

3 What could happen if a defendant ignores a summons?

The matter could be heard by a court in the absence of defendant who would lose and have a judgment made against him/her. That is, it is not an option to simply ignore a summons.

4 What are the pleadings and what are their purpose?

See page 299

5 What role does the trial judge perform in the pre-trial stage?

See page 299

6 What is the fundamental purpose of the entire pre-trial process?**PLEADINGS**

To force the parties to exchange evidence and other matters so that an out-of-court settlement might be reached.

PRE-TRIAL CONFERENCES

Assist the parties to reach agreement.

Enforce the discovery of evidence.

If not possible, to crystallise the issues so the dispute is reduced to smallest ambit.

Prepare the cases for trial.

See page 299

Focus Questions Page 301**1 At the trial what is the role of the:****(a) plaintiff**

Discharge the burden to prove the defendant has committed a civil wrong and therefore liable to provide a civil remedy

(b) defendant

Rebut the allegations of the plaintiff to prove there is no liability, or at least, contributory liability

(c) judge?

Determiner of law and fact

See page 300

2 Who has the burden of proof and what is the standard of proof?

Plaintiff has burden

Standard is on the balance of probabilities

3 Outline the general rules of procedure that the judge must administer in civil proceedings.

Case book prepared for trial

Opening addresses

Plaintiff's case

Defendant's case

Closing addresses

Judge's summary and decision

See page 300

4 What decisions can the judge make regarding liability?

See page 300

5 What factors does a judge consider when determining the level of damages?

See page 301

Focus Questions Page 302**1 How are legal costs usually determined in civil cases?**

See page 301

2 What courses of action are available to a plaintiff if the defendant does not pay the damages awarded by the court?

See page 301

3 What rights do the parties have if they are dissatisfied with the decision of the trial court?

See appeal-judicial review on page 302

Analytical questions Page 303**1 Should judges be given broader powers to resolve civil disputes?**

YES ARGUMENT

Could ensure all evidence is disclosed so that a just outcome occurs.

Could assist to speed up proceedings and save administration costs to the community.

NO ARGUMENT

Could threaten judicial independence and impartiality.

Judge, under current adversarial rules, is not in the best position to know what is the optimum intervention time or strategies to take. That is, judge not actively involved in the collection of evidence so may arbitrarily interfere in the presentation of the cases by the two parties.

2 Should the parties to civil disputes be compelled to use ADR to preserve the resources of the community?

YES ARGUMENT

Civil justice administration cost savings to the community.

Can speed up the resolution of civil disputes.

Allows parties to control the pace and ownership of the resolution process.

NO ARGUMENT

The parties may be at the intransigent stage and ADR is futile so the only way to bring finality is by court order. That is, a time may be reached when ADR is pointless.

3 Should the pleadings stage be dispensed with to bring matters to trial more quickly?

The pleadings fosters the disclosure of evidence which could facilitate an out-of-court settlement to a point where one parties realises the futility of pursuing a weaker case. Against this background the pleadings stage should be encouraged, not abolished.

4 Is a civil trial a ‘contest between equals’?

Theoretically, all litigants are treated equally before the law but they may not have equal access to the law due to:

financial hardship

unequal bargaining power re financial resources

cultural issues

age, health and disability factors

5 Should parliament prescribe more rules to hasten the resolution of civil cases?

YES ARGUMENT

Is in the litigants’ and community’s best interests to have the resolution processes simplified and hastened.

NO ARGUMENT

Arbitrary interference could jeopardise each party’s right to present their own case to the court.

TOPIC 4 : JUSTICE SYSTEMS

Chapter 17 The Inquisitorial System

Focus Questions Page 306

1 In what fundamental respect does the inquisitorial system contrast with the adversary system?

Role of the judge

Adversary system – Passive role of a truly independent judge

Inquisitorial system – Active role of an investigating judge

See page 304

2 Outline the role of the inquisitorial judge in the resolution of a criminal dispute.

See pages 304/305

3 What are the roles of the prosecution and defendant in the inquisitorial system?

Unlike the adversarial system the parties are not autonomous and in control of their own cases.

Prosecutor operates on direction of judge.

Defendant does not present his/her own case.

See pages 304/305

4 How do the following vary between the inquisitorial and adversary systems:

(a) rights of the defendant

Presumption of innocence applies but the defendant is not in control of his

Or her own case, as the judge accumulates the one case in a dossier

(b) rules of evidence and procedure

Trial is not one continuous event as it can be adjourned so the judge can collect more evidence.

Rules of evidence principally placed on relevance, not technical admissibility as in the adversary system.

See page 305

(c) the verdicts?

Guilty and not guilty as in adversary system, but also an intermediate verdict,

Guilt not proven.

See page 305

5 Why would poorer sections of the community support the inquisitorial system in preference to the adversary system?

If the judge is professionally competent, and a person is innocent then the judge will collect the evidence to prove it so the person is never tried or acquitted at no direct cost to him/her.

6 Why are there likely to be fewer appeals in an inquisitorial system?

As the judge controls all stages of the investigation and the determination of the admissibility of evidence there will be fewer appeals on legal technicalities. Most appeals are on issues of fact, such as were the correct inferences made about the evidence collected or was the sanction appropriate. These are essentially the grounds of the appeals in the 2005 Corby case in Indonesia.

Analytical questions Page 307

1 Does the state play too powerful a role in the inquisitorial system?

YES ARGUMENT

Fewer legal rights bestowed on the accused to control the destiny of his or her own defence.
Just outcome at the discretion of a competent judge.

NO ARGUMENT

An investigating judges addresses shortcomings of the adversary system such as:
inaccessibility to the law as judge in control of 'the' case
fear that the parties are hiding evidence not favourable to their case

2 Inquisitorial judges cannot be truly independent and impartial.

Discuss the validity of this statement.

This is a matter of perception. Investigating judges would argue they have been properly trained to discharge an investigating function at 'arm's length' to guarantee their independence .

Critics of the system would argue being involved in the investigation stage inevitably interferes with their independence and clouds their judgment.

3 The accused has very limited legal rights in the inquisitorial system.

Discuss the validity of this statement.

This is a valid statement, as accused persons do not have control over their own cases ie what evidence will be collected and how it will be presented at the trial. The accused also is not entitled to trial before an independent jury of his/her peers.

Many rights are similar, such as the presumption of innocence and the right to appeal.

TOPIC 4 : JUSTICE SYSTEMS

Chapter 18 A Critical Analysis of the Justice System

Focus Questions Page 311

1 How does the adversary system give effect to the adage ‘great truths emerge from conflicting powerful argument’?

Party control of their own cases and the protection of their legal rights to do this
See page 308

2 Are the accused person’s rights better protected than witnesses’ rights and those of the victims’?

YES ARGUMENT

Appear to have more direct and transparent rights eg silence rule, while victims must give evidence, which can be invasion of privacy, intimidating or embarrassing (especially in sexual assault cases)

NO ARGUMENT

Victims can give evidence at trials.

Victims can give impact statements at sentencing hearings.

Victims do not incur costs to prosecute the accused.

3 Does the adversary system accommodate a trial between equals?

Argument re inaccessibility to the law

See page 309

4 What reforms can improve accessibility to the court system in legal proceedings?

Improvements to legal aid funding.

