VICTORIAN BAR

Candidate Number:

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

3 NOVEMBER 2017

(Annotated with sample answers)

This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 10 May 2017, with annotations included as a means of feedback. For each question requiring a written response (i.e. all questions bar the multi-choice questions), a sample of actual answers given by candidates in the examination immediately follows the question. For multi-choice questions, the correct answers are highlighted and underlined.

Attention is drawn to the following **important points concerning this document**:

- Each sample answer has been reproduced in type-written form verbatim, as it appeared in the candidate's actual examination script. Any errors and omissions contained in the candidate's original answer are therefore included. No attempt has been made in this document to correct such errors and omissions. Accordingly, **each sample answer is not to be regarded as perfect and necessarily exhaustive of all relevant issues disclosed by the particular question**.
- In assessing each sample answer, an examiner has applied a combination of quantitative and qualitative criteria and taken into account any errors and omissions in the answer. The candidate has been awarded either the maximum or *near*-maximum possible marks attainable for that question. For example, in the case of a question worth 2 marks the sample answer scored 2 marks, and in the case of a question worth 4 marks the sample answer may have scored 3½ or 4 marks.
- It is possible that other candidates' answers (not included in this document) obtained a similarly high mark for the same question but for different reasons. Accordingly, each sample answer represents only one way in which it was possible to score highly for a particular question.

Jason Harkess
Chief Examiner
20 December 2017

EXAM DURATION: **3 hours** writing time

30 minutes perusal time (prior to commencement of exam)

INSTRUCTIONS TO CANDIDATES:

1) During the exam, you must not be in possession of anything other than writing implements, this exam script and the hard copies of the Reading Guide and examinable excerpts of legislation that have been provided. You are not permitted to have in your possession any other paper, notes, books, electronic devices, mobile phones, pencil cases or any other items that have not been specifically authorised by the Chief Examiner and/or Invigilators of the exam. Any item on your person, on your chair, or on your desk are deemed to be in your possession.

2) Your Candidate Number (but not your name) appears at the top of this page. Your Candidate Number represents your unique identifier for the purposes of this exam. You have previously been advised in writing of the Candidate Number which has been assigned to you. Please ensure that the Candidate Number above matches the Candidate Number which has been assigned to you. You **must not write your name** on any page in this exam script.

3) This exam tests your knowledge and understanding of rules of **Civil Procedure**, **Criminal Procedure**, **Evidence** and **Legal Ethics**. The exam consists of two parts – Part A and Part B. You **must answer all questions (and sub-questions) in both Parts of the exam**. The total number of marks allocated to questions in the exam is 100, so that the maximum score attainable by any candidate is 100. A total mark of 75 or more is required to pass the exam.

4) **Part A** contains 15 questions (Questions 1 to 15) and is worth a total of 50 marks. Part A commences with a preliminary statement of facts giving rise to a hypothetical **criminal proceeding**. Questions 1 to 15 then follow. In answering Part A, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part A informs you of the following: (i) whether you are being tested on rule(s) of criminal procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part A is: Criminal Procedure (20 marks), Evidence (20 marks) and Legal Ethics (10 marks).

5) **Part B** contains 15 questions (Questions 16 to 30) and is worth a total of 50 marks. Part B commences with a preliminary statement of facts giving rise to a hypothetical **civil proceeding**. Questions 16 to 30 then follow. In answering Part B, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part B informs you of the following: (i) whether you are being tested on rule(s) of civil procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part B is: Civil Procedure (20 marks), Evidence (20 marks) and Legal Ethics (10 marks).

6) Although each question is designated as either 'Criminal Procedure', 'Civil Procedure', 'Evidence' or 'Ethics', you may refer to legal rules and principles outside the designated subject area if you consider these to be relevant in answering the question. With some questions, it may be necessary to do so in order to completely answer the question.

7) You must write your answers in the writing space provided after each question. The reverse side of each page in this exam script contains further writing space if required. Further additional blank writing pages have been provided at the end of this exam script.

8) In the case of multi-choice questions, you must simply circle the answer(s) you consider to be correct. Some multi-choice questions are worth 1 mark where **only one answer** may be circled, and other multi-choice questions are worth 2 marks where **two answers** may be circled. If you circle more than one answer for a 1-mark multi-choice question, or more than two answers for a 2-mark multi-choice question, a score of **zero marks will be recorded** for that question. If you wish to change your answer(s) to a multi-choice question, you will not be penalised for doing so provided that the change is effected in such a manner that clearly indicates your intended final answer(s).

9) Your attention is also drawn to the following:

   i) If an application of state law is necessary in answering any question, you should assume that the law of Victoria applies.

   ii) In answering questions, you are not required to cite section numbers or case names unless the question specifically directs you to do so. You may restate principles of law or rules in your own words. A significant degree of latitude is given to you paraphrasing rules and principles.

iii) The standard of expression, spelling, punctuation, grammar, and conciseness will be taken into account in the assessment of your answers. Please take care to ensure your writing is legible.

10) It is suggested that you allocate time spent on each question proportionate to the number of marks allocated. The table below is provided to assist you in planning time (calculated on the basis of 180 minutes total writing time).

TABLE – SUGGESTED TIME SPENT ANSWERING QUESTION BASED ON MARKS ALLOCATED

Marks	**Time (approx.)**
1 mark	no more than 2 minutes
2 marks	3½ minutes
3 marks	5½ minutes
4 marks	7 minutes
5 marks	9 minutes
10 marks	18 minutes

11) You are **not permitted to remove this exam script** from the examination room.

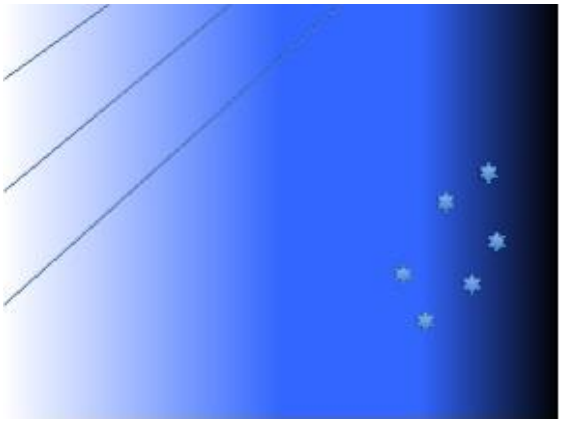
PART A (Questions 1 to 15) – Candidates are required to answer ALL questions in Part A.

Assume the following prosecution summary of alleged facts relates to all questions in Part A.

The Accused is Harold BENSON, 65 years old and lives at 51 Orchard Grove, Mitcham, Victoria.

Between July and September 2017, the Australian Federal Government held a non-compulsory postal vote in which members of the public were asked to decide whether to change the Australian Flag from the current flag (the Flag of Australia), to an alternate flag titled "Ocean Stars", as illustrated below (**Exhibit 1**). The Ocean Stars design was a simple design containing six stars to represent each of Australia's six states and territories, and three diagonal lines to represent the vast ocean surrounding Australia. The traditional "Union Jack" (the Flag of the United Kingdom) was absent from the Ocean Stars design.

Exhibit 1 – Ocean Stars Flag Design



The Ocean Stars flag had been chosen as the alternate flag after a lengthy and competitive process in which designs were solicited from the general public. Over 100,000 designs were submitted. The Flag Contemplation Panel ("FCP") was a body corporate set up by the Federal Government for the purpose of selecting the winning design. The FCP was also tasked with promoting the competition and engaging the general public in relation to the non-compulsory vote. The FCP had its own Facebook page devoted to promoting participation in the vote.

The Victim is Evelyn PRICE and is 17 years old. The Victim was the winning contestant. She designed the Ocean Stars flag. At 7.30pm on 10 June 2017, FCP's Facebook page published a profile of the Victim which provided basic information about her and included a photo of her in her school uniform. The Victim attended a private girls' school in the inner Eastern suburbs of Melbourne.

At 8.40pm on 10 June 2017, the Victim "shared" the FCP's profile of her with her own Facebook friends, and commented "*I'm so proud to have been the winning contestant in this important competition. Please vote for my flag and say good riddance to the Union Jack and monarchy forever!*"

Our Proud History Foundation, Inc ("OPHF") is an organisation that promotes the maintenance of strong ties between Australia and the United Kingdom. It holds weekly history meetings where its members discuss historical events deemed to be of significance to the organisation. OPHF also manufactures and sells Australian-themed memorabilia, including traditional and commemorative Australian flags. The OPHF strongly encouraged its members to vote "*No!*" to change the official flag of Australia. The Accused is the duly elected president and chief executive officer of OPHF.

At 9.35pm on 10 June 2017, the Accused logged on to Facebook and saw the FCP's feature post about the Victim. At 9.39pm, the Accused "replied" to the Victim's comment in relation to the Union Jack. The Accused wrote: *"This anti-traditional attitude will bring down Australian society as we know it. Vote no if you want to uphold Australian values"*.

Other Facebook users also posted replies. Most replies were overwhelmingly supportive of the Victim and derisive of the Accused. One message, posted by fellow high school student Diana LIEU, posted at 10.37pm. Ms Lieu wrote: "*Old farts like Harold Benson of the Our Old Farts Proud History Foundation need to piss off back to the 1800s*".

At 11.49pm on 10 June 2017, the Victim received the following private message via the "Messenger" application on her smart-phone:

"You silly little girl. Show some respect for Australia's traditions! I'm going to shove your irreverent flag where it belongs. I know your school. I know where you live."

Upon reading the message, the Victim feared for her safety. She immediately reported the matter to Victoria Police.

