

Semester 1, 2020 Exam
Answer Guide

**POLITICS
AND LAW
UNIT 1**

Name:

Please place your student identification label in this box

Student Number: In figures

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In words

Time allowed for this paper

Reading time before commencing work: ten minutes
Working time for paper: three hours

Materials required/recommended for this paper

To be provided by the supervisor

This Question/Answer Booklet

To be provided by the candidate

Standard items: pens, pencils, eraser, correction fluid, ruler, highlighters

Special items: nil

Important note to candidates

No other items may be taken into the examination room. It is **your** responsibility to ensure that you do not have any unauthorised notes or other items of a non-personal nature in the examination room. If you have any unauthorised material with you, hand it to the supervisor **before** reading any further.

See next page

Structure of this paper

Section	Number of questions available	Number of questions to be answered	Suggested working time (minutes)	Marks available	Percentage of exam
Section One: Short response	4	3	45	30	30
Section Two: Source analysis	2	1	35	20	20
Section Three: Part A: Extended response	2	1	50	50	50
Section Three: Part B: Extended response	2	1	50		
					100

Instructions to candidates

1. Answer the questions in the space provided.
2. You must be careful to confine your responses to the specific questions asked and to follow any instructions that are specific to a particular question.
3. Spare pages are included at the end of this booklet. They can be used for planning your responses and/or as additional space if required to continue an answer.
 - Planning: If you use the spare pages for planning, indicate this clearly at the top of the page.
 - Continuing an answer: If you need to use the space to continue an answer, indicate in the original answer space where the answer is continued, i.e. give the page number. Fill in the number of the question(s) that you are continuing to answer at the top of the page.

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Section One: Short response

30% (30 Marks)

This section has **four (4)** questions. You must answer **three (3)** questions.

Suggested working time for this section is 45 minutes.

Question 1

(10 marks)

a) Outline the purpose of the principle of 'separation of powers'.

(2 marks)

Description	Marks
Outlines two aspects of the purpose of the 'separation of powers'.	2
Outlines one aspect regarding the term or gives an example.	1
<p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none"> • It is the idea that the organisation of the functions of government are organised in such a way that prevents the concentration of power in the hands of one leader or an elite group. • The powers to make laws, to administer laws, and to adjudicate on laws are given to different institutions, so that they each have sufficient power to check and balance the powers of the other two. 	

b) Explain the principle of 'division of powers' as it applies in Australia.

(3 marks)

Description	Marks
Explains briefly three elements of 'division of powers' as it applies in Australia.	3
Outlines two elements of the division of powers.	2
Outlines one element of the division powers.	1

<p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none">• The idea that, in a federation, the powers of government are divided between different levels of government.• In Australia, the Constitution allocates the Commonwealth Parliament a defined list of exclusive powers, including deciding where the national capital should be.• The Constitution also defines a list of concurrent powers, shared between the Commonwealth and State governments, including taxation and marriage.• The Constitution allows the states to retain the powers they exercised prior to federation (residual powers), such as law enforcement and education.	

c) Discuss **two** features of the rule of law, as it operates in Australia. (5 marks)

Description	Marks
Discusses two features of the rule of law, as it operates in Australia with supporting examples, or one detailed example.	5
Outlines two features of the rule of law as it operates in Australia, or discusses one feature and outlines another feature.	3-4
Identifies one feature of the rule of law as it operates in Australia, or makes a general statement concerning the rule of law. Answers could include, but are not limited to: <ul style="list-style-type: none">• Rule of law is the principle by which everyone is subject to the law, regardless of power, wealth, or any other quality.• It relies on a number of principles, which can be observed in Australia to varying extents:<ul style="list-style-type: none">o Courts and judges should be independent of government, so their decisions are not influenced by political concerns. In Australia, the High Court is established as a separate branch by the Constitution, and judges are not able to be removed by government, except in the case of proved misbehaviour or incapacity.o The law should apply universally to everyone. A recent example of this has been the application of s44 of the Constitution to several members of parliament, so that they were found not eligible to sit in parliament, including the Deputy Prime Minister.o The law should be known, clear, consistent, and coherent. In Australia, all laws are published on government websites and are accessible to the public. Although statute laws may at times be vague or inconsistent, courts are able to engage in statutory interpretation to clarify the meaning of statute laws as they apply to specific cases.	1-2

Question 2

(10 marks)

a) Explain the term 'responsible government'.