Limitation of costs re legal representation fees and charges.

Reduce the quantum of damages.

Movement towards ADR as opposed to court action.

Peg the amount parties can spend on legal representation.

Impose penalties on arbitrary methods use by counsel to disadvantage the other party

Allow judge to speed up proceedings to reduce trial time and associated costs.

5 Should criminal and civil matters be heard simultaneously?

YES ARGUMENT

Will involve only one court appearance by the parties to the dispute, thereby saving individuals and the State additional expense.

Currently occurs in some inquisitorial systems.

NO ARGUMENT

Civil and criminal cases involve different standard of proof which may be difficult to reconcile at the same court hearing.

Would appear contradictory if the court found an accused person no guilty of the crime but liable to provide a civil remedy.

6 Does the adversary system provide natural justice to the accused and the victims of crime?

ACCUSED - YES ARGUMENT

If an accused person has all of his/her legal rights protected, the judge conducts the trial in accordance with law and is afforded the right to appeal

VICTIM

Not a matter of 'natural justice' as a victim is not being prosecuted and his/her rights are not at jeopardy because he/she will not be convicted and sanctioned.

Focus Questions Page 315

1 How do the rules of evidence protect the rights of the accused in criminal proceedings?

Exclusion of unreliable and irrelevant evidence

Application of the right to remain silent rule

Past criminal record prohibited to ensure the accused is judged solely on the crime before the court.

2 How do the rules of evidence:

(a) facilitate the conduct of a fair trial

Only admissible evidence can be presented in a very prescribed form

(b) inhibit a fair trial for the accused

When judge dismisses a *voir dire* application for evidence to be declared inadmissible. If conviction ensues accused incurs significant cost to appeal the Verdict to have it quashed at an appellate hearing.

(c) deny justice to the victims of crimes?

Relevant evidence being declared inadmissible on a technicality and the accused is Acquitted because of it.

3 Should the hearsay rule be abolished or modified?

It is allowed under certain exception rules, but doubtful whether it will be allowed in a broader sense it has been found to be notoriously unreliable.

4 How can the rules of witness examination be reformed to ensure that the truth emerges at a trial?

Allow competent witnesses give their versions of events in the narrative to prevent Counsel phrasing questions to hide unfavourable evidence.

Special examination rules need to occur for child witnesses, particularly in sexual assault cases. eg children should not be subject to unreasonable cross-examination.

5 Was justice done in Coco's case?

General community sentiment would say not. Quite relevant and compelling evidence was disallowed on a legal technicality, not in the interests of seeking the truth.

Focus Questions Page 319

1 Why are juries considered to be an 'extension of the democratic principle'?

See page 315

2 Explain why ordinary citizens may have difficulties performing the role of a juror.

Lack of adequate legal education and training

Lack of training to adequately comprehend and weight evidence.

Legal issues too complex to grasp during a trial period.

Forced to work in a team with strangers in an arbitrary setting.

3 What three main reasons do you believe explain why the community wants to preserve the jury system?

See strengths of the jury system on pages 315/316

4 Should untrained and unqualified lay jurors be allowed to bring down verdicts in criminal trials?

Yes, if trial by your (randomly and therefore untrained) peers is the ultimate objective
 No, if it is believed determiners of fact should be adequately trained, experienced and prepared for the role

5 Is it defensible to maintain the secrecy about the reasons for a jury verdict?

ARGUMENT FOR SECRECY

Jurors are untrained in law and written judgments would lead to endless appeals and there would not be finality to a case.

Giving reasons would increase the cost of administering the criminal justice system as trials would last longer.

People would be more reluctant to serve as jurors, making the compiling process more difficult.

NO ARGUMENT

A person who is about to lose his/her freedoms from a jury conviction should be entitled to know the reasons to be sure the verdict was based on law and sound logic.

6 Outline three main reasons why the jury system is criticised in Australia.

See the weaknesses on pages 316/317

7 What reforms to the jury system could be implemented to improve its effectiveness?

See pages 317/318

8 What are possible alternatives to the current jury system to ensure the accused gets a fair trial?

See page 319

9 If you were being prosecuted for a serious offence, would you want trial by judge or jury? Give reasons for your answer.

Matter of personal judgment after weighing up the strengths and weaknesses.

Focus Questions Page 321

1 What weaknesses of the adversary system is the inquisitorial system able to overcome?

See page 320

2 What are the strengths and weaknesses of an intermediate verdict?

See page 320

3 A French magistrate has been quoted as saying: 'If I was innocent, I wouldn't care whether I was tried in France or England, but if I was guilty I would prefer to be tried in England'.

Give possible reasons to explain why the French magistrate holds this view.

An inquisitorial judge seeking the truth should find an innocent person did not commit the crime, and reasonable doubt should be able to be created in the adversary system to get an acquittal.

However, a guilty person is more likely to be acquitted in the adversary system because of the strictness of the rules of evidence, where vital prosecution evidence is disallowed on a technicality that eventually leads to an acquittal. See *Coco's case* on page 313 as an illustration.

Analytical questions Page 323

1 Should judges be given more discretionary powers to administer evidence and examine witnesses?

YES ARGUMENT

Could ensure all evidence is disclosed so that a just outcome occurs.

Could assist to speed up proceedings and save civil justice administration costs to the community.

NO ARGUMENT

Could threaten judicial independence and impartiality.

Judge, under current adversarial rules, is not in the best position to know what is the optimum intervention time or strategies to take. That is, judge not actively involved in the collection of evidence so may arbitrarily interfere in the presentation of the cases by the two parties.

2 Should the adversary system be replaced with the inquisitorial model?

Matter of personal judgement after considering the strengths and weaknesses of both systems

See arguments throughout Chapter 18 generally

3 The current rules of evidence often protect the accused at the expense of the community. Discuss the validity of this statement.

YES ARGUMENT

Right to silence rule precludes the accused from being examined if he/she is unwilling to take the witness stand.

A guilty person is more likely to be acquitted because of the strictness of the rules of evidence, where vital prosecution evidence is disallowed on a technicality that eventually leads to an acquittal. See *Coco's case* on page 313 as an illustration.

4 Should the jury system be abolished?

Matter of personal judgement after considering the strengths and weaknesses.

See pages 315 to 317

5 The community would have more confidence in the jury system if volunteers were allowed to be empanelled and jurors took a more active role in the trial. Discuss the validity of this statement.

Accused persons would be suspicious of volunteers' motives and such persons would likely be challenged during the empanelling process.

Doubtful that this system would be accepted by the parliament to amend the *Juries Act* as it would be too open for abuse by those with agendas to peddle.

6 Should juries be compelled to give reasons for their verdicts?

YES ARGUMENT

A person who is about to lose his/her freedoms from a jury conviction should be entitled to know the reasons to be sure the verdict was based on law and sound logic.

NO ARGUMENT

Jurors are untrained in law and written judgments would lead to endless appeals and there would not be finality to a case.

Giving reasons would increase the cost of administering the criminal justice system as trials would last longer.

People would be more reluctant to serve as jurors, making the compiling process more difficult.