Victoria Police executed a search warrant at the residential premises of the Accused on 14 June 2017 and seized a number of items including 1 x PC desktop computer, 1 x Apple desktop computer (an iMac), and 1 x PC notebook computer. Forensic analysis conducted by a Digital Forensics Investigation Professional established that the threatening message originated from the PC desktop.

The Accused was subsequently arrested and interviewed by Detective Senior Constable Avery JORDAN ("DSC Jordan") on 28 June 2017. The Accused gave a "no comment" interview.

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The Accused has been charged with threatening to cause serious injury and summonsed to appear at the Magistrates' Court of Victoria at Melbourne.

Threatening to cause serious injury is an offence under s 21 of the *Crimes Act 1985* (Vic), which states:

> **21 Threats to inflict serious injury**
>
> A person who, without lawful excuse, makes to another person a threat to inflict serious injury on that other person or any other person—
>
> (a) intending that that other person would fear the threat would be carried out; or
>
> (b) being reckless as to whether or not that other person would fear the threat would be carried out—
>
> is guilty of an indictable offence.
>
> Penalty: Level 6 imprisonment (5 years maximum).

The Prosecution puts its case on the basis that the message sent by the Accused at 11.49pm on 10 June 2017 constitutes a relevant "threat" and that the Accused was *reckless* as to whether or not the Victim would fear a threat of harm would be carried out.

QUESTION 1

Criminal Procedure: Draft the charge that appears on the Accused's charge-sheet. **[3 marks]**

Answer #1 The Accused did at Mitcham on the 10th day of June 2017 make a threat to inflict serious injury, without lawful excuse, upon Evelyn Price and being reckless as to whether or not Evelyn Price would fear that the threat would be carried out.

Answer #2 (2.5/3) Charge sheet must be in writing, signed by informant and comply with Schedule 1:
"That the accused did, at 11:49pm on 10 June 2017 threaten to cause serious injury to Evelyn Price, at Melbourne, and was reckless as to whether or not the victim would fear the threat would be carried out"

For the purposes of answering further questions in Part A, assume the following additional facts:

The Accused intends to plead **not guilty** to the charge. He will provide the following instructions to his lawyers:

1 The Accused was asleep at the time the threatening message was sent to the Victim.
2 The Accused suspects that his housemate, Shaun BROWN, may have used the computer to send the threatening message. Alternatively, the Accused thinks that his Facebook account was hacked and somebody sent the incriminating message falsely under his name.

After the Accused was served with the charge and summons to appear in court, the Accused did a *Google* search inputting the search query "*need a criminal barrister*". He clicked a link which took him to the Victorian Bar website. He reviewed a number of barrister profiles before telephoning a barrister whose profile he liked. He spent twenty minutes on the telephone discussing the charge with him.

Accused: So can you be my barrister?

Barrister: No I'm sorry, it's just not possible.

Accused: Why not? You sound really good.

Barrister: You don't. I don't really like clients who threaten innocent school girls. Anyway, you need to go through a solicitor. I'm a barrister. Good bye.

QUESTION 2

Ethics: Discuss the ethical implications of the Barrister declining to act for the Accused. **[4 marks]**

Answer #1 The cab-rank rule obliges a barrister to accept a brief with their area of practise if it is within their capacity, skill and experience, they are available, the fee offered is acceptable and they are not required or permitted to return the brief. However, nothing in the Rules requires a B to accept a brief from a person who is not a solicitor (r21). However, the B has acted impermissibly in rejecting the brief as the basis of her personal view of the A. That is the very act the rule is designed to prevent.

A B may act for a person directly if they inform them of the matters set out in r22(a) (i.e. – effect of rules 11 and 13, crics may require sol to be briefed), obtaining a written acknowledgement of such disclosure, and if the B does not have any reasonable grounds to believe that the failure to retain a solicitor would seriously prejudice the B's ability to advance client's interest.

Here, A has been charged with indictable offence (albeit poss could be heard summarily). If tired in the County Court before jury, B should decline to act on the basis of 101(k). If summarily, B will have to give careful consideration to how the A will put its case. If merely putting the P to proof on the charge, may be able to accept brief. But if A wishes to advance a positive case, including implicating his housemate, B should decline as an instructing sol will be required to investigate and gather evidence for the A.

Answer #2

1) B's are subject to the cab rank rule (r12) and are obliged to accept all briefs with their capacity/skill experience and fee is acceptable. There are some exceptions.

2) B's dislike of the Acc is not a proper basis on which to decline brief. If refuses to act on this basis, may amount to unprof conduct.

3) B incorrect to say "you need to go through a solicitor". B can accept a direct access brief, but isn't obliged to do so (r21).

4) If wanted to accept DAB (here B does not) would have to explain work that B cannot perform (address for service/corro) and need for potentially briefing solicitor at short notice (r11, 13, 22). Would need signed acknowledgement of this.

QUESTION 3

Criminal Procedure: Will the charge be heard and determined in the Magistrates' Court or the County Court? You should include in your answer explanations as to: (i) whether one or both courts are able to determine the charge; (ii) which court would be preferable for the Accused; and (iii) the procedural steps involved in having the charge finally disposed of by the court(s). **[4 marks]**

Answer #1 The charge may be dealt with in either the MC or CC. It is an indictable offence however is able to be tried summarily because its level 6 imprisonment.

The preferable court is the MC because their jurisdictional limit on one offence is 2 years, also it's a faster process because there is no committal hearing required.

In order to have the MC deal with the charge, A will need to make a summary jurisdiction application, which can be done any time before a committal hearing. The Court will look at factors in s29(2) CPA, including the seriousness of the offence (nature, manner, complexity), adequacy of sentence available and other relevant matters. Notice of the SJA can be made in the Form 32.

In this case, because only one offence charge which is confined to a single act of sending message via messenger and whilst serious, not at the top-end of this type of offending – likely to be granted and matter dealt with at the MC.

Procedural steps to have matter heard with will either be a plea of guilty and then a plea hearing (at CC) (at MC – can be dealt with at any stage) or plea of not guilty and summary hearing (MC) or trial (CC).

Answer #2 The offence is indictable and therefore default position is it be tried before judge or jury. Here, given a particularly serious offence, would be CC. However, the A may apply under s30(1) CPA to have the matter heard and determined summarily in the MC. This is often because the offence is punishable by max Level 6 (5 years) imprisonment. As such is an indictable offence which may be determined summarily by reason of 28(1)(b)(ii) of the Act. The A will want a summary hearing. It will present a more streamlined procedure in the MC and is likely to involve less cost and delay. Most importantly, the MC only has the power to sentence to imprisonment for max 2 years for single charge. As such, A is exposed to a lesser max sentence in the MC. Application for summary hearing may be made any time before A is committed. May ask P for outline of evidence is evidence is not already given. In deciding whether to order a summary hearing, M will consider the seriousness of the offence inc its nature, and the manner it is alleged to have been committed, the complexity of the proceeding and the adequacy of sentencing options

in the MC. Here, A likely to be given SH. Offence is not particularly serious, is likely on the lower end of the range, and the sentencing jurisdiction of the MC likely adequate.
The MC may also offer a SH (s30(2) CPA).

For the purposes of answering further questions in Part A, assume the following additional facts:

The matter will be determined summarily by the Magistrates' Court. Victoria Police has briefed a barrister to conduct the Prosecution. The Accused is also represented by a barrister.

QUESTION 4

Criminal Procedure: Explain the following concepts and how they may/may not be applied in the context of the Accused's proceeding:

i. 'contest mention hearing' **[2 marks]**;

Answer #1
A contest mention hearing is an interlocutory hearing in a summary proceeding. The purpose is to manage the progress of the matter by requiring information from the parties such as estimated hearing time, information relating to witnesses to be called, require the filing and serving of material and allow the amendment of documents filed in the proceeding. Such a hearing will likely be held in A's case as there may be a number of witnesses and complex issues to be determined, so case management in this way will be beneficial.

Answer #2 A contest mention hearing is heard in the Magistrates Court (s 55) including for indictable matters that may heard and determined summarily. As this matter is being determined summarily this provision could apply. It essentially allows the Magistrate to case manage the proceedings, for example by requiring an estimate of time for the hearing, number of witnesses (bearing in mind the accused's limited obligations to disclose), confirm the accused has funding. It is likely to occur in this case as it does not appear to be entirely straightforward, so resolving these details would be beneficial.

ii. ‘diversion program’ **[2 marks]**;

Answer #1 A diversion program allows the Court to adjourn proceedings before a formal plea is taken if (1) A acknowledges guilt, (2) the prosecution (Pros) and A consent, and (3) it appears appropriate in the circumstances. The Court may adjourn for a max of 12 months and must dismiss the charge if A successfully completes the diversion program. This is unlikely to be used here because the matter is a serious indictable offence and A will likely not acknowledge guilt.

Answer #2 Diversion program is an opportunity for the Court to deal with an offender in a way that does not involve criminal sanction if the case is appropriate to do so. It allows the hearing to be adjourned for up to 12 months to allow for the accused to participate in a diversion program. If the accessed satisfactorily completes the diversion program then the Magistrate must discharge the accused. A requirement to be eligible for this diversion program is that the accused acknowledges responsibility for the offence. Here, the accused proposes to plead not guilty, and so would not be eligible.

iii. ‘sentencing indication’ **[2 marks]**;

Answer #1 A sentencing indication in a summary hearing allows the Court to indicate whether a sentence of immediate imprisonment or other type of sentence would be imposed if A pleads guilty. This may be sought at any time during the proceeding and would be informative for A but would likely not be used as A does not intend to plead guilty.