(2 marks)

Description	Marks
Outlines two aspects of 'responsible government' and gives an example	2
Outlines one aspect regarding the term or gives an example.	1
<p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none"> • Westminster convention Executive is drawn from and accountable to legislative branch • IMR / CMR • Secrecy / Solidarity 	

d) Explain the concept of federalism as it applies in Australia.

(3 marks)

Description	Marks
Explains briefly three elements of 'federalism' as it applies in Australia.	3
Outlines two elements of federalism.	2
Outlines one element of federalism.	1
<p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none"> • Federalism is a system of government where sovereignty is geographically divided between one central and two or more regional governments, each sovereign within their own sphere. • In Australia, the Constitution defines a list of powers for the central Commonwealth Government, and leaves residual powers to State 	

<p>governments.</p> <ul style="list-style-type: none">• The Council of Australian Governments is a means by which national and state governments can cooperate on matters of national importance.• The imbalance in revenue between the Commonwealth and State governments has allowed the Commonwealth to coerce State governments in their own policy areas.	
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- e) With reference to a non-democratic system, evaluate the extent to which Australia and the non-democratic system uphold the principle of 'separation of powers'. (5 marks)

Description	Marks
Evaluates two ways in which Australia and a non-democratic system uphold the principle of Separation of powers using specific example / s.	5
Outlines two ways in which Australia and a non-democratic system uphold the principle of separation of powers, or evaluates one way and outlines another way	3-4
Identifies one way in which Australia or a non-democratic system uphold the principle of separation of powers, or makes a general statement concerning the principle of separation of powers.	1-2

Answers could include, but are not limited to:

- China CCP
 - North Korea faux elections
 - Nazi Germany "Reichstag"
 - Australia responsible government
 - Fusion of exec / leg branches
 - Independence of Aus judiciary 'feedback loop'
 - Delegated legislation
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Question 3

(10 marks)

a) Explain the term 'constitutionalism'.

(2 marks)

Description	Marks
Outlines two aspects of 'constitutionalism'.	2
Outlines one aspect regarding the term or gives an example.	1
<p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none"> The idea that power should be limited. The opposite of absolutism. Australia is a 'constitutional monarchy', meaning that although it retains a monarch - who traditionally would have had unlimited powers - their powers are currently severely limited by a written constitution. 	

f) Outline **three** foreign influences on Australia's political and legal system.

(3 marks)

Description	Marks
Outlines briefly three foreign influences on Australia's political and legal system.	3
Outlines two influences.	2
Outlines one influence.	1
<p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none"> Australia adopted the Westminster system from Britain, including a bicameral parliament, responsible parliamentary government, and constitutional monarchy. Australia adopted federalism from the USA, with a central national government having jurisdiction over a limited range of matters, and state governments retaining control over matters that they controlled prior to federation. 	

<ul style="list-style-type: none">• Australia adopted the method of altering its Constitution from Switzerland, whereby any proposed changes must be put to a vote of the people, rather than just being decided by governments.	
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- g) Discuss **one** argument for and **one** argument against the proposition that 'the Senate adequately upholds its intended function as a House of Review'. (5 marks)

Description	Marks
Discusses one argument for and one argument against the proposition with reference to at least one specific example of a feature of the bicameral system	5
Outlines two arguments for or against the proposition, or discusses one argument and outlines another argument.	3-4

Identifies one argument for or against the proposition, or makes a general statement concerning the proposition.

1-2

Answers could include, but are not limited to:

- Arguments **for**:
 - o Strong bicameralism
 - o States House
 - o S.53
- Arguments **against**:
 - o S.53 (Depending how you argue)
 - o S.57 Double dissolution

Question 4

(10 marks)

a) Explain what is meant by 'parliamentary sovereignty'.