7 Judges are more likely to reach just outcomes than juries. Discuss the validity of this statement.

YES ARGUMENT

A judge's verdict must be decided purely by law on the merits of the evidence presented at the trial as the decision is in writing and is transparent.

NO ARGUMENT

Unlike judges, juries can take into account community sentiment regarding the application of the law when delivering a verdict.

8 A French judge once stated: 'If I was guilty, I would prefer to be tried in the adversary system. If I was innocent, I wouldn't object to being tried in either the adversary or inquisitorial system'. Why would the French judge make this statement?

An inquisitorial judge seeking the truth should find an innocent person did not commit the crime, and reasonable doubt should be able to be created in the adversary system to get an acquittal.

However, a guilty person is more likely to be acquitted in the adversary system because of the strictness of the rules of evidence, where vital prosecution evidence is disallowed on a technicality that eventually leads to an acquittal. See *Coco's case* on page 313 as an illustration.

9 Should Australian judges have more investigatory powers?

YES ARGUMENT

Could oversee the investigation stage to ensure all evidence is disclosed so that a just outcome occurs.

NO ARGUMENT

Could threaten judicial independence and impartiality.

Would weaken the roles and powers of the autonomous parties and put the nature of the adversary system in jeopardy.

10 The inquisitorial system is more likely to reach just outcomes than the adversary system. Discuss the validity of this statement.

Matter of personal judgement after considering the strengths and weaknesses of both systems
See arguments throughout Chapter 18 generally

A hypothetical

The new justice system

Focus Questions Page 323

1 What is the likelihood of this justice system being adopted in South Australia?

Without the backing of the judiciary and the legal profession, the general community is unlikely to support this radical reforms so it is unlikely of success.

2 What weaknesses of the current adversary system would be overcome by this new system?

All evidence is more likely to be brought to light.

Improve accessibility to criminal justice

Fewer acquittals on the technicalities of the rules of evidence.

3 What strengths would be lost from the current system if this model was implemented?

The advantages of having investigating judges – assuming they are adequately trained and appropriately motivated.

The accused would have few legal rights, specifically the right to collect his/her own evidence and present his/her case at the trial.

Loss of trial before an independent jury.

4 Would criminal cases be more likely to result in just outcomes?

Yes if there are fewer acquittals, and the appellate courts do not disturb the verdicts of the trial courts.

5 What legal rights should people have in this new legal system?

Presumption of innocence

Reduced right to remain silent

Right to employ legal counsel who can liaise with the judge re the application of evidence collected and stored in the dossier.

TOPIC 5 : THE FAMILY AND THE LAW

Chapter 19 Relationships in Australia

Focus Questions Page 326

- 1 (a) **What powers does the Commonwealth have to make legislation regarding family relationships?**
See page 326

- (b) **What are the jurisdictional limits of that power?**
Cannot make family laws with respect to no-de jure marriages, such as:
de facto relationships, including same-sex couples
See pages 326/327

- 2 (a) **What powers do the states have to make legislation regarding family relationships?**
Residual powers
See page 327

- (b) **What are the jurisdictional limits of that power?**
Cannot make laws that conflict with federal law
Laws only apply with the particular state.
See page 327

- 3 **What jurisdiction does the Northern Territory have regarding family law and where did it get this power from?**
See page 328

- 4 (a) **How has jurisdiction over family law changed between the states and the Commonwealth since federation?**
Cwlth has gained power over ex-nuptial children per the referral of powers
See page 327

- (b) **Why did this change occur?**
So matters arising from children disputes – nuptial and ex-nuptial – could be uniformly and consistently determined in the Family Court.
See pages 327 and 352

- 5 **What are the current principal:**
 - (a) **Commonwealth statutes regarding family law?**
Marriage Act 1961
Family Law Act 1975 (as amended many times)
Child Support Act 1988 (Which in 2005 is undergoing significant amendment)

 - (b) **state statutes regarding family law?**
Family Relationships Act 1975
De Facto Relationships Act 1996

 - (c) **Northern Territory statutes regarding family law?**
De Facto Relationships Act 1991

6 Summarise how the federation divides family law between the states, territories and the Commonwealth.

COMMONWEALTH

Specific powers over marriage and divorce of valid marriages, and all children – nuptial and ex-nuptial.

STATES

Residual powers over all non-valid marriage relationships, predominantly *de facto* relationships-different and same-sex.

Focus Questions Page 334

1 What are the four common law elements of a valid marriage?

See pages 331/332

2 Where did these four elements originate from?

A British House of Lords case, *Hyde v Hyde and Woodmansee* 1866

See page 329

3 What constitutes a ‘man’ or a ‘woman’ in marriage law?

The definition is outlined in *Kevin and Jennifer J* 2003 decided in the Full Court of the Family Court

See page 331

4 Outline the following statutory requirements under the *Marriage Act*:

(a) marriageable age

See page 333

(b) prohibited relationship

See page 333

(c) valid marriage ceremony

See page 334.

5 Under what conditions is a foreign marriage recognised in Australia?

See page 334

Focus Questions Page 335

1 What is an annulment of a marriage?

A Family Court determination that a valid marriage never existed in the first place.

See page 335

2 Where are the rules for a nullity of a marriage prescribed?

See page 335

3 What grounds allow the Family Court to grant a decree of nullity?

See page 335

4 How does a person get his or her marriage annulled?

See page 335

Focus Questions Page 338

1 Describe the legal rights and obligations the married spouses have in the following categories:

(a) parental responsibilities

- (b) **property ownership**
- (c) **sexual relationships**
- (d) **financially maintaining each other**
- (e) **criminal and civil proceedings**
- (f) **death of one spouse**
- (g) **citizenship.**

See pages 335 to 338 for an itemised explanation of each one.

2 Explain how changing social values have affected the rights and obligations of the spouses to a marriage.

General dissatisfaction by a broad section of the community that the State was making a moral judgment about private affairs and invading the privacy of the individual.

This sentiment led the Labor Federal Attorney-General in 1975 (Lionel Murphy) to introduce the Family Law Bill into the Cwlth Parliament.

The Bill was passed by a conscience vote in both Houses and commenced in January 1976.

While it did not change the nature and procedures of creating a valid marriage it did radically change the philosophy how a valid marriage could be dissolved. As a consequence spouses who married after 1976 had a different attitude towards marriage and the legal rights and obligations contained in it.

Focus Questions Page 340

1 How is a *de facto* relationship defined in:

- (a) **South Australian law**

See page 338

- (b) **Northern Territory law**

Similar to SA, See pages 338 to 340

- (c) **NSW and Victorian law?**

Have passed legislation to include same-sex partners as *de facto* partners

See page 339

2 (a) Why is the Commonwealth constrained in its powers to legislate in family law for *de facto* relationships?

Has no specific power over non-valid marriage relationships

- (b) **How could this federal relationship change?**

Constitutional amendment by referendum

Referral of power

Radical change of the definition of 'marriage' by the High Court

Cwlth enacting uniform legislation pursuant to an UN convention

Cwlth and States agree to uniform legislation per a co-operative federal agreement (co-operative feudalism)

- (c) **What areas can the Commonwealth legislate in regarding *de facto* relationships?**

Under its incidental specific powers, such as taxation and social security

3 (a) What must occur for a *de facto* relationship to commence?