Answer #2 A sentencing indication can be made by the Magistrates Court at any time during a proceeding for an indictable offence that may be heard and determined summarily (s 60, an equivalent provision also exists in respect of indictable offence), which gives an indication of the type of sentence the court is likely to give should the accused plead guilty. If this is offered, and the accused takes up this offer the Court is prohibited from imposing a more severe sentence. If not, the proceeding will need to be transferred to another magistrate unless all parties consent. The stage at which the accused pleads guilty (if at all) can factor in to the s 6AAA Sentencing Act discretion. This would likely be offered in this instance, perhaps instead of a diversion program (depending on the Magistrate’s discretion).

For the purposes of answering further questions in Part A, assume the following additional facts:

The Accused's housemate, Mr Brown, is 30 years old. The Accused owns the house. Mr Brown has been renting a room from the Accused since February 2015.

On 28 June 2017, Detective Senior Constable Jordan attended Mr Brown's place of employment in Camberwell and asked Mr Brown about ownership of the computers that were seized pursuant to the search warrant: '*All the computers are usually in the spare room. They're all owned by Harold but he lets me use them for uni. I prefer to use the Apple iMac but sometimes use the PC. Harold always uses the PC. He also has a laptop which I don't use.'* When asked to make a formal police statement, Mr Brown refused.

On 3 July 2017, Mr Brown telephoned DSC Jordan and said: *'I don't actually use the PC at all like I said the other day. That was a mistake. I don't want to be involved in this. It has nothing to do with me.'*

Mr Brown has a prior conviction for making a false statement to police for which he served 3 months in prison in 2011.

The Prosecutor is aware of all this evidence. However, the Accused's legal representatives have not been apprised of any of it because it was not disclosed by the Prosecution. The Accused is only aware that Mr Brown 'spoke to police' because Mr Brown briefly mentioned it to him at home.

The day before the contested hearing, Defence Counsel telephoned Prosecuting Counsel. The following words were exchanged:

> **Defence Counsel:** Are you calling Shaun Brown as a witness?
>
> **Prosecutor:** No. He has nothing useful to say. You can call him though.

QUESTION 5

Evidence: Is Mr Brown's evidence 'relevant'? Explain. **[3 marks]**

Answer #1 To be relevant under s55 of the Evidence Act (EA), the evidence must be capable of affecting the assessment of the probability of the existence of a fact in issue in the proceedings, if accepted. The fact that SB initially admitted to using the PC could affect the likelihood that A sent the message, as it gives SB the opportunity to do so. His subsequent inconsistent statement could

be used to undermine his credibility, but this does not preclude the evidence from being relevant. Assuming that the evidence is accepted creates a low bar that would likely be met here. Although the statements are hearsay, Pros could argue that the exception in s66 applies, if the statements were 'fresh in the memory' of SB when they were made.

Answer #2 Yes. B's first statement on 28/6/17 refers to use of the computers at A's residence, in particular use of the PC. It is alleged by P that A used the PC to send the threatening msg to V. Therefore the use of the PC by B and others is relevant to an issue in dispute i.e. the identity of the person who sent the msg to V.
The second statement is also relevant as it goes to the 'credit' of B in that it is a prior inconsistent statement to the first statement (see s55(2)(a) EA).

QUESTION 6

Ethics: Discuss the ethical implications of the Prosecution's failure to disclose the evidence concerning Mr Brown and the Prosecutor's decision not to call him as a witness. **[4 marks]**

Answer #1 The PC has no obligation under the BRs to put the whole of the relevant evidence before the court (r83 BR). Further, pursuant to the BRs, PC must disclose all material – incl names – that could constitute evidence relevant to the guilt or innocence of the A (r87). r89 provides that PC does not have to call all witness subject to specific exceptions – however here it does not appear that the evidence f Mr Brown that is relevant to a fact in issue may be covered in the evidence elsewhere.
As the witness is potentially unreliable due to their prior conviction for making a false statement, the PC would need to seek the consent of DC to not call him.
r90 BR puts a positive obligation on the PC to inform DC they are not calling Brown and why (unless not in the interests of justice to do so).
To not do so would breach the Barristers Rules.

Answer #2
(1) P has a continuing obligation of disclosure (s42) which obliges it to provide relevant material, including witnesses it does not intend to call. Clear non-compliance by P with that obligation.
(2) P will not have complied with r83 – as in not calling B as a witness, P hasn't placed all relevant evidence before the Court – plainly the evidence is relevant (refer to Q5).

(3) P wouldn't have complied with r87 which requires disclosure of all relevant witnesses of which P is aware. (No suggestion here that P wouldn't be able to rely on "danger" exception).
(4) P hasn't complied with r89,90 obligation to call all witnesses necessary for presentation of case and also to inform D of witnesses not being called for reasons of reliability, etc. (being charitable, maybe this has basis for P saying that W has "nothing useful to say"). P's conduct could amount to unsatisfactory prof conduct or prof misconduct.

QUESTION 7

Evidence: Assume neither the Prosecutor nor the Defence call Mr Brown as a witness. Discuss the evidentiary implications of: (i) the Prosecutor's decision not to call Mr Brown; and (ii) Defence Counsel's decision not to call Mr Brown. **[4 marks]**

Answer #1 The rule in *Jones v Dunkel* ordinarily applies to allow adverse inferences to be drawn where a party fails to call evidence in certain circumstances. However, the rule in *Jones v Dunkel* has been abolished in relation to criminal proceedings under s44 of the Jury Directions Act (JDA) (applicable under s4A). Instead, s41JDA and s42 JDA prohibit the drawing of such a negative inference where A fails to call particular evidence, as well as any statement or suggestion that such an inference should be drawn (e.g. more likely A is guilty, fill a gap in Pros case). On the other hand, s43 does allow an adverse inference in circumstances where Pros was reasonably expected to call the witness and has not satisfactorily explained why it did not. An inference may then be drawn that the witness would not have assisted Pros case. However, even without calling SB, statements made to police may be admissible under exceptions to the hearsay rule, e.g. s65 if attempts to compel SB not successful and s65(2) is made out.

Answer #2 Prosecution: whilst the rule in Jones v Dunkel has been abolished by the Jury Directions Act in relation to the defence, it still exists for the prosecution (s 43). This means that should the prosecutor not call Mr Brown, the Trial Judge would be entitled to direct the jury (for example under the power in s 222 in CPA), and could be requested to direct the jury (under s 43 JDA read with s 12), that it can be assumed that the evidence would not help the prosecution case.
Defence: firstly, it should be noted that if the existence of Mr Brown's testimony is not revealed to the defence, they would have only a very weak basis to make a decision on whether or not to call Mr Brown. Such a failure to disclose the testimony and provide the defence with the option of deciding whether or not to call the witness could provide a basis for the accused to appeal following

the conclusion of the matter, or provide a basis for an interlocutory appeal should the information be revealed as the proceedings progress.

Putting that to one side, the defence is under no obligation to call witnesses. The defence could also request directions to that effect under s 41 and 42 of the JDA, and possibly the new s.44I if appropriate.

Finally, in terms of evidentiary consequences in respect of both the prosecution and defence, the witness's statement (assuming one of the police took it down in a notebook) could possibly be hearsay (s 59) depending on the purpose it was adduced for. If so, as the witness was not called (and was available as appears to be the case here), it would be unlikely that the evidence in the form of the (unofficial) statement could be adduced, at least on basis of s 137 unfair prejudice discretion enlivened by Brown refusing to make official statement and not being available for cross-examination – could possibly be adduced through police giving evidence.

For the purposes of answering further questions in Part A, assume the following additional facts:

The matter proceeds to a contested hearing. The Prosecution calls the Victim, Ms Price, as its first witness. The Prosecution intends to adduce evidence of the circumstances leading up to her receiving the threatening message from the Accused, including: (i) the Ocean Stars Flag Design ('**Exhibit 1'**); and (ii) the sequence of Facebook posts, including the Victim's post, the Accused's post, and comments made by others, that occurred prior to the threatening message being sent (collectively, '**Exhibit 2'**).

The following exchange takes place in court before the Magistrate:

> **Defence Counsel:** I object to this evidence your Honour. It's all hearsay.
>
> **Prosecutor:** It's the first I've heard of this objection your Honour. We've had no notice of this.

QUESTION 8

Criminal Procedure: In what circumstances is the Defence obliged to give prior notice to the Prosecution of an intention to object to the admissibility of evidence? Was the Defence obliged to do so here? **[2 marks]**

Answer #1 The defence only has limited obligations to provide notice. Most of these obligations (including response to pre-trial admissions (ss182-183) and informing court so that it can make relevant orders and decisions (s200 informed by s199)) apply only in the case of trial on indictment. Here, the matter is being heard summarily, before a magistrate, and so these provisions do not apply. The relevant obligations here would be for the defence to inform the prosecution of expert evidence and alibi evidence: ss50-51. Here, the evidence does not fall within these categories and accordingly no notice needed to be given.

Answer #2 In a summary hearing, A is only required to give notice of expert and alibi evidence, and is otherwise not bound to disclose its case to Pros before the hearing. However, if a summary case conference or contest mention is held, A may be required to raise issues in dispute in order to ensure the orderly progress of the case. As this is not a trial, the obligation in s200 CRPA does not apply.