(2 marks)

Description	Marks
Outlines two aspects of 'parliamentary sovereignty'.	2
Outlines one aspect regarding the term or gives an example.	1
<p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none"> The idea that statute law always prevails in a system where both common and statute laws are created. This is because parliament is the body that is democratically elected, and judges are not. In a democracy, therefore, laws made by parliament are considered democratically superior. 	

h) Explain the relationship between the law-making powers of the House of Representatives and the Senate.

(3 marks)

Description	Marks
Explains briefly three elements of the relationship between the law-making powers of the House of Representatives and the Senate.	3
Outlines two elements of the relationship between the law-making powers of the House of Representatives and the Senate.	2
Outlines one element of the relationship between the law-making powers of the House of Representatives and the Senate.	1
<p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none"> Both the House of Representatives and the Senate are able to initiate legislation on most matters listed in s51 and s52 of the Constitution. 	

<ul style="list-style-type: none"> • The Senate is prohibited from initiating or amending laws appropriating money or imposing taxation. The Senate may request amendments from the House of Representatives. • If a Bill originates in and passes by majority vote through one chamber, the Bill must also be considered and passed by majority vote through the other chamber, before it is given Royal Assent by the Governor General and becomes law. 	
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i) Discuss **one** strength and **one** weakness of delegated legislation. (5 marks)

Description	Marks
Discusses one strength for and one weakness of delegated legislation with reference to at least one example.	5
Outlines one strength and one weakness, or discusses one strength and one weakness of delegated legislation.	3-4

<p>Identifies one strength or weakness, or makes a general statement concerning delegated legislation</p> <p>Answers could include, but are not limited to:</p> <ul style="list-style-type: none">• Delegated legislation is law-making power granted by the legislature to the executive.• Strengths:<ul style="list-style-type: none">o Increases efficiency of law-making, e.g. welfare payment adjustments do not need to go through parliament every time, saving time.o Enables agencies to respond quickly to changing circumstances or emergency situations, e.g. allowing ASIO to investigate matters relating to national security.o Although delegated legislation is a potential breach of the separation of powers, parliament retains oversight of regulations through the Senate Standing Committee on Regulations and Ordinances, which ensures that regulations are made in accordance with statute, that rights and liberties are not interfered with, and do not permit retrospective decisions.• Weaknesses:<ul style="list-style-type: none">o The volume of delegated legislation potentially means that agencies are making regulations that the parliament is not able to control. <p>Delegated legislation is made out of the public and media gaze, so is less likely to be transparent for accountability purposes.</p>	<p>1-2</p>
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Section Two: Source analysis

20% (20 Marks)

This section has **two (2)** questions. You must answer **one (1)** question. Write your answers in the space provided.

Spare pages are included at the end of this booklet. They can be used for planning your responses and/or as additional space if required to continue an answer.

- Planning: If you use the spare pages for planning, indicate this clearly at the top of the page.
- Continuing an answer: If you need to use the space to continue an answer, indicate in the original answer space where the answer is continued, i.e. give the page number. Fill in the number of the question(s) that you are continuing to answer at the top of the page.

Suggested working time for this section is 35 minutes.

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Question 5

(20 marks)

a) With reference to Source 1, explain why a judge may overrule a precedent. (2 marks)

Description	Marks
Outlines why a judge may overrule precedent	2
Links example from Source 1 to the definition	1
Total	2
The answer could include but is not limited to: <ul style="list-style-type: none"> • Archaic, outdated • No fences / fast cars at the time 	

b) With reference to Source 1, suggest two rules or maxims of statutory interpretation that could be applied to this rule in future cases. (4 marks)

Description	Marks
Identifies two reasons Explains each reason in their own words with direct reference to the source	4
Identifies two reasons Explains one reason and outlines the other reason Answer is mostly in candidate's own words with some reference to the source	3
Identifies two reasons or Identifies and explains one reason Attempts to explain in the candidate's own words	2
One or two reasons are cited verbatim from the source	1
Total	4
The answer could include but is not limited to: <ul style="list-style-type: none"> • Golden / Mischief / Literal rule • Ejusdem generis • Noscitur a sociis 	

c) With reference to examples, discuss one advantage and one disadvantage of the 'feedback loop' between parliaments and the courts.. (6 marks)