No formal legal requirements or procedures

See page 338

- (b) **How does the law recognise the commencement date of a *de facto* relationship?**

Some entitlements a time limit is specified

See page 339

(c) Why is a commencement date important?

To be eligible for state and federal legal entitlements and protections

Eg a de facto relationship must have existed for at least 3 years (or a child was born in it) to give the partners statutory protections regarding property settlement after the breakdown of that relationship per the *De Facto Relationships Act 1996*.

See pages 339 and 366/367

Analytical questions Page 341**1 Are the elements of a valid marriage appropriate in modern Australia?**

Concern is expressed that same-sex marriages should be allowed to reflect prevailing community sentiment.

It is interesting to note that the Howard Government had the *Marriage Act 1961* amended in 2004 to formally include the *Hyde v Hyde* definition regarding a marriage being between a man and a woman. Evidently the Federal Government believed a State was going to legislate to allow same-sex marriages in that State. Given that the marriage power is a concurrent power and that the proposed reform could be argued is not inconsistent with the *Marriage Act* then the state legislation could be valid.

To prevent this the Howard amendment prevents any State from pursuing this path because of the inconsistency rule in section 109 of the Australian Constitution.

2 Should the Australian Constitution be changed to give the Commonwealth broader powers over marriages?

Critics have suggested the *Marriage Act 1961* should be amended to recognise:
 same-sex marriages
 customary Aboriginal and Torres Strait Islander marriages
 indeed, all forms of *de facto* relationships

3 Should the state decide who can marry and who cannot?

This would probably be deemed by the High Court (if challenged) to be contrary to Australia's adoption of the principles embedded in the rule of law, namely, that certain human rights are inalienable and cannot be interfered with by government agencies.

As the family unit is a fundamental element of the vibrant life of a nation, the High Court could hold that a marriage must be entered into voluntarily by people who live in accordance with democratic principles, where freedoms and liberties of the individual are paramount.

TOPIC 5 : THE FAMILY AND THE LAW

Chapter 20 Breakdown of Relationships in Australia

Focus Questions Page 344

1 What is 'fault divorce' and when did it apply in Australia?

See page 342

2 Briefly explain how fault divorce occurred.

See page 342

3 Why was there widespread community dissatisfaction with this system?

State made a moral judgment about private affairs.

Gross invasion of the privacy by the State (per the Supreme Courts which held divorce proceedings in open court.

The grounds of divorce often reflected the symptoms of a broken marriage, not the causes.

Unrealistic to apportion total blame on one spouse for the breakdown of a marriage.

Children treated like the property of their parents, as custody was granted to the 'innocent spouse' as a reward for good conduct in the marriage, just as the fault-spouse was punished by not being granted custody.

Focus Questions Page 344

1 When was the *Family Law Act* enacted?

See the list of objectives on page 343

2 Do you think this Act has the community's support and reflects prevailing values and attitudes?

Despite obvious criticisms of the Act by sections of the community, the overall philosophy regarding no-fault divorce is supported by the overwhelming majority of the Australian community.

Clearly the matters regarding children, property, spouse maintenance and child support need constant review to reflect changing community values and attitudes.

As the Act is 'social legislation' it is, by definition, imprecise law, and is never going to satisfy everyone in all aspects at the same time. Fortunately, the community has been willing to constantly review and amend it to address imperfections and injustices as they arise.

2 What is the basic purpose of the *Family Law Act*?

To introduce the concept of no-fault divorce and to give the individuals greater ownership and control over the matrimonial causes that arise from separation and divorce, such as matters regarding children, property, spouse maintenance and child support.

3 How did the *Family Law Act* change the divorce system?

Abolished fault-divorce and replaced it with one non-judgmental no-fault ground for divorce, irretrievable breakdown of the marriage.

See page 344

Focus Questions Page 347

1 What is the only ground and proof to have a marriage dissolved?

See page 344

2 Why were these standards included in the *Family Law Act 1975*?

To make divorce a private affair between the separating spouses, by having a non-judgment ground for divorce.

3 How can the 12 month separation period be conducted?

See page 345

4 Why does the Act allow for one period of reconciliation during the separation period?

See page 345

5 How does a party apply for divorce and what must occur?

See page 346

6 What elements must be proved to the Court before a divorce application is approved?

See pages 346/347

7 What are a *decree nisi* and decree absolute and what are their purposes?

See page 347

Focus Questions Page 348**1 How is a *de facto* relationship terminated?**

See page 348

2 Does a breakdown of the *de facto* relationship also terminate all other legal rights and obligations? Clarify your answer.

No, many obligations continue, and rights need to be accessed in certain ways.

OBLIGATIONS

To accept continuing parental responsibility for the children of the relationship.

To accept the other partner's legal right to a prescribed share of the property accumulated in the relationship, irrespective of whose name it is in or who paid for it.

As from 2006 both parents will have to pay child support.

RIGHTS

To apply for residence, contact and specific issues orders at the Family Court if agreement cannot be reached between the two partners.

To pursue property title to assets of the relationship by contractual agreement or via the state civil courts.

Analytical questions Page 349**1 Is divorce too easy to obtain?****YES ARGUMENT**

Can be unilaterally attained even without attending a court hearing if not children are involved.

NO ARGUMENT

Divorce should be at the discretion of the spouses and not what other people may believe is 'easy'. That is, divorce is a private matter in which the State should not set arbitrary judgmental standards.

2 Should Australia return to a system of fault-divorce?**ARGUMENTS AGAINST**

See the arguments against the system presented to Question 3 on Page 344.

ARGUMENTS FOR

Will lower the divorce rate and maintain existing marriages.

By doing this children will be reared by two parents – a father and a mother. There is concern in the community that young boys are having problems adjusting, and becoming a community nuisance, as they live in single-mother families without a male role-model to guide them.

3 How have Australia's divorce laws been reformed to reflect changing values and attitudes?

General dissatisfaction by a broad section of the community that the State was making a moral judgment about private affairs and invading the privacy of the individual. This sentiment led the Labor Federal Attorney-General in 1975 (Lionel Murphy) to introduce the Family Law Bill into the Cwlth Parliament.

There is now only one non-judgemental ground for divorce, irretrievable breakdown of the marriage proved by 12 months separation. All other matrimonial causes regarding children, property and child support, are determined on merit, not who was at fault in the marriage. This is a more equitable and just way of deciding these issues.

TOPIC 5 : THE FAMILY AND THE LAW

Chapter 21 Children Issues and Property Settlement

Family Relationship Centres – Major Reforms 2005

Between 2003 and 2005 significant reforms have occurred in family law. The Cwlth Parliament has amended the *Family Law Act* to establish Family Relationship Centres. They do not change the principles upon which the concept of parental responsibility is based, but they do offer new initiatives in how parenting issues are addressed. The answers to the following questions regarding parenting issues do not reflect these new reforms as they do not officially commence until mid-2006.

Child Support Scheme – Major Reforms 2005

Between 2003 and 2005 a number of inquiries have reviewed the CSS with the intention of making significant reforms to it. It is anticipated that the reform legislation will be formally drafted in 2005 and passed by the Cwlth Parliament sometime in 2006. This means most of the answers in this section are applicable to the CSS as it applies prior to these reforms.

