

Student Name: _____

2024 LEGAL STUDIES Unit 4 Outcome 1B SAC

The Victorian Courts and the High Court in Law-Making

QUESTION AND ANSWER BOOK

<i>Section</i>	<i>Number of questions</i>	<i>Number of questions to be answered</i>	<i>Number of marks</i>
A	3	3	15
B	1	1	15
			Total 30

- Students are to write in blue or black pen.
- Students are permitted to bring into the examination room: pens, pencils, highlighters, erasers, sharpeners and rulers.
- Students are NOT permitted to bring into the examination room: blank sheets of paper and/or correction fluid/tape.
- No calculator is allowed in this examination.

Materials supplied

- Question and answer book of 10 pages
- Additional space is available at the end of the book if you need extra paper to complete an answer.

Instructions

- Write your **student name** in the space provided above on this page.
- All written responses must be in English.

b. Referring to the case of *Re Z* (1970), explain **one** effect of statutory interpretation.

3 marks

SAMPLE

SECTION B (15 marks)**Instructions for Section B**

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

Answer **all** questions in the spaces provided.

Question 1 (15 marks)**Source 1**

In May 1982, Eddie Mabo and four other Meriam people of the Murray Islands (Mer) began action in the High Court of Australia to legally confirm their traditional Native Title rights. It was claimed that the Meriam people of Murray Island (Mer) could prove continuous possession of the island.

Although it was agreed that the Commonwealth Government had settled the islands in 1879, the people of Mer argued that their rights to custodianship had not been erased by British sovereignty. On 3 June 1992, following a decade of litigation, six of the seven presiding judges found that the Meriam people were “entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands”. This judgement is colloquially referred to as, ‘The Mabo Case.’ The Native Title Act 1993 is the legislation enacted as part of the Commonwealth Government's response to the decision.

Source: Western Government of Australia, ‘Right Wrongs Toolkit Part 6 Mabo Decision, Land Right and Native Title’, 2024, < https://www.dlgsc.wa.gov.au/docs/default-source/aboriginal-history/right-wrongs-toolkit-part-6-mabo-decision-land-rights-and-native-title.pdf?sfvrsn=14e86d2d_2>

Source 2

Below is an abstract of an article by The Right Honourable Sir Harry Gibbs, *formerly Chief Justice of the High Court of Australia*.

Mabo: a judicial revolution. The Aboriginal land rights decision and its impact on Australian law

Many decisions of the High Court have resulted in controversy, but few, if any, have given rise to such a diversity of responses, ranging from euphoria to deep anxiety, as *Mabo v. Queensland*.

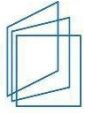
The case raises a number of questions of great public importance. Did the Court carry judicial activism too far in departing from principles that were thought to have been settled for well over a century, on the ground that those principles were contrary to international standards and the fundamental values of the common law? In doing so, the Court applied what some of its members perceived to be current values and the further question arises whether in fact those values are widely accepted in the community and whether, assuming that they are, it is right to apply contemporary standards to overturn rules formulated at a time when community values were not necessarily the same.

a. Outline the requirement for standing in the *Mabo* case.

3 marks

SAMPLE

SAMPLE



EXTRA

EXPERIENCED TEACHER RESOURCES & ASSESSMENTS

2024 LEGAL STUDIES

Unit 4

Outcome 1B SAC

The Victorian Courts and the High Court in Law-Making

SUGGESTED SOLUTIONS

<i>Section</i>	<i>Number of questions</i>	<i>Number of questions to be answered</i>	<i>Number of marks</i>
A	3	3	15
B	1	1	15
			Total 30

Question 2 (6 marks)

Under section 12 of the *Marriage Act* (Cth) a person between the ages of 16 to 17 (inclusive) years may apply to the court for authorisation to marry.

Section 12(2)(b) states that the Magistrate must be satisfied that:

‘the circumstances of the case are so exceptional and unusual as to justify the making of the order.’

This section of the *Marriage Act* must be read together with the common law, such as the precedent set in *Re Z* (1970), where the court held that pregnancy was not an exceptional or unusual circumstance.

- a. Describe **one** reason why a court may need to interpret section 12(b) of the *Marriage Act* (Cth). 3 marks

Marking Guide

Marks	Description
3	A full and complete description, which includes: <ul style="list-style-type: none"> • A description of one reason a court may need to interpret section 12(b) of the <i>Marriage Act</i> (Cth). A description requires some depth of detail, more than an outlining. • There is effective and accurate use of the stimulus material.
2	A strong/good response that falls short of full marks. For example: <ul style="list-style-type: none"> • A general or brief description of a reason why section 12(b) may need to be interpreted but it is not comprehensive • It does not sufficiently refer to the stimulus, or it references an incorrect point of the stimulus which does not relate specifically to section 12(b) of the <i>Marriage Act</i> (Cth) • There is an error that cannot be ignored
1	The response is more than nothing and, in some way, relates to the question. For example: <ul style="list-style-type: none"> • The answer states a reason for statutory interpretation
0	<ul style="list-style-type: none"> • Incorrect response or no response given

Possible Responses

Below is a non-exhaustive list of possible points that could be made...