Description	Marks
For each argument: <ul style="list-style-type: none"> • Identifies key features of the argument • Discusses in detail a link to a case for this argument 	5 - 6
For each argument <ul style="list-style-type: none"> • Identifies some features of the argument Makes reference to an example	3 - 4
Makes a general statement about the feedback loop with an example	1 – 2
Total	6

- j) Discuss, using examples, the extent to which Australia's common law system upholds the principle of stare decisis (8 marks)

Description	Marks
Discusses in detail two key features of Australia's common law hierarchy system, with reference to multiple examples	7-8
Discusses two key features of Australia's common law hierarchy system, with reference to multiple examples	5-6
Discusses one or two key features of Australia's common law hierarchy system, with reference to examples	3-4
Discusses one or two key features of Australia's common law hierarchy system, with no examples	1-2
Total	8
The answer could include but is not limited to: <ul style="list-style-type: none">• Hierarchy• Binding / persuasive precedent• Judicial activism / legalism• Common law• Abrogation / codifying law	

Unit 2: Representation and justice

Question 6

Read **Source 2** and answer **all** the question parts that follow.

Morrison's \$158 billion tax plan set to sail through Senate after deals with crossbenchers

The Conversation, Michelle Grattan <<https://theconversation.com/morrisons-158-billion-tax-plan-set-to-sail-through-senate-after-deals-with-crossbenchers-119873>> (accessed 20th February 2020)

The Morrison government will finish the first week of the new parliament with its election centrepiece - [the \\$158 billion, three-stage tax package](#) – passed into law.

The first stage of the tax relief – in the form of an offset for low- and middle-income earners when people submit their returns - will be available as soon as the Tax Office makes the necessary arrangements over the next few days. Getting the legislation through this week means there is only minimal slippage from the July 1 start date that was promised in the budget.

The numbers fell into place with Tasmanian crossbench senator [Jacqui Lambie declaring she would vote for the package](#). She had negotiated with the government on her demand that it forgive the \$157 million social housing debt her state owes the Commonwealth. This would save Tasmania \$15 million a year, which Lambie wants used to deal with issues of homelessness and social housing.

...

The other crossbench votes needed for the package come from independent Cory Bernardi and the two Centre Alliance senators.

Centre Alliance extracted a deal over action on gas prices.

It said in a Thursday statement that it had "worked with the government on both short- and long-term reforms to deal with gas market concerns."

The government would announce the full package in coming weeks, it said.

Question 6

(20 marks)

a) Define the term 'crossbench'.

(2 marks)

Description	Marks
Outlines the meaning of the term 'crossbench'	2
Makes a general statement about the term 'crossbench'	1
Total	2
The answer could include but is not limited to: <ul style="list-style-type: none"> • The term used to describe members of a house of parliament who are independents or who are not members of a major governing party. • They sit in the 'U' shaped benches opposite the Speaker of the House of Representatives or President of the Senate. • In the Senate, crossbenchers can exercise great political power because they may hold the 'balance of power'. 	

k) With reference to **Source 2**, explain in your own words, **two** reasons that the government's tax relief policy passed successfully through the Senate. (4 marks)

Description	Marks
Identifies two reasons that the government's tax relief policy passed successfully through the Senate. Explains each reason in their own words with direct reference to the source	4
Identifies two reasons that the government's tax relief policy passed successfully through the Senate. Explains one reason and outlines the other reason Answer is mostly in candidate's own words with some reference to the source	3
Identifies two reasons that the government's tax relief policy passed successfully through the Senate. or Identifies and explains one reason that the government's tax relief policy passed successfully through the Senate. Attempts to explain in the candidate's own words	2
One or two reasons are cited verbatim from the source	1
Total	4
The answer could include but is not limited to: <ul style="list-style-type: none"> • 'numbers fell into place with Tasmanian crossbench senator Jacqui Lambie declaring she would vote for the package.' - Lambie used her power as a Senate crossbencher to provide her vote for the bill in exchange for benefits to her home state of Tasmania • 'Centre Alliance extracted a deal over action on gas prices' - the two Centre Alliance crossbenchers provided their vote to the government bill only with the promise that the government would reform the gas market, a key concern for this minor party from South Australia. 	
Note: reasons must be drawn from the source.	