Please see an updated version of Chapter 22 of the book at the end of this CD which summarises the two fundamental reforms outlined above.

Focus Questions Page 352

1 How did the common law rule of '*filius nullius*' affect children?

See pages 350/351

2 When, how and why was the common law concept of illegitimacy abolished?

Family Relationships Act 1975 (SA)

See page 351

3 How did the *Matrimonial Causes Act 1959* treat children's rights on the divorce of their parents?

See page 3

51

4 Why was the original *Family Law Act 1975* criticised regarding the application of guardianship and custody?

The Family Court was obliged under the *Family Law Act 1975* to award custody of a child over 14 years of age to the parent of his/her choice.

This arrangement had two basic problems:

It assumed a 14 year old was responsible and adequately mature to make the right decisions, and it led to abuse, such as children being bribed by the wealthier parent to select him or her.

Focus Questions Page 356

1 What is the purpose of the *Family Law Reform Act 1995*?

See pages 352/353

2 What rights did the Act give children?

Their interests would be protected by them being placed in the care (called residence) who was the most appropriate parent. They also had the right to contact with the non-residence parent (NRP)

See pages 352 to 355

3 Explain the changes this Act made to the philosophy of parenting under the following headings:**(a) parental responsibility**

See pages 353/354

(b) elements of a parenting plan.

See page 354

4 How did the amendments to the *Family Law Act* in 2003 change the nature of parenting plans?

While parents could voluntarily enter into a verbal or written parenting plan, the Family Court would no longer register them after 1 January 2004 to give them legal force.

See page 354

5 What underlying principle guides the Family Court when deciding parenting issues?

The best interests of the child is paramount

See page 354

6 Briefly outline five guiding principles which the Family Court must consider when applying the underlying principle in Question 5 above.

See the list of criteria on pages 354/355

Focus Questions Page 357**1 What is a parenting order?**

See page 354

2 Who can make and who can seek a parenting order?

Either biological parent, or any adult with a proven interest in the child's welfare, care and development.

See page 356

3 Briefly outline the main stages in the Family Court to make a parenting order.

See the stages outlined on pages 356 to 357

4 When is a family dispute considered final?

When either a consent order or parenting order is made by the Family Court.

See pages 354 (consent order) and 354 and 357 (parenting order).

Focus Questions Page 358**1 What is international child abduction?**

See page 358

2 How does Australian law deal with international abduction of children?

See page 358

3 What problems does a parent face if his or her child is abducted?

See page 358

Focus Questions Page 361

1 Outline the criticisms of the pre-Child Support Scheme where the Family Court determined child maintenance orders.

See page 358

2 What is the Child Support Scheme and why was it implemented?

See pages 358 to 361

3 Outline how Stage 1 of the Child Support Scheme operated.

See page 359

4 Under Stage 2 of the Child Support Scheme:

(a) who can apply for child support?

Residence parent

(b) how is child support liability determined?

Privately arranged, or on application to the CSA, by administrative formula prescribed in the child support legislation and regulations.

(c) how is child support collected?

Depends on circumstances

It is normally garnished from the regular wages and salaries of the NRP.

Self-employed NRPs are expected to make regular payments to the CSA

(d) when does child support cease?

See page 360

5 How can child liability and assessment be reviewed?

See page 361

Focus Questions Page 266

1 What is property in family law?

See page 362

2 Clearly explain how the following concepts are applied in a property settlement case in the Family Court:

(a) direct contribution

(b) indirect contribution

(c) the means and needs of the parties

See pages 362 to 364

3 Explain the three steps in deciding a property dispute.

See page 362

4 What are financial agreements and why were they included in the Family Law Act?

NOTE These were commonly called 'pre-nuptial agreements' and are still referred to as that in normal conversation and in the media.

See page 364

5 Under what conditions can the Family Court put a financial agreement aside?

See page 365

6 Which courts hear property disputes under the *Family Law Act*?

Family Court (open jurisdiction) or Federal Magistrates Court (limited jurisdiction)

Focus Questions Page 367**1 What jurisdictional conditions are placed on courts hearing property disputes under the *De Facto Relationship Act 1996* (SA) or the *De Facto Relationship Act 1991* (NT)?**

See pages 366/367

2 Which courts hear property disputes arising from *de facto* relationships in SA and the NT?

Depends on the jurisdiction of the civil court.

Eg claims under \$80,000 are heard in the General Claims Division of the Magistrates Court in SA.

3 What is a cohabitation agreement and what forms can they take in SA?

See pages 366/367

4 Clearly explain how the following concepts are applied in a property settlement case for *de facto* relationships in SA and the NT:

(a) contribution

(b) needs.

They are very similar to those prescribed in the Family Law Act.

See pages 362 to 364

Analytical questions Page 369**1 Should the state make laws about the parenting of children?**

YES ARGUMENT

Uniform laws need to be made to protect the interests of the children, whether the parents can reach agreement or not.

State law applies to children who are not adequately cared for by parents, whether the parents have a residence order from the Family Court or not.

2 Are judges in the best position to make judgments about the parenting of children?

There is continuing debate on this topic. This is one of the main reasons why the Cwlth amended the *Family Law Act* to create Family Relationship Centres. The philosophy behind those Centres is that parenting issues will hopefully be decided in amicable ways by agreement between the parents, without the need to take formal court proceedings in the Family Court.

3 Are children adequately protected after the breakdown of their parents' marriage?

Federal family law exists to decide parenting orders if the parents cannot agree between themselves. The State Community Welfare Department is responsible for ensuring that all children in SA are adequately care for. If parents cannot adequately care for their children they can be compulsorily be removed by Community Welfare and placed in foster homes.

The other concern is the payment of child support by the NRP for the financial support of the children of broken relationships. Currently around 14% are defaulting on their payments and this is an issue being addressed by the Cwlth in its CSS reforms.

4 Are fathers at a disadvantage in parenting proceedings at the Family Court?

The general consensus is that they are. It appears that mothers are more likely to be granted residence orders, than fathers. The arguments why this may occur with babies, infants and young children are obvious, but there is concern by NRP that the Family Court is 'biased' in this respect towards mothers.

The Cwlth is currently reviewing this situation with a view to introducing reforms regarding shared parenting of children. In June 2005 the Federal Attorney-General released an exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill. A parliamentary committee reviewed the proposal and submitted its report in August 2005. By late 2005 a special committee of inquiry was taking submissions from interested parties, including The Hon Diana Bryant, Chief Justice of the Family Court.

It is anticipated that the proposed reforms will be implemented sometime in 2006.

5 Is the Child Support Scheme fair on non-residence parents?

This area of family law is currently under review. See the new Chapter 22 discussion on this topic at the end of this CD.

TOPIC 5 : THE FAMILY AND THE LAW

Chapter 22 A Critical Analysis of Family Law

Please note:

Comment as at October 2005

There are significant reforms to family law currently being reviewed by the Federal Government throughout 2005. Chapter 22 of “Legal Studies : New Ideas”, the first edition, is unfortunately now outdated. A copy of the new chapter to be published in the 2005 reprint is supplied at the end of this CD.