- **The meaning of words is ambiguous:** Words used in statutes may have more than one meaning or when read in conjunction with other words, phrases or sections within the Act, ambiguity may arise.
- **The meaning of words may have changed over time:** Words used in statutes can change over time as society changes. This sometimes requires the court to clarify the meaning for today's society.
- **The statute is drafted in broad terms:** Parliament drafts laws in broad terms, so it covers a broad range of circumstances (including those it can't foresee). This can lead to terms being so broad that they need to be interpreted to work out if or how they apply to specific circumstances.
- **Unforeseen circumstances:** Parliament is not able to foresee all future circumstances where a law may need to be applied, particularly in areas that quickly change such as technology. This can lead to a situation where the court may need to interpret whether Parliament intended the legislation apply to a new and unforeseen circumstance.

Suggested Response

One reason why section 12(b) of the Marriage Act (Cth) may need to be interpreted is because some of the words in this section of the Act are ambiguous. Words such as 'exceptional and unusual' may be ambiguous because they have more than one meaning, and as such, the court may need to give meaning to these words to determine what constitutes an exception or unusual circumstance that would justify a Magistrate to give

permission for 16 to 17-year-olds to marry. This will then allow that court to apply that meaning to the case before them and resolve the case.

b. Referring to the case of *Re Z* (1970), explain **one** effect of statutory interpretation.

3 marks

Marking Guide

Marks	Description
3	A comprehensive response which includes: <ul style="list-style-type: none"> • An explanation of one (mark the first response only) effect of statutory interpretation in the case of <i>Re Z</i> • An explanation must include depth and detail rather than stating a point or providing a definition • Demonstration of an understanding of the effect • There is effective and accurate use of the stimulus material
2	A strong/good response that falls short of full marks. For example: <ul style="list-style-type: none"> • A general or brief explanation of one effect of statutory interpretation but it is not comprehensive • It does not sufficiently refer to the stimulus, or it references an incorrect point of the stimulus that does not relate specifically to the case of <i>Re Z</i> • There are one or two errors that cannot be ignored
1	The response is more than nothing and, in some way, relates to the question. For example: <ul style="list-style-type: none"> • The response identifies one effect of statutory interpretation
0	<ul style="list-style-type: none"> • Incorrect response or no response given

Possible Responses

Below is a non-exhaustive list of possible points that could be made...

- **The words/phrases in the statute are given meaning:** Statutory interpretation provides a statute with the certainty and stability it requires to be applied to a case before the court and resolve the dispute.
- **Establishes precedent:** Statutory interpretation can lead to a precedent being established that must be followed by lower courts in the same hierarchy when determining similar cases
- **Narrowing the law's application:** Statutory interpretation can lead to the law applying to less circumstances/scenarios if the judge/s take a narrow approach to interpreting words/phrases

Incorrect Response

- **Broadening the law's application:** Broadening the law's application is an incorrect response and should be awarded no marks. In the case of *Re Z*, the effect of interpretation was the opposite, which narrowed the law's application.

Suggested Response

One effect of statutory interpretation in Re Z was to narrow the law's application. The court in Re Z determined that 'pregnancy was not an exceptional or unusual circumstance' which would allow the Magistrate to give 16 to 17 years old permission to marry. This, therefore, narrowed the law's application, meaning that fewer circumstances would be considered 'exceptional or unusual'.

SECTION B (15 Marks)**Question 1 (15 marks)****Source 1**

In May 1982, Eddie Mabo and four other Meriam people of the Murray Islands (Mer) began action in the High Court of Australia to legally confirm their traditional Native Title rights. It was claimed that the Meriam people of Murray Island (Mer) could prove continuous possession of the island.

Although it was agreed that the Commonwealth Government had settled the islands in 1879, the people of Mer argued that their rights to custodianship had not been erased by British sovereignty. On 3 June 1992, following a decade of litigation, six of the seven presiding judges found that the Meriam people were “entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands”.

This judgement is colloquially referred to as, ‘The Mabo Case.’ The Native Title Act 1993 is the legislation enacted as part of the Commonwealth Government's response to the decision

Source: Western Government of Australia, ‘Right Wrongs Toolkit Part 6 Mabo Decision, Land Right and Native Title’, 2024, < https://www.dlgsc.wa.gov.au/docs/default-source/aboriginal-history/right-wrongs-toolkit-part-6-mabo-decision-land-rights-and-native-title.pdf?sfvrsn=14e86d2d_2 >

Source 2

Below is an abstract of an article by The Right Honourable Sir Harry Gibbs, *formerly Chief Justice of the High Court of Australia*.