- l) Discuss the extent to which **two** key features of the legislative process promote liberal democratic principles. (6 marks)

Description	Marks
Identifies two key features of the legislative process Discusses how these processes promote principles of liberal democracy	5 - 6
Identifies two key features of the legislative process Outlines how these processes promote principles of liberal democracy Or Identifies and discusses how one key feature of the legislative process promotes the principles of liberal democracy	3 - 4
Makes a general statement about one or two key features of the legislative process Or Lists two key features of the legislative process	1 - 2
Total	6
<p>The answer could include but is not limited to:</p> <p>Principles of liberal democracy</p> <ul style="list-style-type: none"> • Equality of political rights • Majority rule • Political participation • Political freedom <p>Key features:</p> <ul style="list-style-type: none"> • Bill must pass through both houses in identical form before it can receive Royal Assent and become law – link to idea of majority rule • If two houses cannot agree on a bill it is said to have been 'blocked' - can result in a double dissolution election (last occurred in 2016 as a result of two industrial relations bills blocked by the Senate) - demonstrates equality of political rights – equality in the power of minor parties and independents in the Senate with the majority government – and political freedoms – allowing all members of Parliament to participate in the lawmaking process • Any member of parliament may introduce a bill – link to political participation – eg in March 2020 Adam Bandt (member of the Greens) introduced the 'Climate Emergency Declaration Bill 2020' with the aid of Independent MP Zali Steggall. Private Members' Bills are however notoriously difficult to pass – in the 45th Parliament only one PMB was successful (amendment to the <i>Marriage Act 1961</i> to legalise same sex marriage in 2017). • Non Parliamentarians have the ability to influence the creation of legislation – eg same sex marriage amendment was a result of pressure group influence such as 'Australian Marriage Equality' and the participation of Australians in the non binding postal survey on marriage equality – link to political participation and political freedom • Bills also go through rigorous scrutiny during the committee phase – during this phase committees may invite public submissions – eg the Senate Select Committee established to discuss the proposed Marriage Amendment (Same-Sex Marriage) Bill received over 401 submissions from the public from a diverse range of groups such as FamilyVoice, Parents and Friends of Lesbian and Gays – link to political participation 	

- m) Evaluate the extent to which **one** contemporary issue involving the legislative process, undermines the principle of 'representative government'. (8 marks)

Description	Marks
Discusses in detail one contemporary issue involving the legislative process. Makes an evaluation of the extent to which this one contemporary issue, undermines the principle of 'representative government'.	7-8
Discusses one contemporary issue involving the legislative process. Makes an evaluation of the extent to which this one contemporary issue, undermines the principle of 'representative government'.	5-6
Outline one contemporary issue involving the legislative process. Makes an evaluation of the extent to which this one contemporary issue, undermines the principle of 'representative government'.	3-4
Makes a general statement concerning the extent to which one contemporary issue involving the legislative process, undermines the principle of 'representative government'. and/or Identifies one issue involving the legislative process that undermines the principle of 'representative government'.	1-2
Total	8

The answer could include but is not limited to:

Representative government:

- A form of government in which the people are sovereign, but are represented in government by elected members of an assembly (parliament) acting as their representatives.

Examples of a contemporary issue involving the legislative process include:

- The dominance of the legislative process by the Government – eg in the 45th Parliament, 402 bills were granted Royal Assent, however only one of these was a Private Members' Bill (amendment to the *Marriage Act 1961* in 2017) and the Private Member was also a member of the governing party (Senator Dean Smith from the Liberal Party).
- Influence of the crossbench in minority government – the crossbench can work with the Opposition to pass legislation in the House of Representatives that is counter to the policies of the government of the day (potentially subverting the will of the majority) - eg for the first time in 90 years, the government lost a vote on its own legislation when Kerryn Phelps (Independent) worked with Labor and the crossbench to pass the medevac amendments in February 2019
- Power of the Senate crossbench – will of the minority exerting influence over the will of the majority – eg Jacqui Lambie negotiated for Tasmania to receive \$157 million for public housing in exchange for her vote on the government's income tax cuts in July 2019.