Analytical questions Page 377

1 Should rebuttable physical joint custody be adopted in Australia?

See the discussion in the new chapter 22 at the end of this CD

2 Should property disputes be settled by statutory formula primarily by mediation and arbitration?

Strong argument that this should occur as it could prevent expensive and protracted property disputes going to litigation in the Family Court of Federal Magistrates Court, where neither gets exactly what they want.

3 No family law reform will ever overcome criticisms of the parenting of children or resolution of property disputes.

Discuss the validity of this statement.

Gauging by the number of times the *Family Law Act* has been amended since 1975 this is a valid statement. As the Act is ‘social legislation’ it is an imprecise legal document that is always subject to reform with changing values, attitudes and other circumstances.

Chapter 22

Family law

Critical analysis of family law

Overview

The issues relating to family law are simply too diverse to be discussed in detail in this chapter. This chapter will evaluate and review the most significant areas of family law, with particular reference to the major reforms being considered by the Federal Government in 2005.

The critical analysis of family law is an ongoing task. Students are encouraged to keep abreast of changes in this dynamic branch of the law by regularly reading newspapers, watching the evening news on television or visiting the Family Court website identified at the end of this chapter.

An evaluation of family law

No-fault divorce

The *Family Law Act 1975* created only one non-judgemental ground for divorce: irretrievable breakdown of the marriage to be proved by 12 months separation. This made matrimonial behaviour irrelevant as a ground for divorce and deciding the other matrimonial causes. It prevented the state from making a moral judgement about private affairs.

The procedure for getting a divorce is relatively simple now and far less stressful, humiliating and expensive than it was when the fault divorce system applied before 1976.

On the other hand, the *Family Law Act* is criticised for making divorce too easy to obtain and thereby playing a direct role in demeaning and destabilising the social institution of marriage.

Legal standing of the marriage spouses

The *Family Law Act* is applauded because it made men and women equal before the Family Court in family proceedings. For example, both parents have an equal right to apply for a residence order for the children, spousal maintenance or an equitable share of the matrimonial property after separation or divorce.

The Family Court makes its decisions on the merits of each case and in accordance with law, rather than on arbitrary factors such as the gender of the party.

Women's rights are also protected by making home-keeping and child caring a significant indirect contribution when compared to direct financial contribution towards the acquisition, preservation and improvement of property. This is important as it gives women a more equitable claim to matrimonial property on breakdown than if only the common law financial contribution principle was applied.

The inclusion of the indirect contribution principle in the *Family Law Act* recognises the sacrifice made by women to their careers so they can stay at home to care for the children and do the house-keeping.

While matrimonial conduct is considered when the Family Court decides property settlement, critics argue that it does not go far enough. For example, a woman who undertakes paid

employment and still does the majority of the housework should receive a more generous property settlement.

Rights of the children

Since the enactment of the *Family Law Act* in 1975, children are no longer considered as the 'property' of their divorcing parents. Particularly after the 1995 reforms, the *Family Law Act* treats children as separate legal entities whose rights and interests are paramount on the breakdown of the relationship of their parents.

In special cases, the Family Court can order that children be separately represented by legal counsel in residence and contact cases to protect their interests.

Matrimonial causes

One of the primary objectives of the *Family Law Act* was to minimise the stress, humiliation, cost and delay involved in getting a divorce and resolving family disputes by providing counselling and mediation services to assist the divorcing parties to settle their differences without resorting to litigation.

While the *Family Law Act* has been successful in removing the acrimony from divorce proceedings, it has, in some instances, merely transferred the bitterness, cost and anguish to the other matrimonial causes, notably to parenting and property disputes. While the vast majority of family matters are resolved amicably between the spouses many of those cases that do go before the Family Court become very expensive and protracted proceedings that place the spouses and their children at the mercy of the system and involve them in expensive legal representation.

While the above is a genuine criticism of family law, it must never be overlooked that the no-fault system took blame out of deciding matrimonial causes. No longer are property and parenting disputes settled with blame in the breakdown of the marriage as the main criteria.

Alternative family relationships

Family law in Australia is criticised for not adequately addressing alternative families such as *de facto* relationships, same-sex relationships and marriages by aboriginal custom.

While all states have enacted legislation to provide more legal rights to some of these alternatives, a large number of anomalies and inconsistencies exist. For example:

- all states, except SA by October 2005, have included same-sex couples in their protections of *de facto* relationship legislation.
- South Australian *de facto* partners have no statutory or common law claim to spousal maintenance as allowed in the NT and other states.
- South Australian *de facto* partners can only access the statutory rights of the *De Facto Relationship Act 1996* if they have cohabited for at least three years or had a child in the relationship. Married couples get immediate access to the statutory rights in the *Family Law Act* from the first day of separation..

Child Support Scheme

The Child Support Scheme has been applauded and criticised since its inception in 1989. As the Federal Government is undertaking a significant review of the Scheme in 2005, a summary of the proposed reforms is discussed in the next section of this chapter.

Summary

The *Family Law Act* was designed to foster a confidential, inexpensive and straightforward method of lawfully dissolving unhappy marriages, but it has stumbled onto almost every obstacle possible after the divorce stage.

It could be argued that the *Family Law Act*, and its vehicle, the Family Court, have been very successful in achieving their goals. Apart from granting a divorce which must occur in the Family Court or Federal Magistrates Court over 50% of all broken marriages do not use the family courts to resolve their other matrimonial matters. Of the other 50% or so who do use it, well over 90% of them resolve their disputes without recourse to litigated proceedings at a trial. This means fewer than 5% of all divorces end up in lengthy litigated proceedings which by any statistical standard is an acceptable achievement.

Of course, there is a lot of overt bitterness and acrimony demonstrated in family disputes, but this often reflects built-up hatreds, personal vanity and irrational behaviour that no system, however perfect, will ever overcome.

Possible reforms

Recognition of alternative marriages

The specific marriage power of the Australian Constitution prohibits the Commonwealth Parliament from enacting legislation to recognise alternative forms of family relations, whether they be different-sex or same-sex *de facto* relationships and Aboriginal and Torres Strait Islander customary marriages. As an increasing number of people in Australia are choosing to live in alternative family relationships, it is considered important to preserve the principles of social justice and equity. Good arguments exist that all people should have the same civil and legal rights and responsibilities regarding their family relationships provided that minimum standards are met.

The current statutory definition of marriage is based on Christian values outlined in English common law. Critics argue that the marriage laws should more realistically reflect Australia's multicultural society. Of course, to meet this objective, it would be necessary for the people to approve a change to the wording in the Constitution by referendum or each of the states would need to transfer its residual powers to the Commonwealth according to the referral of powers rule outlined in section 51(xxxvii).

The great advantage of this reform would be that laws conferring rights and bestowing responsibilities would be uniformly applied on all Australians in federal law, rather than fragmented between the Commonwealth, states and territories. This is particularly important in a nation where there is significant mobility between the states and the territories.

Parenting issues

Ever since the commencement of operations of the Family Court in 1976, which enforces the *Family Law Act*, there has been considerable criticism of the 'custody battles' between competing parents. The issue has been festering for decades and a number of major reforms have been undertaken to address it, the most recent being in 1995 when the *Family Law Reform Act* introduced the concepts of parental responsibility and parenting plans.