Mabo : a judicial revolution. The Aboriginal land rights decision and its impact on Australian law
Many decisions of the High Court have resulted in controversy, but few, if any, have given rise to such a diversity of responses, ranging from euphoria to deep anxiety, as *Mabo v. Queensland*.

The case raises a number of questions of great public importance. Did the Court carry judicial activism too far in departing from principles that were thought to have been settled for well over a century, on the ground that those principles were contrary to international standards and the fundamental values of the common law? In doing so, the Court applied what some of its members perceived to be current values and the further question arises whether in fact those values are widely accepted in the community and whether, assuming that they are, it is right to apply contemporary standards to overturn rules formulated at a time when community values were not necessarily the same.

a. Outline the requirement for standing in the *Mabo case*.

3 marks

Marking Guide

Marks	Description
3	A comprehensive response that has the following features: <ul style="list-style-type: none"> • A detailed overview of the requirement for standing • The answer that is more than defining standing • There is effective and accurate use of the stimulus material
	A strong/good response that falls short of full marks. For example: <ul style="list-style-type: none"> • It defines the requirement for standing and makes limited use of the stimulus material • The answer effectively outlines the requirement for standing but makes no use of the stimulus material • There is an error that cannot be ignored
1	The response is more than nothing and, in some way, relates to the question. For example: <ul style="list-style-type: none"> • The requirement for standing is defined
0	<ul style="list-style-type: none"> • Incorrect response or no response given

Suggested Response

Standing is the requirement that a party initiating a case must be directly affected by the issues involved in the case. This means they are aggrieved in some way. A party may also be able to establish standing if they have a 'special interest' in the case by showing that their interests are more adversely affected than any other member of the public. In the Mabo case, Eddie Mabo had standing as he was directly affected because he was not dispossessed of his land, which he claimed to have "continuous possession" of.

b. Distinguish between judicial activism and judicial conservatism.

4 marks

Marking Guide

Marks	Description
4	An excellent explanation which has the following features: <ul style="list-style-type: none"> • A comprehensive description of at least one difference between judicial activism and judicial conservatism • Answer should 'distinguish' between the two concepts. Terminology such as whereas, however, on the other hand, in comparison to, conversely, should be used to show the difference. • Demonstrates an understanding of judicial activism and judicial conservatism • There is effective and accurate use of the stimulus material • Multiple differences can be used to demonstrate depth of knowledge and understanding
3	A strong response but falls short of full marks. For example: <ul style="list-style-type: none"> • A good explanation of a difference, but there is not enough elaboration to warrant full marks (i.e. some points are briefly made). • Some points are not sufficiently linked to the stimulus material • The response is lacking in some small aspect • An error is present which cannot be ignored
2	The response is limited. For example: <ul style="list-style-type: none"> • It does not sufficiently address the 'difference'. There is a description of judicial activism and judicial conservatism, but no difference is identified

	<ul style="list-style-type: none"> • There is very limited or no use of the stimulus material • There are significant errors present which cannot be ignored
1	A brief response that is more than nothing and, in some way, relates to the question. For example: <ul style="list-style-type: none"> • Either judicial activism or judicial conservatism is defined
0	<ul style="list-style-type: none"> • Incorrect response or no response given

Suggested Response

Judicial activism and conservatism are different approaches to law-making by judges. Judicial conservatism is an approach to law-making where judges exercise constraint in developing new law because they believe law-making is the primary role of parliament. Under this approach, judges stick to the 'black letter of the law' to the greatest extent possible and do not base their decisions on either their own political views or their perceived views and values of the community.

Whereas, judicial activism is an approach to law-making where judges are willing to consider a range of social and political factors, including community views and values and the recognition of rights. Under this approach, judges go beyond the 'black letter of the law' when interpreting statutes and developing common law. The Mabo case is a clear example of judicial activism where the decision was against law that has been 'settled for well over a century' and where the Court considered 'international standards and the fundamental values' when determining the case.

c. Describe codification as a relationship between Parliament and the courts.