Note: 'contemporary' means within the last three years

End of Section 2

Section Three: Extended answer

50% (50 Marks)

This section has **four (4)** questions. Answer **one (1)** question from Part A: Unit 1 and answer **one (1)** question from Part B: Unit 2 in the space provided. Number your choice clearly.

Suggested working time for this section is 100 minutes.

PART A

Answer **one (1)** question from a choice of **two (2)**.

Question 7

(25 marks)

Evaluate the extent to which the Australian political and legal system is a product of international influences.

Relevant terms and parameters of discussion

- Australian political and legal system: including structure of government as outlined in Constitution; structure of Parliament; elections; design of federalism; structure of courts.
- International influences: influences from political and legal systems of UK, USA, Canada, and Switzerland (primarily).

Issues including pertinent examples could include:

- Influences from UK:
 - o Westminster system:
 - Bicameral parliament
 - Responsible parliamentary government; executive drawn from legislature
 - Ceremonial head of state with constitutional limitations on power
 - Collective and Individual Ministerial Responsibility (although seems to have weakened, e.g. Angus Taylor)
 - Parliamentary opposition
 - o Common law, doctrine of precedent, and court hierarchy; although British courts no longer part of Australian hierarchy.
- Influences from USA:
 - o Federalism
 - o Senate with equal representation for states
- Influences from Canada:
 - o 'Washminster' hybrid (Westminster system, combined with US-style federalism)
- Influences from Switzerland:
 - o Democratic method of altering Constitution; proposed amendments must be approved by voters.
- Unique aspects of Australia's system:
 - o Electoral systems: preferential voting and proportional representation different to First-Past-The Post used in UK and USA.

- o Australian federalism has evolved so that power has centralised in the federal government, due to High Court decisions and Vertical Fiscal Imbalance.
- o Party discipline in parliament has evolved to be much more strict than in UK.

Discussion of extent:

- Whether Australia's political and legal system is the product of international influences, or has developed unique aspects.

OR

Question 8

(25 marks)

With reference to the principles of 'majority rule' and 'political freedom', evaluate the extent to which Australia is a liberal democracy.

Relevant terms and parameters of discussion

- Liberal democracy: a system of government which is based on both popular sovereignty (the will of the majority) and the respect for and protection of individual rights.
- Majority rule: based on popular sovereignty and expression of the will of the majority in government and law-making. Key operating principle of liberal democracy.
- Political freedom: entitlements that are enjoyed by all citizens that enable political participation. Includes freedom of conscience, speech, association, assembly, and media. Key operating principle of liberal democracy.

Issues including pertinent examples could include:

- Extent to which Australia upholds 'majority rule':
 - o Regular democratic elections for people to choose legislature; 151 representatives chosen by the people to reflect the people's will in making laws; roughly one vote, one value.
 - o Executive is determined by party/parties with majority of seats in House of Reps.
 - o Changes to Constitution must be approved by a majority of Australians in a majority of states.
 - o HOWEVER:
 - Party policy and discipline often determines how MPs vote on laws, rather than representing their constituents (e.g. Tony Abott on same-sex marriage)
 - Head of government (Prime Minister) is not directly chosen by the people, but by the party with majority in House of Reps, e.g. Scott Morrison became PM without being elected by the people.
 - Proportional representation voting used in Senate allows minor parties and independents to hold the balance of power, so they are often able to thwart the will of the majority by negotiating changes to legislation that favour their state or ideology, e.g. One Nation and Jacqui Lambie voting against government's anti-union bill.
- Extent to which Australia upholds 'political freedoms':
 - o Freedom of religion is protected in the Constitution; different religions are freely practiced in Australia.
 - o Citizens are generally free to say and write what they want about the government and each other, as long as it is not defamatory or vilification.

- o Citizens are generally free to join associations such as trade unions, political parties, and pressure groups. A large range of these exist in Australia.
- o Citizens are allowed to assemble in groups to express their views, in forums such as protests, as long as it is lawful and not violent.
- o HOWEVER:
 - Australia does not have a constitutional or legislated Bill of Rights, protecting political freedoms such as freedom of speech, freedom of assembly, freedom of association, freedom of the media.
 - Complicated Freedom of Information laws can make it difficult for citizens and media organisations to obtain information about government activities, reducing transparency.
 - Different governments have introduced various anti-association laws, e.g. VLAD laws in Queensland; Queensland anti-protest laws banning locking devices.
 - Australian government laws criminalising whistleblowing on questionable government activity, e.g. Witness K trial.