In June 2003, the House of Representatives Family and Community Affairs Committee commenced an inquiry into child custody arrangements in the event of a breakdown in parents' relationships. The Committee's report was released in August 2005.

One of the major concerns that the Prime Minister, John Howard, expressed when announcing the creation of the Committee, was the growth in single-parent families where boys do not have regular access to a male role model. He also expressed concern at the lack of male teachers in primary schools who can act as male role models. The Federal Government has already undertaken initiatives in education policy to address this perceived imbalance.

Critics have identified two significant problems with the current parenting system on the breakdown of a relationship:

- 1 it discriminates against fathers
- 2 it fails to provide adequate adult male role models for boys.

To address these identified problems the Government released an exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill in June 2005.

It must be remembered that the Bill is only in its initial stages and it is probable that many amendments will be made to it before enactment. Below is a summary of one proposal that the community is asked to debate.

Rebuttable presumption of joint physical custody

This is a philosophy in family law where it is assumed, from a starting point, that both parents have joint custody of their children after their relationship breaks down. This can be applied in a number of ways, such as a child spending a week with mother and then a week with father.

Essentially, this proposal is in direct contrast to the system which currently operates in Australia, where most residence orders go to one parent, and the other parent is physically isolated from the child for most of the time.

Under the rebuttable joint custody model the onus is on a parent who wants sole custody to rebut the worthiness of the other parent to be a joint custodial parent. In our present system, it is the reverse as any parent who proposes a joint custody arrangement has to prove why shared custody would be in the best interests of the child.

Family Relationship Centres

The Federal Attorney-General, Phillip Ruddock, officially announced on 31 July 2005 that the Government would be establishing 65 Centres around Australia over the next three years. Two of the first 15 Centres, which open in the middle of 2006, will be at Salisbury in South Australia and Darwin in the Northern Territory.

The initiative does not change the principles upon which parenting arrangements can be made by separating parents or the Family Court. The concept is designed to assist spouses to come to mutual agreements about the parenting of their children, and a whole range of other family related issues, without resorting to formal court proceedings.

The Centres are designed to be a central point in the community where spouses, parents, grandparents and children can all go to get help, advice and support about family matters.

If the Centres operate as planned it is hoped that parenting plans will be formalised by consensus or mediation, without lawyers or Family Court involvement. There will be no charge for initial advice and consultation, or to use the national advice line.

The Centres will be managed by appropriate community organisation on licence by the Commonwealth Government.

Child Support Scheme (CSS)

In response to the House of Representatives Family and Community Affairs Committee's findings, the Federal Attorney-General established a Task Force on Child Support that was chaired by NSW University Professor Patrick Parkinson. It submitted its final report in June 2005 with 30 recommendations in it. Those recommendations are now being considered with a view to draft legislation in late 2005 to radically reform the CSS.

Weaknesses of the current Child Support Scheme

The Parkinson Task Force identified the following weaknesses:

Fallible assumptions underlying the CSS

The current formula does not reflect the profile of the modern Australian family. The average family in Australia no longer has predominantly one male income earner with the mother staying home to care for the children

Most women in a family relationship enter the workforce to earn an independent source of income. This arrangement continues after separation and divorce even when the mother has a residence order for the children.

The current child support formula is targeted on the non-residence parent's income, which is predominantly the father. As the residence parent is usually an income earner also, and often in another solid financial relationship with a new partner, many child support payers are effectively paying spouse maintenance as well as child support.

Fallibility of the current formula

The formula assumes that the costs of caring for children do not vary with their age and development because it adopts the same liability percentage whether the child is an infant or a teenager. The Parkinson report presented data to show that this assumption is unrealistic as the costs to rear a teenager far outweighs those to care for an infant.

Failure to accommodate shared parenting

The current formula fails to adequately take into account the time that the children spend with the non-resident parent. For example, the formula does not adjust child support liability even if children spend 100 nights a year with the child support payer.

Default of child support

The Child Support Agency (CSA) supplied figures to the Parkinson Task Force to show that over 13% of assessed payers were defaulting on their payments, and by 2004 approximately \$739 million was owed to the CSA in back-payments. Figures also indicated that 40% of payers only contributed the minimum payment of \$5 per week allowed under the Act.

Recommended changes to the Child Support Scheme

Some of the more significant 30 recommendations are explained below.

Joint parent assessment

In contrast with the current system it is recommended that child support liability should be calculated by a formula which takes into account both parents' incomes. That is, both

parents have a responsibility to pay child support, not simply the non-residence parent. The principle more realistically reflects the current profile of an Australian family unit.

Child support liability should be determined on that joint income after the protected income (or self-support threshold) has been deducted. It is also recommended that the protected income increase from around \$13,500 currently to \$16,880 per annum per parent.

Two tiered child support

The current five level formula should be replaced by a new one divided into two categories which will more realistically reflect the costs to care for children at the different ages. The two tiers or bands are:

Children under 12 years of age
Children 13 to 17 years of age.

The child care costs will obviously be higher in the second band.

Discounts for share residence

A specific formula will reduce child support liability of the non-residence parent who has care of the child for a significant period. The proposed formula is:

Nights' care a year by minority NRP parent	Share of cost owing to residence parent
0 to 51 nights	100%
52 to 126 nights	76%
127 to 175 nights	75% minus .5% for each night over 127 nights
176 to 182 nights	50%

Resettlement costs

For the first five years after separation, overtime income and second job income should not be counted when determining child support liability. This relief is provided to allow child support payers to re-establish themselves in a new stable financial position.

Minimum payment

This should be increased from \$5 per week to \$20.

Family tax benefits

The residence parent should keep all taxation entitlements unless the non-residence parent exceeds 35% in residence time.

Extended role of the Child Support Agency

The CSA should be given broader powers to assess and collect child support to overcome non-compliance. Currently the CSA reports that almost 20% of all high income earners are defaulting on their child support payments.

Child support cap

A limit should be placed on child support so that it solely reflects the costs of caring for children, not the ability of the non-residence parent to pay. Currently many high income earners are effectively payment spouse maintenance because the amount paid is in excess of the costs associated with caring for children.

Summary

This commentary only summarises the main proposed reforms to the Child Support Scheme. They may not eventuate precisely in the form recommended by the Task Force, although it can be reasonably assumed that the reforms will follow those explained above in principle.

It is anticipated that the new Child Support Scheme will commence in 2006.

Property settlement

It has been suggested that property settlement could be decided by an administrative formula which takes into account direct and indirect contributions and the needs of the spouses after the marriage breaks down. The strength of this proposal lies in its uniform and predictable approach to property settlement.

For example, a family with no children and relatively equal contributions could divide property 50:50. In marriages where dependent children are involved, a weighting could be included, say 10% for each dependent child. Models of this nature are currently used in some western democracies.

In recent amendments to the *Family Law Act 1975*, greater emphasis was placed on independent arbitration to resolve property disputes. Many observers suggest that arbitration should be made compulsory in specialised tribunals with the minimal involvement of lawyers.