2 marks

Marking Guide

Marks	Description
2	A full and comprehensive response that has the following features: <ul style="list-style-type: none"> • Description of codification • demonstrates an understanding of the relationship between Parliament and courts • Effective and accurate use of the stimulus material
1	The response is more than nothing and, in some way, relates to the question. For example: <ul style="list-style-type: none"> • Codification is correctly described, but there is no link to the stimulus material
0	<ul style="list-style-type: none"> • Incorrect response or no response given

Suggested Response

Codification is the process of parliament passing legislation that adopts/confirms a legal principle established by the courts in common law. Parliament codifies common law legal principles where they reflect parliament's intentions or parliament wants to continue developing the law within statute law. This can be seen in the stimulus where Parliament codified the Mabo decision by enacting 'The Native Title Act 1993... as part of the Commonwealth Government's response to the decision'.

- d. Discuss how the cost and time in bringing the *Mabo case* to the High Court may have affected the court's ability to make law. 6 marks

Marking Guide

Marks	Description
6	<p>A detailed and comprehensive discussion that has the following features:</p> <ul style="list-style-type: none"> • Comprehensive discussion (not explanation) of the impact of cost and time in bringing a case on court's ability to make law • A discussion is more than an explanation, so counter-arguments, limitations, cons, and restrictions should be raised. • The response should address both sides of the argument: how the court's ability to make law is enabled and hindered • Demonstrates an understanding of cost and time in bringing a case • Demonstrates an understanding of law-making by courts • Draws on the salient and relevant facts of the stimulus material to support response
5	<p>A strong response that falls short of full marks. For example:</p> <ul style="list-style-type: none"> • It is a very good discussion, but there is not enough elaboration to warrant full marks (i.e. some points are briefly made). • There is an understanding of the impact of cost and time factors on the court's ability to make law, but there is a lack of depth of knowledge on the topic • There is an error that cannot be ignored
4	<p>A good response that is lacking in some areas. For example:</p> <ul style="list-style-type: none"> • It is a strong explanation of how cost and time hinder the court's ability to make law, but it does not engage with opposing points (i.e. it is not a discussion). • There is an attempt at a discussion, but the points are made briefly and require elaboration, or there is a list of points made but no depth • There are a number of errors that cannot be ignored.
3	<p>The response is 'middle of the range' but is missing key features. For example:</p> <ul style="list-style-type: none"> • Cost and time factors are explained but links to law-making by courts are weak or under-developed • Only one factor (cost or time) is full explained and linked to law-making by courts • Limited use of the stimulus material • There are significant errors such that part of the answer is incorrect.
2	<p>The response is limited. For example:</p> <ul style="list-style-type: none"> • It makes one brief point about how cost and/or time impact law-making by courts. • Costs and time are briefly outlined but does not otherwise address the question. • There is no use of the stimulus material to support the response
1	<p>The response is more than nothing and, in some way, relates to the question. For example:</p> <ul style="list-style-type: none"> • Cost or time has been defined
0	<ul style="list-style-type: none"> • Incorrect response or no response given

Possible Responses

Below is a non-exhaustive list of possible points that could be made...

Costs involved in bringing a case

- Costs involved in bringing a case to court can include solicitor fees, barrister fees, court fees, and potential adverse costs orders.

Time involved in bringing a case

- Bringing a case to court can be time-consuming due to a backlog of cases, preparation delays, complex pre-trial procedures, the complexity of the dispute, and lack of court resources. Furthermore, if the parties are looking to change/develop the common law, it may require a case to be pursued by higher courts on appeal, which could take considerable time.

Enable law-making by Courts

- **Discourages frivolous claims:** The high costs and time involved in pursuing a case helps to ensure only disputes with merit are brought to court, which ensures resources are allocated to important matters and provides courts with more opportunity to develop common law.
- **Encourages the use of alternative methods of dispute resolution:** The high costs and time involved in pursuing a case encourages parties to use alternative methods of resolving their dispute, which can free up the court's time to deal with complex legal issues that may require the court to establish or expand a precedent.

Hinders law-making by Courts

- **Requires a case to be brought:** Courts require a case to be brought before them to develop common law. The cost and time taken to appeal decisions to a higher court can result in courts having fewer cases come before them and, therefore, fewer opportunities to develop the common law.
- **Deters legitimate claims:** The high costs and time involved in bringing a case can deter parties from bringing legitimate claims to court that may have involved important legal issues that would have allowed common law to be developed.

Suggested Response

Below is the start of a high-scoring response...

Costs are a factor that may enable courts to make law. Costs refer to any costs involved in bringing a case to court and can include solicitor fees, barrister fees, court fees, and potential adverse costs orders. The high costs associated with bringing a case to court may enable courts to make law because they discourage frivolous and trivial claims from being pursued. Therefore, only disputes with merit will be brought to court. This is especially the case when cases are being brought before the High Court, such as in the Mabo case. To bring a case to the High Court is extremely expensive and thus will ensure the Court only dedicates its time and resources to cases like Mabo, which are considered legally important and allow courts an opportunity to make and develop the common law.

However, the time involved in bringing a case to court may hinder court from making law...