QUESTION 9

Evidence: Are Exhibits 1 and 2 'hearsay'? Explain. **[2 marks]**

Answer #1 Evidence of previous representations will only be inadmissible as hearsay if they are adduced for the purpose of proving the truth of the asserted fact in the representation.
(i) The flag design in Exh 1 is a previous representation but does not appear to have adduced for a hearsay purposes – i.e. to prove the fact of the design – only that she did make an alternative design to the Australian flag. It is not hearsay.
(ii) Exh 2 similarly is not adduced to prove the contents of the messages, only that the messages were sent. This aspect of the messages is not hearsay. The messages contain a secondary representation, however; that is, the metadata of who sent/received the messages. That information is hearsay and adduced for a hearsay purpose, however will be admissible under the exception to metadata in s71.

Answer #2 Ex 1 is not hearsay as it is not to be admitted to prove the existence of a fact. It can reasonably be supposed that a person intended to assert by the representation – Ex 1 is not being adduced for a hearsay purpose and is therefore admissible (s59).
Ex 2 is also not being adduced for a hearsay purpose but for another purpose – it is relevant to prove that statements were made and relevant for the purpose of showing a threat was made (s60).

For the purposes of answering further questions in Part A, assume the following additional facts:

The Prosecution proposes to call Selena CRICHTON, a customer service representative employed by Telstra Ltd. The Accused's internet and phone services are provided by Telstra. Ms Crichton will give evidence that on 30 June 2017, shortly after the Accused was charged, the Accused telephoned the Telstra Customer Service Centre. Ms Crichton took the Accused's call during which the Accused asked, *'Can Telstra please delete all records of my internet usage for June?'*. Ms Crichton told the Accused that it was not possible for Telstra to do this.

When the Prosecution called Ms Crichton, the following exchange took place:

> **Defence Counsel:** I object to this evidence your Honour.
>
> **Magistrate:** Why?
>
> **Defence Counsel:** This is evidence of post offence conduct, your Honour. It's governed by the Jury Directions Act.
>
> **Magistrate:** This isn't a jury trial, Counsel. That legislation has no application in my courtroom.
>
> **Defence Counsel:** With respect, that's not quite right your Honour.

QUESTION 10

Evidence: What is 'post offence conduct'? Is Ms Crichton's evidence of this kind? Explain **[2 marks]**

Answer #1 Post-offence conduct can be relevant if it is incriminating conduct. Conduct is incriminating if it amounts to an implied admission by the A that he has committed the offence or an element thereof or which negates a defence. Here, evidence is incriminating (and post-offence) because it discloses an effort by the A to destroy evidence which may be inculpatory. Will be admissible if M considers that the evidence is reasonably capable of being viewed as evidence of incriminating conduct, and P gives notice (which may be extended).

Answer #2 Post-offence conduct is provided for in s18 of the Jury Directions Act. In essence, it is conduct of an accused which occurs after the event alleged to constitute an offence which may amount to an implied admission by the accused of having committed the relevant offence. Here, it could be used to imply that the accused was worried his internet history would show he sent the

relevant message and accordingly could meet the relevant definition. Accordingly, it would be post-conduct evidence.

QUESTION 11

Criminal Procedure: Does Part 4 Division 1 of the *Jury Directions Act 2015* apply to this evidence? Explain. **[2 marks]**

Answer #1 Although this is not a jury trial, the new s4A of the Jury Directions Act means that the Act applies beyond jury trials, including summary proceedings under the CPA. Accordingly, Part 4 Division 1 applies insofar as the magistrate's reasoning 'must be consistent' (s4A) with how a jury would be directed in accordance with the incriminating conduct provisions of the act.

Answer #2 Yes, this part applies in summary proceedings under the CRPA pursuant to s4A of the JDA. S4A(2) states that, in such proceedings, the Court's reasoning must be consistent with how a jury would be directed under Parts 4, 5, 6 or 7.

For the purposes of answering further questions in Part A, assume the following additional facts:

The Accused has a prior conviction. In May 2014, the Accused was convicted and fined $3000 by the Magistrates' Court at Melbourne for threatening to cause serious injury. The victim in that matter was Nigel YANG, the then president of Republicans Australia, Inc, an organisation that aspires to have Australia sever ties with Great Britain so that it can have an Australian as the head of state. On 12 November 2013, Mr Yang had given a live interview on a current affairs television program where he expressed his desire for Australia becoming a republic. Later that night, the Accused sent Mr Yang an email which stated: *'Traitor! You will die for dishonouring our heritage. I know where you work.'*

The Prosecution in the present case has given written notice to the Accused that it proposes to call Mr Yang to give evidence of the circumstances that resulted in the Accused being convicted for that prior offence on a **tendency and/or coincidence** basis. The Prosecution also intends to adduce the certified record of the conviction for that purpose. The Prosecution will submit that the evidence of Mr Yang and the prior conviction is admissible pursuant to s 97 and/or s 98 of the *Evidence Act 2008* on the basis that it demonstrates the Accused's '*peculiar passion and obsession with mother England, and a propensity to make threats of violence to any person who publicly promotes a contrary opinion.*'

QUESTION 12

Evidence: Can the Prosecution adduce the evidence of Mr Yang and the Accused's prior conviction as part of its case, under either s 97 or s 98 of the *Evidence Act 2008*? Explain with reference to the case of *Hughes v The Queen* [2017] HCA 20 and *Velkoski v The Queen* [2014] VSCA 121 (**Note:** The case of *Velkoski* is not listed in the Reading Guide but was discussed in *Hughes*). **[6 marks]**

Answer #1 The prosecution will seek to adduce this evidence under s97 EA as evidence that the accused has a tendency to make threats of violence to any person who promotes an opinion conferring to his which relates to his views on the republic + England and therefore had this tendency on the occasion in question in this case. Prima facie this evidence is inadmissible unless notice is given (it is here) and the court thinks this evidence will, either by itself or with other evidence have significant probative value (PV). Further, tendency evidence cannot be adduced unless the PV substantially outweighs the prejudicial effect (s101). The court in *Velkoski* determined that in order to have the requisite level of PV, the tendency must exhibit similarities, a pattern of behaviours or a particular Modus Operandi. The majority of the HCA in *Hughes* disagreed. They stated that *Velkoski* evinced an unduly restrictive approach to s97 and incorporated common law concepts that should not be read into the section – such wording re. similarities etc. would have been incorporated had that been the intention of Parliament (note s98 uses the work "similarities"). Therefore, in order to have the requisite PV, it is not necessary to show a pattern of behaviour, similarities or MO, although the HCA notes these are often present, simply not determinative. PV is the capacity of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue. It is clear that both the record of conviction and Mr Yang's evidence has probative value in that it has the capacity to affect the assessment that the accused exhibited this tendency on the occasion in question making it more likely he was responsible. It has strong probative value in that there was a conviction recorded and there is similarity in the words used. The prejudice referred to is the capacity for the jury to misuse the evidence in an impermissible way for example, to infer that because he was guilty previously, he is guilty on this occasion, or on an emotional or illogical basis. This is a largely circumstantial case and in my view, the probative value of the tendency evidence substantially outweighs the prejudicial effect it may have. If admitted for a tendency purpose, DC may request a direction under s27 JDA.

Answer #2 The evidence would be intended to be adduced as tendency evidence, on the basis that the evidence supports that the accused had a tendency to act in a particular way. For it to be admitted in this way, pursuant to the test set out by the majority in Hughes, the evidence must strongly support the existence of a tendency, and that tendency must strongly support the proof of a fact in issue. Applying that test here, the evidence supports a tendency (put relatively narrowly) that the accused is liable to respond to attacks made against Australia being a republic, by sending electronic communications (email/facebook message). That tendency in turn supports a fact in issue, being that the accused was the one (as opposed for example to Mr Brown) who sent the message to the victim.

It is important to consider whether this test satisfies the 'strong' requirement in Hughes (which equates to the requirement in s 97 that the evidence have 'significant probative value'). Here, there is just one instance, however the language used 'I know where you work') is identical, and the use of the term 'heritage' is close to 'traditions'. Arguably, this evidence does meet the requisite test.

It is important to remember that Hughes overturned the (stricter) test based on common law concepts in Veloski. In Hughes, the relevant tendency was essentially opportunism towards preying on 16 year old girls without regard for being caught. The tendency as described above arguably meets that level of specificity.

Noting the additional hurdle put in place by the s 101 'probative value outweigh prejudicial value' requirement for the evidence to be admitted, arguably the relevant test is satisfied and accordingly the tendency evidence could admitted only for proof of that purpose. As per Dickman, prejudice can be addressed by appropriate directions to the jury. Here, as there is no jury, it is a fair application of that principle to assume that the Magistrate would be able to place an appropriate amount of weight on the tendency evidence so that it is not prejudicial to the accused. Accordingly, s 101 would not operate to exclude the evidence, and neither would the similar exclusionary rule in s 137 (on the basis that the probative value, which is high, is not outweighed by prejudice).

The analysis for coincidence evidence would be similar. Although the majority in Hughes did not expressly address coincidence evidence, their Honours did note that the Evidence Act was intended to make widescale changes to both tendency and coincidence, including by removing old common law concepts. This may mean that the 'striking similarity' test is no longer good law, and may also mean that similarly to Hughes the threshold for admitting coincidence evidence has been somewhat lowered. In any event, should the evidence be admitted for a coincidence purpose, there may be credible grounds for the defence to make an interlocutory appeal on the basis that there is an important point of law that needs resolving (namely, the applicability of Hughes to coincidence evidence).