Discussion of extent:

- Whether Australia meets the requirements of a liberal democracy, particularly with reference to the principles of 'majority rule' and 'political freedom'.

PART B: Unit 2

Answer **one (1)** question from a choice of **two (2)**.

Question 9

(25 marks)

Analyse the extent to which statute law is more powerful than common law.

Relevant terms and parameters of discussion

Statute Law

- Made by elected members of parliament – must pass through both houses of parliament and then receive royal assent before becoming a law
- Has democratic legitimacy and is superior to common law (except High Court constitutional precedents)

Common law

- Judge made law
- Made in courts by judges when deciding cases

More powerful

- Significance in the legal landscape

Issues including pertinent examples could include

- Democratic legitimacy
 - o Parliamentary sovereignty – delegated this power due to popular sovereignty
 - o Because parliament expresses the will of the majority and translates this into majority rule it has to be the most powerful institution in the system of government
 - o Mandate of governments to make
 - o Parliamentary legislation has primacy over the common law. Judges are obliged to follow statute law.
- Issues covered
 - o Statute law can be broader
 - o Courts are only able to interpret statute law where the meaning is uncertain, or where it needs to be adapted to unforeseen circumstances. In this sense, courts are able to incrementally change the law through creating new interpretations and precedent. However, parliament is able to override court interpretations by passing statutes or amending existing ones – eg *Wik* (1996) and the *Native Title Amendment Act 1998 (Cth)*
 - o By the same token, parliament is often influenced by court decisions in the making of statute law, for example through the codification of court decisions, e.g. the *Mabo* decision of the High Court prompted the Keating government to introduce the *Native Title Act 1993*. This is especially the case if it is the decision of a superior court like the High Court, with the ability to make new precedent.
 - o Constitutional issues:

- The High Court can be especially powerful in law-making, as it is able to interpret the Constitution, and decide on the constitutional validity of statute law.
- For example, the High Court decided that statute law was unconstitutional in the cases of *ACT v Commonwealth* and *Brown v TAS*. This meant that the High Court in this case had more power than those respective parliaments with regard to those laws.
- Timing
 - o Statute law is forward thinking – can anticipate issues before they arise
 - o Statute law can more easily respond to changing social needs (eg marriage equality)
 - o However parliament can't possibly foresee every single circumstance it is trying to cover, so courts are able to 'fill in the gaps' of statute law as new circumstances arise.
 - o precedents can only be created ex post facto (after the fact)
- Influence of politics
 - o Courts are depoliticised and therefore potentially more powerful in making law in relation to controversial subject matter – judges are not elected and therefore make law based purely on the matter before them rather than also being concerned about job security from the electorate (eg creation of native title in *Mabo*, High Court's s44 rulings) vs reluctance of Parliament to amend the *Marriage Act 1961* in 2017 without first conducting a postal survey to delegate decision making power over potentially controversial issues back to the electorate (between 2004 and 2018 there were 22 unsuccessful private members' bills introduced to Parliament regarding the issue of same sex marriage)

Analysis

To what extent is statute law more powerful than common law?

OR

Question 10

(25 marks)

'Separation of powers is fundamental to democracy.' Evaluate this claim, with reference to one democratic and one non-democratic political and legal system you have studied.

Relevant terms and parameters of discussion

Separation of powers

- A doctrine by which the power to make, carry out, interpret and enforce the laws are dispersed to prevent the concentration of power

Fundamental

- Democracy could not exist without separation of powers

Democracy

- A system of government based on popular sovereignty

Democratic and non-democratic systems

- Democratic System: eg Australia, Britain, USA
- Non-democratic system i.e. China; Saudi Arabia; Kuwait; Zimbabwe.