Summary of key points

Evaluation of family law

- Family law treats men and women as equal before the law, gives children their own legal identity and rights, adopts the no-fault system of resolving family disputes, provides non-judgmental guidelines for parenting arrangements and arranges for the compulsory payment of child support.
- Family law is criticised because it does not equitably recognise alternative family units, has failed to adequately address parenting and child care issues and has made divorce too easy to get.

Reforms to family law

- The recognition of alternative family relationships so that family law respects choice and gives every person equal rights in that relationship and on its breakdown.
- In 2005 the Federal Government initiated an exposure Bill to introduce the concept of shared parenting. The intention of the reform is to depart from the normal practice where one parent has a residence order and the other parent is largely isolated from the day-to-day care of the children.
- Family Relationship Centres will be created by the Federal Government in 65 places around Australia over the next three years to use alternative dispute resolution mechanisms so that family disputes are diverted away from lawyers and the Family Court.
- The Parkinson Task Force has recommended that the Child Support Scheme be significantly reformed to:
 - determine child liability on the joint parents' income
 - assess child support in a two band formula based on age where the amounts reflect the costs of caring for children, not the non-residence parent's income and ability to pay.
- It is proposed that property settlement should be determined by an administrative formula similar in nature to child support and administered by a specialised tribunal using arbitration as the final adjudicating method.

Analytical questions

- 1 Should people in all family relationships in Australia have the same legal rights in that relationship and on its breakdown?
- 2 The Family Relationship Centres will divert family disputes away from the Family Court and Federal Magistrates Court.
Discuss the validity of this statement.
- 3 Are the proposed reforms to the Child Support Scheme workable and desirable?
- 4 Is shared parenting responsibility a workable reform to family law?
- 5 Should property disputes be settled by statutory formula primarily by mediation and arbitration?
- 6 No family law reform will ever overcome criticisms of the parenting of children or the resolution of property disputes.
Discuss the validity of this statement.

Useful websites and references

Australian Parliament House – Family and Community Affairs Committee
www.aph.gov.au/house/committee/fca

Child Support Agency
www.csa.gov.au

Family Court of Australia
www.familycourt.gov.au

Law Societies
www.familylawsection.org.au

Legal Services Commission of South Australia
www.lawhandbook.sa.gov.au

Publications from the Legal Services Commission of South Australia
SACE Legal Studies Essentials Booklet

Analytical questions New addition to reprint

1 Should people in all family relationships in Australia have the same legal rights in that relationship and on its breakdown?

YES ARGUMENTS

Citizens should be allowed choice in choosing relationships but should not be discriminated against because of their choice.

To deny people the same rights is contrary to the spirit of the rule of law.

NO ARGUMENTS

People who exchange vows to make a long-term commitment should receive greater legal protections.

To grant equal legal rights to non-marriage spouses would demean the institution of marriage and destabilise an important social institution.

2 The Family Relationship Centres will divert family disputes away from the Family Court and Federal Magistrates Court.

Discuss the validity of this statement.

YES ARGUMENTS

May play an important role in creating permanent and stable marriages.

May assist low income earners to resolve matrimonial dispute at minimum cost.

NO ARGUMENTS

Some spouses will want their 'day-in-court' and will not settle by any method other than judicial order.

3 Are the proposed reforms to the Child Support Scheme workable and desirable?

No objective and reliable comment can be made until the reforms have been implemented and tested.

4 Is shared parenting responsibility a workable reform to family law?

The biggest problem will be its practical application, particularly when the parents do not live close to each other.

5 Should property disputes be settled by statutory formula primarily by mediation and arbitration?

YES ARGUMENTS

Resolves 'money' disputes with minimum cost to parties and taxpayers who pay for the family court system.

Many property disputes do not involve complex legal issues so could be resolved equitably by an arbitrator, as opposed by a judge.

NO ARGUMENTS

Fundamental philosophy in a liberal democracy that parties to a dispute can have their disputes resolved by judicial decree.

6 No family law reform will ever overcome criticisms of the parenting of children or the resolution of property disputes.

Discuss the validity of this statement.

Probably a valid statement as every reform attracts its supporters and critics, and a small percentage of people will always challenge every administrative decision until forced to comply by a judicial order.

Recommended Teacher References

All Topics

Law Faculty, Monash University, “**Alternative Law Journal**”, A journal published quarterly covering a very broad range of issues relevant to the Stage 1 and 2, Legal Studies courses. Have to pay a subscription fee. Contact Tel (03) 9544 0974, Fax (03) 9905 5305, Email: Liz.Boulton@law.monash.edu.au

Topic 2 : Constitutional Government

Craven, Greg, 2004, “**Conversations with the Constitution, not just a piece of paper**”, UNSW Press

Topic 3 : Lawmaking

Department of the House of Representatives Magazine, “**About the House**,”, An educational magazine produced by the Liaison and Projects Office, House of Representatives, Parliament House, Canberra, ACT 2600. Get on the free mailing list by: Freecall 1800 139 299, Fax (02) 6277 8521, Email: liaison.reps@aph.gov.au

Topic 4 : Justice Systems

Attorney-General’s Department, November 2004, “**Information for Victims of Crime**”, Government of South Australia (An educational booklet provided at no cost by the Attorney-General’s Department)

Moles, Robert N, 2004, “**A State of Injustice**”, Lothian Books.

Sarre, Rick and Tomaino, John, Editors, 2004, “**Key Issues in Criminal Justice**”, Australian Humanities Press

Recommended Websites

General

www.abc.net.au

Australian Broadcasting Corporation

www.lawhandbook.sa.gov.au

Legal Services Commission of SA

Topic 1 : Australian Legal System

Chapter 2 : Types of law

www.wa.aic.gov.au

Australian Institute of Criminology

Topic 2 : Constitutional Government

Chapter 6 : Australia’s Global Links

www.asil.org

Australian Society of International Law

www.icj-cij.org

International Court of Justice

www.ejil.org/journal

European Journal of International Law

www.cidh.aos.org

Organisation of American States

www.oau-oau.org

Organisation of African Unity

www.coe.fr/index/asp

Council of Europe

www.austlii.edu.au/au/other/dfat

Australian treaty database

www.nesl.edu/research/warcrim2.htm

New England School of Law – war crimes, international criminal tribunals

www.unaa.org.au/fset.html

United Nations Association of Australia

www.amnesty.org

Amnesty International

www.un.org/law/icc/statute/romefra.htm

Rome Statute of the International Criminal Court

www.icrc.org/eng

ICRC – databases on international humanitarian law

Chapter 7 : Rights of Indigenous People

www.atsic.gov.au

Aboriginal and Torres Strait Island Commission

Topic 3 : Lawmaking

Chapter 9 Legislation

www.austlii.edu.au

Excellent site to review all legislation

www.aph.gov.au/bills

Commonwealth bills re Australian Parliament House website

www.aph.gov.au/hansard

Commonwealth Hansard re Australian Parliament House website

www.aph.gov.au/library/pubs/bd/index.htm

Commonwealth Bills Digest

Topic 5 : Family and the Law

www.centrelink.gov.au

Centrelink

www.csa.gov.au

Child Support Agency

www.fas.gov.au

Family Services Australia

www.familycourt.gov.au

Family Court of Australia

www.fms.gov.au

Federal Magistrates Service