QUESTION 13

Evidence: Refer to Question 12. Assume the Magistrate rules in favour of the Accused such that the evidence proposed to be adduced by the Prosecution is inadmissible under ss 97 and 98. Identify and explain **TWO (2) hypothetical situations** which could subsequently arise in the course of the contested hearing, which might permit the Prosecution to make another attempt to adduce the evidence of Mr Yang and the Accused's prior conviction. (***Note:*** you may assume and specify the existence of any additional facts that may assist you with your explanations): **[3 marks]**

Answer #1

(1) If DC has XXNd a P witness about a matter relevant solely to a P witness' credibility (s103), or to prove that P witness has tendency to be untruthful, then P, with leave of court, may XXN accused re: prior (s104(4)) IF P can establish that the prior 'substantially affects the credit of A' (s103). Mag would have regard to s192 factors in determining whether to grant leave.

(2) If, during giving EIC, A asserts (or another D witness) that he is 'not the kind of person to issue threats of this kind', P may adduce evidence in rebuttal as this is 'character evidence' (s110), but P must seek leave to XXN as to character (s112) and Mag will again have regard to s192 matters.

Answer #2

(1) If D sought to adduce evidence of A's good character, then P could seek to adduce the prior conviction and/or previous threatening conduct of Y to prove that A is not of good character (s110 EA), however, P must first seek leave of Court.

(2) If A adduces evidence that a P witness tends to be or has a tendency to be untruthful (for example by attacking Brown on his prior conviction for false statement), which would be relevant mainly to Brown's credibility, A loses its shield to be XXN about his credibility and P could seek leave to XXN A about his prior.

For the purposes of answering further questions in Part A, assume the following additional facts:

The Magistrate finds the Accused guilty of the charge and the matter proceedings to a sentencing hearing. Apart from the prior conviction concerning Mr Yang, the Accused has three other prior convictions in relation to separate incidents that occurred in South Australia in 2005, 2009 and 2010 (collectively, "the **SA Priors**"). The SA Priors are all relatively minor assaults for which the Accused

received convictions and a small fine. In the course of sentencing, it becomes clear to Defence Counsel that neither the Prosecutor nor the Magistrate are aware of the Accused's SA Priors.

QUESTION 14

Ethics: *Your answer:* ***(circle TWO)*** **[2 marks]**	Which of the following **TWO (2)** propositions are correct? a) Defence has no general duty of disclosure owed to the Prosecution. b) Defence is entitled to make submissions at the sentencing hearing as if the Accused has only the one prior Victorian conviction. c) Defence has a duty to inform the Prosecutor and the Magistrate of the SA Priors. d) Defence has a duty to keep the SA Priors confidential if the Accused so instructs, but must not suggest they do not exist. e) If the Prosecutor asks Defence whether the Accused has any other priors, the Defence has a duty to disclose the SA Priors. f) If the Magistrate asks Defence whether the Accused has any other priors, the Defence must cease to act for the Accused.

For the purposes of answering further questions in Part A, assume the following additional facts:

The Magistrates' Court convicts the Accused and imposes a fine of $5000.

QUESTION 15

Criminal Procedure: Explain the appeal options for the Prosecution and Defence. **[3 marks]**

Answer #1

(1) A can appeal finding of guilt and fine as of right (s254) to CC within 28 days (see proceed detail at s255). P's appeal would be heard on a de novo basis. CC would need to warn if it was going to impose custodial sentence.

(2) DPP can appeal sentence to CC under s257, with notice of appeal etc.

(3) A/P could appeal directly from MC to SC on a question of law (s272) but this would preclude an appeal to CC.

(4) A/P could appeal CC decision to the Court of Appeal with leave of Ct of appeal (s274, etc.) Appeal would be conducted on *House v R* basis -> not interfere with exercise of discretion of CC unless error etc.

Answer #2 P can appeal against sentence (no leave required) if satisfied it is in public interest. Must file notice of appeal within 28 days of sentence. In practice appeals against sentence from MC by P are rare – so special public interest here.

A can appeal as of right against conviction and sentence, or sentence alone. 28 days' notice required. A to be informed of risk of more severe sentence could be imposed. De novo hearing.

Either can appeal question of law to SC but must choose one or the other.

END OF PART A

PART B (Questions 16 to 30) – Candidates are required to answer ALL questions in Part B.

Refer to the facts in Part A and assume the following further facts relate to all questions in Part B.

Following the success of the '*No!*' campaign and the retention of the traditional Flag of Australia, the Flag Contemplation Panel ("FCP") sought to capitalise on an anticipated surge of patriotism by commissioning the making of 20,000 "*Special Edition"* Australian flags for sale through its Facebook page. OPHF is the leading manufacturer of Australian flags.

On 1 October 2017, the FCP entered into a written agreement with OPHF for the manufacture of the 20,000 special edition traditional Flags of Australia ("OPHF Agreement"). The OPHF Agreement contained the following term:

> **18. Values**
>
> The Parties agree to execute this Agreement in the spirit of the Parties' shared values of professionalism, integrity and accountability.

Pursuant to Schedule 1 of the OPHF Agreement, FCP was to pay $100 per flag unit making the total value of the contract worth $2 million.

On 3 October 2017, Channel 5's *A Serious Matter* presented a story on prime-time television relating to the prosecution and ultimate conviction of OPHF director Harold Benson (the subject matter of Part A of this exam above). The story portrayed OPHF as radical in its political ideology and Mr Benson as being the type of person who "flies off the handle" at anyone who holds a contrary view to his own. The journalist presenting the story, Elaine SAIGE, also referred to Mr Benson's previous conviction for making the threat to Mr Yang in the course of her exclusive report. Ms Saige also referred to Mr Benson's three prior South Australia convictions which she had uncovered after a bit of "digging around". The story also included camera footage of Ms Saige running after Mr Benson with a microphone as he was making his way to his car outside OPHF's office in Brunswick East. The footage captures Ms Saige shouting at Mr Benson, '*Do you have a temper problem, sir?*' after which Mr Benson turns around and pushes Ms Saige to the ground. Mr Benson then gets into his car.

The FCP, a body corporate created by the Commonwealth government, sought to distance itself from OPHF following the airing of the program. Upon review of the OPHF Agreement, the FCP has determined that clause 18 of the OPHF Agreement (set out above) has been breached by OPHF by the conduct of its President and Chief Executive Officer, Mr Benson. The FCP also determined that clause 18 is a fundamental contractual term of the OPHF Agreement breach of which amounts to a

repudiation of the OPHF Agreement. This conclusion, if correct, entitled the FCP to terminate the OPHF Agreement immediately. On 11 October 2017, the FCP notified OPHF in writing that it was terminating the OPHF Agreement, effective immediately.

On 15 October 2017, the FCP entered into another agreement with another flag manufacturer, Flags of the World Pty Ltd ("FOTW"), for the production of the 20,000 flags at a cost of $150 per flag unit ("FOTW Agreement").

OPHF rejects the FCP's allegation that clause 18 was breached. Furthermore, OPHF considers that the FCP has repudiated the OPHF Agreement by wrongfully purporting to terminate it and by subsequently entering into the FOTW Agreement. OPHF has decided to commence proceedings, naming itself as Plaintiff and the FCP as Defendant.

The facts in issue in the proceeding will include:

1 whether conduct in the nature of Mr Benson's threat could legally amount to a breach of clause 18 of the OPHF Agreement;
2 if question 1 is answered affirmatively, whether Mr Benson's conduct can be imputed to OPHF;
3 if the answer to 1 or 2 (or both) is answered negatively, whether FCP's purported termination and entering into the FOTW Agreement could legally amount to a fundamental breach of the OPHF Agreement.

QUESTION 16

Civil Procedure: *Your answer:* ***(circle ONE)*** **[1 mark]**	Proceedings are most likely to be filed by the Plaintiff in which court? a) Administrative Claims Court of Victoria. b) Victorian Civil and Administrative Tribunal. c) Commonwealth Court of Commercial Claims. d) High Court of Australia. e) Magistrates' Court of Victoria. f) Supreme Court of Victoria.

QUESTION 17

Civil Procedure:	Which **TWO (2)** documents are most likely to be filed by the Plaintiff at the commencement of the proceeding?
Your answer: *(**circle TWO**)*	a) Claim by affidavit. b) Disclaimer. c) Originating claim. d) Statement of claim. e) Statement of issues.
[2 marks]	f) Writ.

For the purposes of answering further questions in Part B, assume the following additional facts:

FCP has been served with OPHF's proceedings. FCP intends to vigorously defend the matter. It also wants to claim damages against OPHF for breach of clause 18 for the costs incurred for having to negotiate another contract with FOTW ($25,000) and the additional cost charged by FOTW per flag unit ($1 million). FCP has engaged a private firm of solicitors, Clark & Clark, for this purpose. The Chair of the FCP, Leonida VALLINS, had the following conversation with Helena CLARK, a principal solicitor at the firm:

> **Ms Vallins:** So can you explain the procedure from here?
>
> **Ms Clark:** Yes, we'll need to have FCP file two documents, a defence and a counterclaim.
>
> **Ms Vallins:** What's the defence document?
>
> **Ms Clark:** It's the formal denial by FCP of all of the plaintiff's allegations.
>
> **Ms Vallins:** And the counterclaim?
>
> **Ms Clark:** It basically allows you to pursue your own claim against OPHF in a separate trial. That's because they're based on separate claims so they can't be heard together.