Issues including pertinent examples could include

Independent judiciary

- In a liberal democracy, the judiciary is the arm of government which makes legally binding decisions to resolve disputes about the meaning of law and enforces the rights of parties to a case
- An independent judiciary is fundamental to the rule of law and therefore to upholding democracy
- The judiciary must be able to apply the law without fear or favour to any party in a case
- In Australia, the High Court's independence from Parliament and Government was critical when deciding on the interpretation of s44 of the Constitution in the 'Citizenship Seven' case in 2017, in which five members of Parliament, including then Deputy PM Barnaby Joyce, were found to be ineligible to stand for Parliament
- Contrast with Saudi Arabia - court effectively exonerated Crown Prince Mohammed bin Salman's inner circle of involvement in the murder of the dissident journalist Jamal Khashoggi – effectively contradicting the conclusion of the CIA and other western intelligence agencies

Partial overlap

- Not critical to upholding of democracy
- Australia's Westminster system has a constitutionally enshrined overlap between the executive and legislative arms of government – s64 Constitution
- The Westminster system places parliament in the central position in government because it is the only part directly chosen by the people in a single parliamentary election
- In other democratic systems (eg US) where the executive and legislative are elected separately – popular sovereignty is divided between the congress and president, which weakens the sovereignty of the congress
- Contrast with other non democratic systems, in which there is complete overlap – critically including the judiciary – preventing the power of the people to be sovereign

Checks and Balances

- Separation of the legislative, executive and judiciary is not just about preventing concentration of power, it also importantly provides for a system in which each branch can act as a check on the power of other branches
- These checks provide a strong limit to the powers of each arm of government
- Eg – legislature makes the laws and the judiciary interprets and can make judgements on the constitutionality of the law (eg *Williams No 2*)
- Judiciary can also act as a check on the legality of executive policy – eg *Malaysia Solution*, *Williams No 1*

Other fundamental principles that may be more important

- rule of law, political freedoms.

Evaluation

Is separation of powers fundamental to democracy?

Are other features of democratic systems more important?

GENERIC MARKING KEY

Description	Marks
Explains relevant terms and outlines parameters of discussion	
Explains all relevant terms and outlines parameters of discussion	5
Explains some relevant terms and outlines parameters of discussion	4
Indicates what is to be addressed in the discussion	3
Attempts to provide a focus for discussion	2
Makes a general statement concerning the topic/claim	1
Subtotal	/5

Discussion of relevant issues including pertinent examples	
Discusses relevant issues comprehensively using a well-structured format and supportive examples in a cohesive, logical sequence and relevant political and legal terminology	9-10
Discusses some relevant issues incorporating some examples in a cohesive, logical sequence and using relevant political and legal terminology	7-8
Limited discussion with limited examples in a logical sequence and some relevant political and legal terminology	5-6
Limited discussion of the issues with limited political and legal terminology	3-4
Makes general statements concerning the topic	1-2
Subtotal	/10

Evaluation / assessment / analysis	
Evaluates/assesses/analyses the claim using specific evidence which demonstrates a comprehensive understanding of the topic	7
Evaluates/assesses/analyses the claim using appropriate evidence which demonstrates an understanding of the topic	6
Evaluates/assesses/analyses the claim using some evidence which demonstrates some understanding of the topic	5
Constructs a relevant but weak evaluation/assessment/analysis	4
Constructs a weak evaluation/assessment/analysis	3
Limited evaluation/assessment/analysis	2
No relevant evaluation/assessment/analysis. A statement only	1
Subtotal	/7

Conclusion	
Draws together the argument linking evidence	3
Summarises the argument	2
Makes general/superficial statements	1
Subtotal	/3

ACKNOWLEDGEMENTS

Source 1:

Garvey, P: "West Australian push for choice of judge or jury trial" *The Australian* 14 October 2019 via <<https://www.theaustralian.com.au/nation/west-australian-push-for-choice-of-judge-or-jury-trial/news-story/d8198c8b8ce7126039c5each26368ba6>> (accessed February 13th 2020)

Grattan, M: "Morrison's \$158 billion tax plan set to sail through Senate after deals with the crossbenchers" *The Conversation*, <<https://theconversation.com/morrison-158-billion-tax-plan-set-to-sail-through-senate-after-deals-with-crossbenchers-119873>> (accessed 20th February 2020)