QUESTION 18

Civil Procedure: What is the difference between a "defence" and a "counterclaim"? Is Ms Clark's explanation of these two documents correct? Explain. **[3 marks]**

Answer #1 A defence is a document filed by a defendant which responds to the statement of claim made by the plaintiff. It may admit, deny, or not-admit the various claims made in the statement of claim, and must comply with the pleading requirements in order 13, see in particular r 13.12.
A counterclaim is a separate claim, often made by the defendant against the plaintiff. For example, a plaintiff's statement of claim may claim a breach of contract, and a defendant's counterclaim may claim the plaintiff has committed a tort: see order 10. Counterclaim will generally be tried at same time as plaintiff's claim. A counterclaim is combined with the defence, filed in a document called 'defence and counterclaim': order 10.02.4
Ms Clark is incorrect insofar as

- Defence and counterclaim can and indeed generally should be heard together to promote expeditious hearing in line with overarching obligation requirements.
- Defence need not merely deny allegations – as outlined above, it can admit, deny, or not-admit. Often it will be appropriate to deny only the various allegations and admit various background facts.
- Clark incorrect to say need to file two documents, as noted above, defence & counterclaim is filed as one document.

Answer #2 A defence is the formal document filed by the defendant (D) in response to the claims set out in the plaintiff's (P) statement of claim. C is wrong in saying that it is a denial of all allegations by P. D should properly deny, admit and not admit particular allegations of fact based on the facts and material available. C will have to file a proper basis certificate verifying her reasonable belief in each denial/admission/non-admission and so should not simply deny everything unless there is a proper basis.
The counterclaim is not a separate document, it forms one document with a defence called the defence and counterclaim. It is pleaded in the same way as a statement of claim and will be tried in the same proceedings unless the Court orders under r10.05 of the Supreme Court Rules (SCR).

QUESTION 19

Ethics:	In settling the defence, Counsel for the Defendant **must** be satisfied of which **TWO** of the following matters?
Your answer: ***(circle TWO)***	a) Each denial of fact raises no legal issue. b) Each denial of fact is reasonably well founded, having regard to the client's instructions. c) Each non-admission is not unduly burdensome for the Plaintiff in prosecuting its claim. d) Each non-admission is premised on the basis that Counsel cannot infer, one way or the other, whether the Plaintiff's allegation is true. e) Each prayer for relief is conservatively estimated. f) Each prayer for relief is supported by an independent expert's opinion.
[2 marks]	

For the purposes of answering further questions in Part B, assume the following additional facts:

Dominic FINLAY is a director of OPHF. On the evening of 20 October 2017, Mr Finlay attended a social event at the "Windy Hill" football ground in Essendon. Fleur PRENDERGAST was serving drinks behind the bar. Ms Prendergast is the daughter of a member of the FCP, Wayne PRENDERGAST. Ms Prendergast was aware of the proceeding brought by OPHF. After serving Mr Finlay a few drinks, she overheard him talking to another patron about his involvement with OPHF. Ms Prendergast decided to add extra shots of alcohol to Mr Finlay's drinks so she could "loosen him up" and get him talking about OPHF because her father might find it useful. Her plan worked:

> **Ms Prendergast:** Goodness! I hope you have some luck with that court case. Those guys at the flag panel sound really nasty.
>
> **Mr Finlay:** Thanks luv. You can't believe how bad they've made it for us. We're about to go bust. This contract was going to clear all of our debts and now it's over.

Ms Prendergast reported the conversation to her father later that night. Mr Prendergast relayed the information to the FCP's solicitors the next day. The FCP's solicitors have advised their client to bring on a 'security for costs' application immediately.

QUESTION 20

Civil Procedure: What is a 'security for costs' application? With reference to the procedural steps and issues considered in *Raventhorpe Pty Ltd v Westpac Banking Corporations* [2017] VSC 362, explain the likely anticipated course of FCP's security for costs application from inception to its final disposition. **[4 marks]**

Answer #1 An application for security for costs is made under Oder 62 and is not available unless a ground of jurisdiction is made out (62.02(1) SCR). Assuming that OPHF is a corporation, D will rely on 62.02(1)(b) as a ground for the Court to be able to make the order. The Court will then have regard to various factors to determine whether the order is appropriate in the circumstances (1) Delay, (2) Prospects of success, (3) Contribution to financial issues, (4) Voluntary assumption of risk, and (5) Individual co-plaintiff. Issue (5) is not relevant here. In addition to delay, *Raventhorpe* held that it is not a strong factor against the making of an order, but is relevant to the type of costs ordered (e.g. future only) and the date for payment. There is no evidence of a significant delay here, and no reason to believe P's case is not prima facie and properly pleaded (2). However, P will argue that its impecuniosity is a result of D's termination of the contract, and, as proceeding founded in K, may be strong factor. D also voluntarily assumed the risk by deciding that it was financially prudent to enter into the K. Likely no order.

Answer #2 A security for costs application is where a D seeks security for their costs of defending the claim against P on a party/party basis. It is governed by O62 SPV Rules. In this case the P is a corporation who prima facie has insufficient assets in Victoria to pay the costs of D (r.62.02(1)(b)). In *Westpac*, the court considered this type of application. In determining whether to make such an order, they considered the factors of delay, the P's prospects of success, any stultification of proceedings, voluntary assumption of risk, whether the impecuniosity of P was caused by or contributed to by the D and whether the application was made (the earlier in proceeding the more reasonable). The court made the order in that case, and had discretion to order security to be given in an amount and manner so directed (r.62.03).

In this case, there has been no delay in bringing the application and it appears there are grounds for A. It appears to have been brought early in the proceeding, although at this stage, P's prospects of success not entirely evident. D has not contributed to P's impecuniosity and there is no natural Co-P. The court will likely make the order given the above factors and the fact P has said they are about to go bust.

QUESTION 21

Evidence: Refer to Question 20. At the commencement of the hearing of the FCP's security for costs application, the following exchange takes place:

> **Counsel for OPHF:** I object to the admissibility of all evidence concerning the words exchanged between Mr Finlay and Ms Prendergast. It's all hearsay your Honour.
>
> **Counsel for the FCP:** Oh but they are admissions your Honour, a well-known exception to the hearsay rule of course. My learned friend must have forgotten that.
>
> **Associate Judge:** Indeed, but you will still need to impute those comments to the Respondent corporation to get them in, won't you?
>
> **Counsel for the FCP:** I'm sorry, you've lost me your Honour.
>
> **Counsel OPHF:** Thank you, your Honour. And might I remind my learned friend of the underhanded way in which this evidence was ultimately obtained. It should be excluded on that basis alone.
>
> **Counsel for FCP:** Perhaps I should remind my learned friend and, with respect, the court that this is not a trial. It is a security for costs application and all of those rules of evidence referred to don't apply.

Explain the above exchange and discuss the merit in all points made by Counsel and the Associate Judge. **[5 marks]**

Answer #1 FCP's counsel: (i) Admissions are not an exception to hearsay, but the hearsay rule does not apply to evidence of an admission (s81). This would be an admission as it is against the interest of the party to the proceeding, and appears to be made with authority within the scope of authority of the party or related to it: s87(G) of Evidence Act (to deal with the judge's point, although the judge agrees that admissions are an exception to hearsay, which is wrong: s81 of Evidence Act). It is an admission in the context of the current application as adverse to the party's interest in the outcome of the 'proceeding' for security for costs: see definition of 'admission'.
(ii) The Evidence Act applies to interlocutory proceedings: s4(1)(b). However, on interlocutory applications, affidavits may contain statements of information and belief it the source is identified, which it is here. See r43.03(2). Security for costs is interlocutory
OPHF's counsel: (i) The words are not hearsay, as she (Prendergast) heard them directly, but if used to prove truth of contents of representation of Finlay, then would be caught by the hearsay rule, but see above as it is an admission, so hearsay rule does not apply.
(ii) Underhanded way the evidence was obtained raises s138 of Evidence Act as 'improperly' obtained evidence. Prendergast added extra alcohol to Finlay's drinks with an express purpose to get damaging information, but this was done without authority or knowledge of party. Because of

that, the desirability of admitting the evidence probably outweighs the undesirability of admitting the evidence obtained in the circumstances, given the importance of evidence and relatively unimportant stage of the proceedings.

Answer #2 PC is correct to submit that the statements with Ms P are hearsay – they are an out of court statement adduced to prove the truth of facts Mr F can reasonably be taken to have intended to assert. However, a SFC application is an interlocutory proceeding and as such, the hearsay rule does not apply: s75. However, under the Rules, the deponent of the hearsay evidence must state the source of the evidence. Assuming Ms P identifies Mr F in her affidavit, the hearsay evidence will be admissible. PC is right re admission insofar as the statement is adverse to the interests of the P, however the statement must be made by a person who 'is or becomes a party'. HH is correct, as OPHF is the party, DC needs to be able to fix the admission on the P by establishing that Mr F had authority to make statement on behalf of OPHF, or was an employee and the representation was within the scope of his employment: s87.

Mr F is a director of OPHF. It is reasonably open to find that he has authority to make statements on behalf of OPHC. Although moot, admission exception likely applies.

Finally, PC is right to raise the issue of the manner in which the evidence was obtained. Section 138 EA will be engaged where evidence is obtained improperly or in contravention of a law (or as a consequence of). If established, desirability of admitting must outweigh undesirability.

Ms P has probably breached RSA laws, or other laws about supplying intoxicating substances without knowledge. PC will have to establish the causal connection between that act and the statement. If so, it will be likely that balancing exercise weighs in favour of exclusion – D's prospects on an interlocutory skirmish unlikely to outweigh importance at court not concluding the conduct in question.

QUESTION 22

Civil Procedure: Explain the obligation and purpose of 'discovery' in civil proceedings. Identify **FOUR (4)** categories of documents (specific to the likely issues to arise in this proceeding) that would be sought/discovered by any of the parties to the proceeding. **[4 marks]**

Answer #1 The obligation of discovery is contained in Order 29 (and Order 32 for non-party discovery). It requires that should a party be served with a notice of discovery (r 29.02), they must discovery of all documents of which after a reasonable search they are aware that: they rely on; that adversely affect their case or another party's case; or support another party's case. Documents

that are privileged are excluded but a reason for the privilege must be provided: r 29.04, see also s131A Evidence Act.

The purpose is to allow all relevant information to be shared between parties and court to extent possible to ensure that proceeding is determined fairly (in accordance with overarching obligations) and additionally to open the door for ADR and pre-trial settlement (once all documents are revealed, it may be that certain causes of action fall away): as to which see s 8, 16, 22, 23 of Civil Procedure Act. Four categories of documents that would be sought to be discovered are:

- Financial records of OPHF
- Internal documents concerning disposition/temper of Mr Benson
- Documents concerning FOTW contract
- (3P discovery) documents used for research of A Serious Matter program.

Answer #2 Discovery requires each party to proceedings to disclose (by affidavit of documents) all documents within their possession, custody, power or control (or of which they are aware in another person's possession etc.), having conducted a reasonable search considering the nature of the proceedings, importance of documents and cost to locate. The purpose of discovery is to ensure that each party is apprised of all relevant evidence so that they can narrow the issues in dispute and/or settle the proceedings. Here, documents likely to be discovered include:

(1) Documents disclosing or relevant to the scope of Mr Benson's role in P (to prove his conduct may/may not be imputed to P).

(2) Documents substantiating P's loss (relevant to damages)

(3) Documents substantiating D's loss (relevant to damages in counterclaim/set-off)

(4) Extrinsic materials relevant to the interpretation of cl18 of the OHPF agreement (relevant to determining whether Mr B's conduct, if imputed to P, breached cl18).

For the purposes of answering further questions in Part B, assume the following additional facts:

In the course of inspecting documents discovered by the FCP, the solicitors acting for OHPF came across an email from Wayne PRENDERGAST (FCP member) to Iona VINEY (FCP member). Mr Prendergast's email is dated 9 October 2017 and forwards an email he received from Sebastian JONES (director of FOTW) earlier that day. The email from Mr Jones to Mr Prendergast simply states: *'Hi Wayne, thanks for taking my call. Time to get rid of the motley crew I think and sign up with us. As discussed, while we might be more expensive, we'll deliver the goods without a public spectacle being made of it.'* The email from Mr Prendergast to Ms Viney states: *'Hello Iona, see*

message from Flags of the World below. They're ready to take on the job. We now need to advise the rest of the panel to kill the Benson contract.'

Upon receiving further advice from Counsel about this email, OPHF believes both the FCP and FOTW are liable in damages for the torts of interference with contractual relations and conspiracy.

QUESTION 23

Civil Procedure: Explain what procedural steps OPHF should take in order to pursue these additional claims and to obtain further information that will enable OPHF to better articulate them. **[4 marks]**

Answer #1

(1) OPHF can re-plead its SoC to include the new claim about conspiracy/interference. Depending on timing, this could be done as of right or with leave.

(2) OPHF could join FCP as a defendant to the proceedings as the matter involves common questions of fact/law and the rights to relief arise from same set of transactions (r9.02)

(3) Alternatively, O could issue fresh action as FCP and could apply to have the proceedings tried together.

(4) Further info: Before joining FCP, O could seek discovery from a prospective defendant (O32.05) as it has reasonable cause to believe it has a claim against F but hasn't been able to get enough information to decide this. Alternatively, O could subpoena the records of FCP (O42) provided it paid conduct money etc.

May also be wise to issue subpoenas to individuals such as WP, IV, SJ, etc.

Answer #2 The procedural steps to add FOTW as a defendant to the proceeding. It would depend on the status of the proceeding as to whether leave is required – if pleadings have closed you need the leave of the Crt to do so (order 9 SCR). The P may issue proceedings against FOTW and have the proceedings consolidated (r9.12 SCR) as there is a common question – they may be consolidated or tried together.

In order to obtain additional information – the OPHF may seek discovery from a 3rd party before issuing an order to better articulate the claim against them – order 32 SCR. Rule 32.05 allows for discovery from a prospective defendant – here there is reasonable cause to believe that there is a right to obtain relief. This may be facilitated by an application and then order by the court.

For the purposes of answering further questions in Part B, assume the following additional facts:

FOTW is now also a party to the proceeding.

The matter has been set down for trial. It has become apparent to OPHF and its legal representatives that the FCP will be taking issue with the way OPHF has quantified its alleged losses. Assuming the FCP is found liable, it will then be for OPHF to convince the court that its actual costs associated with producing each flag unit are relatively low (this will result in a higher award of damages for lost profits). To this end, Counsel for OPHF has arranged a conference in chambers with Harold BENSON (director of OPHF), Leanne HARTWELL (director of OPHF) and Glyn SHAND (independent auditor and accountant). OPHF has engaged Mr Shand to provide an independent assessment of its calculable losses. The following exchange takes place in Counsel's chambers:

> **Mr Shand:** So my calculation brings your costs per flag unit at $68.50.
>
> **Ms Hartwell:** That's ridiculous. That's well above our own estimate. What do you think Counsel?
>
> **Counsel:** Yes. Play with the numbers a bit more if you can Mr Shand. There's nothing wrong with a bit of creative accounting as long as you're comfortable with the final figure. It's just very important that each of you are all on the same page when it comes to giving evidence in court. There's nothing worse than inconsistencies as between witnesses. It's the last thing we need. Are we in agreeance?
>
> **Mr Benson:** Absolutely.
>
> **Mr Shand:** Hmmmm. Very well. You are paying for this after all. Harold, I'll be adding a premium to my fee for this, you realise?
>
> **Ms Hartwell:** Great!

QUESTION 24

Ethics: Discuss the ethical implications of what has transpired in Counsel's chambers. **[4 marks]**

Answer #1

(1) B has breached r69 as has effectively suggested expert gives false evidence (r69). This is coaching the witness and goes far beyond testing inconsistencies, etc. (s70)

(2) Also, appears B is conferring jointly with several potential witnesses, when isn't usually permitted (s71)

(3) B (and the expert, to whom the overarching obligations also apply) are likely to have breached several of the overarching obligations, including obligation not to mislead or deceive, act honestly, etc.

(4) Consequences:

- For B would amount to unprof conduct or prof misconduct and could be reprimanded, fined, etc. Or even suspended from practice – post *Hudspeth* it is clear that this is not acceptable
- For B and expert and solicitors – costs orders could be made under CPA

Answer #2 Breach of ethical obligation both on counsel and expert (*Hudspeth v Scholastic*).

Barrister must not suggest witness give false/misleading evidence, must not coach, must not condone such things best done.

Also should not have multiple witnesses/prospective witnesses together when discussing this type of evidence (i.e. not general information, etc.)

Barrister + Expert also have obligation under CPA to ensure interests of the just, timely, efficient and cost effective resolution of the real issues in dispute as noted.

Under CPA – both can be sanctioned and may suffer adverse costs order.

Barrister also subject to disciplinary action, for unprof conduct or misconduct.

For the purposes of answering further questions in Part B, assume the following additional facts:

Mr Shand has prepared a final report which has been provided to OHPF's solicitors and Counsel (but not yet provided to the other parties in the proceeding). Mr Shand's report expresses the view that the cost associated with producing each flag unit by OHPF is $55.50 ("First Shand Report"). After further dialogue with OHPF's solicitors, Mr Shand revises his report and resends it with a new figure of $49.50 per flag unit ("Second Shand Report"). OHPF's solicitors, Counsel and Mr Shand all agree that the First Shand Report can be marked "*DRAFT"*. OHPF's solicitors serve the Second Shand Report on the other parties to the proceeding but not the First Shand Report. The existence of the First Shand Report is kept confidential.

QUESTION 25

Evidence: Explain the evidentiary basis upon which the contents of Mr Shand's Second Report is admissible at trial. Are any rules of evidence likely to be violated? If so, how are they overcome? **[3 marks]**

Answer #1 Mr S's report is clearly relevant to the issue of loss (damages) in the proceeding, but it violates the rule against opinion evidence as it is being adduced to prove the truth of facts about which he has given his opinion. The exception for experts in s79 EA may apply if Mr S has specialised knowledge and the report clearly displays a path of reasoning from facts to be proved to his conclusion using that specialised knowledge.

Answer #2 Shand's report 'expresses views' and therefore includes opinion evidence (s 76). The evidence would be admitted to prove the fact about the existence of which the opinion was expressed; namely, it would be proved to show the cost associated with each flag unit was $49.50. This evidence is prima facie inadmissible but on the basis that he is an 'independent auditor and accountant' his evidence is likely to be considered expert opinion evidence (s 79), as the report covers matters that would seem to fall with in the 'specialised knowledge' that he has acquired as an auditor or accountant. This is subject to the proviso that the report would need to show a clear path of reasoning: Wilson, based on assumptions or facts that had been provided to him. Without more information not possible to know if should be excluded pursuant to s 135 discretion but on facts so far unlikely to be prejudicial, misleading, or time wasting (Wilson). Evidence is relevant because it goes to one of the fundamental issues (cost price) in the trial: s 55.

For the purposes of answering further questions in Part B, assume the following additional facts:

Mr Shand's evidence as contained in the Second Shand Report is ruled admissible.

In the course of being cross-examined about the contents of the report, the following exchange takes place between Mr Shand and Counsel for FCP before an objection is made:

> **Counsel for FCP:** Is that the only report you provided to the Plaintiff's solicitors?
>
> **Mr Shand:** What do you mean?
>
> **Counsel for FCP:** Did you provide them with a draft version before the final version?
>
> **Counsel for OPHF:** I object to this line of question your Honour.

QUESTION 26

Evidence: Explain the following: (i) the relevance of Counsel for FCP's line of questioning; and (ii) the likely basis upon which Counsel for OPHF has objected. How is the trial judge likely to rule on the objection? **[4 marks]**

Answer #1 The line of questioning is relevant on the basis that he is endeavouring to discredit the credibility of Shand.
Counsel for OPHF has most likely objected on the basis of legal privilege. Arguably the earlier report can be characterised as a confidential communication pursuant to s119. It seems arguable that the document was produced for the dominant purpose of providing the client with legal services for a pending proceeding.
However, is privilege lost here on the basis of a form of fraud. Possibly so given that the party has elected to introduce evidence from Shand in this report it is arguable that privilege has been lost. Shand's opinions are now in the public domain and the contents of his earlier report should be accessible.

Answer #2 It is relevant because if a draft is different, it goes to credibility of both the expert, and the opinion itself. The objection is made on the basis of CLP (s119 Litigation privilege). The report is a confidential doc prepared for the dominant purpose of the correct litigation. Given that OPHF is asserting the legitimacy of the opinion and the expert, they will be unlikely to uphold the CLP claim when the evidence they seek to keep privileged is the very evidence they rely on (issue waiver) it is likely the TJ will order the doc to be produced.

For the purposes of answering further questions in Part B, assume the following additional facts:

Counsel for FCP is permitted to continue the line of questioning about Mr Shand's earlier draft. In the course of the remainder of the cross-examination, the "draft" First Shand Report is adduced, and evidence of the pressure exerted upon Mr Shand by the OCHF directors and Counsel to "play with the numbers" is also adduced. The evidence of Mr Shand is in tatters.

Counsel for FCP has applied to have the evidence of Mr Shand ruled inadmissible, in its entirety, on the basis that it is "*inherently unreliable"*.

QUESTION 27

Evidence: Discuss the merit in Counsel for FCP's application to exclude Mr Shand's evidence with reference to the case of *IMM v The Queen* [2016] HCA 14 **[3 marks]**

Answer #1 *IMM* held that the credibility and reliability of a witness cannot be considered in assessing the PV of evidence. That is, it must be assumed that the evidence will be accepted (as with relevance). However, this only requires that it be assumed that Mr S is telling the truth and reliably recounting his opinion. It does not require that his opinion is taken as correct. *IMM* specifically held that extrinsic factors (such as foggy night re ID evidence) can be taken into account. Accordingly, the Court can consider Mr S's first report and the pressure put on him to determine that it has very low PV and should be excluded as misleading or unfairly prejudicial (not outweighed by PV) under s135.

Answer #2 *IMM* provides that in assessing the probative value of ev, the court is to assume that it is both credible and reliable. This would make it difficult for counsel's objection to succeed. However, FCP's position is strengthened by the *IMM* statement that if evidence is so far fetched/fanciful as to be irrelevant then it will of course be inadmissible (s55).
Here, objection not likely to succeed, though little weight will be placed on S's evidence as to the loss as he clearly just writes what client tells him, the rest of his report may have some relevance and may be admitted.

For the purposes of answering further questions in Part B, assume the following additional facts:

Mr Benson has found the trial extremely stressful. His conviction and fine imposed by the Magistrates' Court (refer Part A above) has not helped. Although he has prepared and signed a detailed witness statement for the purposes of the trial, which details his account of all relevant factual matters from his perspective, he is a reluctant witness for the Plaintiff. His witness statement has been served on the other parties. When Counsel for OHPF calls Mr Benson to give evidence, he is sworn and then handed a copy of his pre-prepared witness statement. Counsel for OHPF then asks Mr Benson to confirm the truth of its contents and adopt the statement as his evidence. Mr Benson declines to do so, saying *"…the stress of this has got to me. I can't cope any more. I don't remember a lot of the detail of this. I'm sorry."* Further attempts by Counsel to have Mr Benson adopt the statement lead nowhere.

Counsel turns to the trial judge and states: *"Your Honour, I propose to tender Mr Benson's statement as proof of all that it asserts."* Counsel for the opposing parties object.

QUESTION 28

Evidence: Upon which **ONE (1)** of the following provisions of the *Evidence Act 2008* is Counsel for OHPF most likely to rely in seeking to adduce Mr Benson's written statement into evidence?

- Section 60
- Section 63
- Section 64
- Section 69

Will the statement be admitted? You should include in your answer explanations as to why you think the three provisions you did not select are unlikely to produce the desired outcome for Counsel. **[5 marks]**

Answer #1 Counsel for OHPF is likely to seek to adduced Mr Benson's statement into evidence pursuant to s 60. Counsel would first try to clarify Mr Benson's memory pursuant to s 32. If he could still not remember, as seems likely owing to his status as a 'reluctant' witness, could seek leave to treat as unfavourable witness (s 38), then cross-examine on prior inconsistent statement (being the report, s 43). Could then treat as credibility evidence (s 101A), and get report in through s 106 exception: prior inconsistent statement. Once in for credibility purpose, could use for hearsay purpose under s 60 being to prove the truth of the representations made in the document (unless an order was made under s 138 limiting use, which would seem to be unlikely on these facts).

Section 63 does not apply because Benson is arguably 'available' in the sense that he is competent to give evidence: s 12 (although he can't remember, arguably does not amount to not having capacity to understand question about fact).

Section 64 does not apply because witness arguably not available to give evidence about asserted fact, on basis that he has blatantly refused to give evidence on the relevant issues that are asserted in the report, and has not attested to the truth of the report.

Section 69 does not apply because the report was prepared or obtained in the purpose of proceedings (being the current dispute between the parties): see Barker.

Answer #2 Unlikely: s63 (maker of a statement is not "not available"), s64 (maker available but here objection has been taken by opposing party), s69 (witness statement = not business record as prepared for proceeding).
Likely: s60, by the following "path" there:
(1) Exhaust Benson (B's) memory in evidence in chief (EIC) without statement (done)
(2) Seek Court's leave to refresh memory with aide of statement (done) – not working
(3) Seek court's leave to cross-examine B under s38 EA on one of the grounds permitted (here: any of the 3 may fit: unfavourable, not making genuine attempt, prior inconsistent statement). Also seek leave to XXN as to credit under s38(3) for rescinding from original version of statement.
(4) Put contents of statement to B in XXN once leave granted. See if adopts as accurate. Likely inconsistent.
(5) If does not, then under s106 EA can lead statement as rebuttal evidence from person who took, observed, witnessed it.
(6) Once statement is tendered under s106 (above) for that purpose, by virtue of operation of s60 hearsay exclusionary rule will not apply, and it's in for truth of its contents! Go section 60!

For the purposes of answering further questions in Part B, assume the following additional facts:

After the first week of the trial, Counsel for OHPF spends the weekend with his family. They all attend the Eastland shopping centre for a weekend shopping excursion. While walking around K-Mart, to Counsel's surprise he sees his instructing solicitor walking at some distance in front of him. Counsel is about to go and so hello when he realises that the woman with him is Counsel for the FCP. They are holding hands. It is evident that they are in a relationship. Counsel had no idea about this relationship and it becomes clear to him that OHPF's own solicitors are likely to have been responsible for "tipping off" Counsel for FCP about Mr Shand's First Report which led to the complete obliteration of the Plaintiff's expert evidence.

QUESTION 29

Ethics: Discuss the ethical implications of the observation made by Counsel for OHPF at K-Mart at Eastland. What should Counsel do? **[4 marks]**

Answer #1 Situation has arisen where the interests of the client may be in conflict with interests of the instructing solicitor. It is likely that B has 'reasonable grounds' for holding this belief based on

the perception of the 'romantic relationship' between sol + counsel (therefore providing opportunity for disclosure of conf. information). So, B should first advise solicitor of B's belief and if solicitor does not agree to advise client re: relationship, seek to advise client in solicitor's presence.
Re: B's belief that solicitor "tipped" opponent off, must ensure that is reasonably justified by material available if intend to make allegation in open court (r61).
Solicitor and opponent barrister, if have discussed such conf. information, may be guilty of prof. misconduct and dealt with by tribunal.

Answer #2 If C believes that the solicitor has a conflict of interest with OHPF (and has reasonable grounds for this belief) he must advice the solicitor his belief and if the solicitor doesn't agree to advise the client of C's belief, C must seek to advise the client of his belief in the presence of the solicitor. If the belief about the tip off is accurate, the solicitor may be in danger of disciplinary action being taken for professional misconduct.

QUESTION 30

Civil Procedure: Could this matter have been heard before a jury? Explain. **[2 marks]**

Answer #1 Yes. Any claim based on contract or tort may be heard by a Jury provided that one of the parties elect for this to occur and pays the jury fees.
However, if a court decides that it would be desirable for the matter to be tried without a jury having regard to its complexity the matter can be heard by Judge alone.
Gunns is one such case. Here potentially there is sufficient complexity to do with the number of parties and issues to justify trial by judge alone.

Answer #2 Yes. It was commenced by writ and is founded on contract. Either party may request a jury (P in the writ, D by notice in writing) but must pay jury fees. TJ has discretion to direct that the matter be heard without a jury but will not so direct lightly given the right to request and that juries are regarded as capable of dealing with complexity (Woolworths).

END OF PART B

End of examination