VICTORIAN BAR

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

15 MAY 2018

Annotated with Sample Answers

This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 15 May 2018, 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.

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
19 July 2018

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 16 questions (Questions 1 to 16) 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 16 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 (23 marks), Evidence (20 marks) and Legal Ethics (7 marks).

5) **Part B** contains 18 questions (Questions 17 to 34) 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 (22 marks), Evidence (20 marks) and Legal Ethics (8 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 16) – 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 Co-Accused are Dylan BRADFORD ('**Dylan**') (date of birth 05/04/95) and Cody BRADFORD ('**Cody**') (date of birth 23/02/97) who are brothers. Dylan and Cody both reside at 45 Elliot Close, Reservoir. The Co-Accused are members of Sealegs Australia, Inc. ('**SeaLegs'**), a small environmental activist organisation that has protested against the expansion of Melbourne's shipping ports and the dredging of Port Phillip bay for many years.

The Point Lonsdale Lighthouse ('**Lighthouse**') is located near the township of Point Lonsdale, Victoria. The Lighthouse stands at a height of 21 metres on the eastern end of the Bellarine Peninsula on the western side to the entrance to Port Phillip from Bass Strait. It overlooks a stretch of water that is the only seaborne approach to Melbourne. This stretch of water is considered to be one of the most treacherous navigable passages in the world. Housed in a chamber at the top of the Lighthouse is an aerobeacon, a light assembly used to create a powerful fixed light beam that functions as a navigation aid for ships entering Port Phillip. The aerobeacon consists of a high intensity electric lamp mounted with a focusing device. When operating, the lamp rotates on a vertical axis creating a 'flashing' effect with the light beam visible from distances of up to 17 kilometres away. The Lighthouse is unstaffed and fully automated. The aerobeacon activates whenever light sensors fitted to the roof of the Lighthouse detect visibility conditions outside falling below a certain threshold. Generally, this means that the Lighthouse is always in operation from sunset to sunrise and otherwise during daylight hours in foggy or particularly wet weather conditions.

On 29 July 2017 the weather conditions at Point Lonsdale were wet and windy, with heavy rainfall and gale winds commencing in the early afternoon and continuing through to midday on 30 July 2017. Wind gusts of up to 132 kph were recorded. Port Phillip marine conditions were extreme during this time with high swells, rain and gale force winds making navigation for marine traffic dangerous during this time.

On 29 July 2017, the Lighthouse automatically activated from 3.12 pm and remained in operation for the night. On 30 July 2017, the Co-Accused attended the Lighthouse at approximately 2:00 am. They had with them abseiling equipment, a large sheet of black canvas measuring 2m x 10m, and backpacks which they used to carry these items. At approximately 2:10 am, the Co-Accused scaled the Lighthouse with the use of the abseiling equipment. Upon reaching the top of the Lighthouse, together

they retrieved the sheet of black canvas from one of the backpacks and began draping the canvas around the roof of the Lighthouse, fastening the canvas to the roof with rope at regular intervals. The Co-Accused had managed to encircle the entire top of the Lighthouse with the canvas such that all window panels through which the aerobeacon's light beam travelled were completely covered. This had the effect of blocking all light emanating from the chamber housing the aerobeacon and rendering the Lighthouse as a navigation aid for marine vessels totally ineffective.

Between 3.00 am and 4.00 am a Danish cargo ship, the *MS Haask*, was attempting to navigate the entrance to Port Phillip bay from Bass Strait with its intended destination being Melbourne ports. The crew of the *MS Haask* had navigated the same route on several previous occasions and had expected to be assisted by the Lighthouse beam on the final stretch into Port Phillip bay. However, the inexplicable absence of the Lighthouse beam, combined with difficult weather conditions, resulted in the crew becoming confused as to their exact location as they were entering the bay. As it entered the bay, the ship struck a reef and became grounded near the Lighthouse. Emergency and rescue services arrived at the scene at about 4.30 am. None of the crew were injured. However, significant damage was done to the hull of the ship and all 20,000 tonnes of the cargo (coffee beans) perished in the rough seas. The total losses associated with the grounding of the *MS Haask* are set out in the table below.

***MS Haask* Grounding – Point Lonsdale, 30 July 2017 – Economic Losses**		
Item	**Loss ($)**	**Victim**
Destroyed cargo (coffee beans)	$80,000,000	Gourmet Coffee Distribution Australia P/L
MS Haask ship repairs	$2,180,000	International Søfartsselskab A/S (owner of *MS Haask*)
Rescue operation	$165,000	State of Victoria

Victoria Police executed a search warrant at the residential premises of the Co-Accused on 10 August 2017 and seized a number of items including backpacks and abseiling equipment. The Co-Accused were subsequently arrested and interviewed separately. They both made a 'no comment' interview.

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Dylan and Cody have each been charged with altering a light signal and have been summonsed to appear at the Magistrates' Court of Victoria at Melbourne. Altering a light signal is an offence under s 244 of the *Crimes Act 1985* (Vic), which states:

> **244 Altering signals or exhibiting false ones**
>
> Whosoever unlawfully masks alters or removes any light or signal or exhibits any false light or signal with intent to bring any ship vessel or boat into danger, or unlawfully and maliciously does anything tending to the immediate loss or destruction of any ship vessel or boat and for which no punishment is hereinbefore provided, shall be guilty of an indictable offence, and shall be liable to level 5 imprisonment (10 years maximum).

QUESTION 1

Criminal Procedure: Draft the charge that appears on **Dylan's** charge-sheet. **[2 marks]**

Answer #1:
A charge sheet must comply with schedule 1 of the Crim PA, although it will not be invalid if it fails to comply. Here, the statement of offense on the charge sheet should read: the accused and Cody Bradford between 29 and 30 July 2017 at Point Lonsdale did unlawfully mask a light with intent to bring any ship vessel or boat into danger.

Answer #2:
That Dylan Bradford, at Point Lonsdale in Victoria, on 30 July 2017 did unlawfully mask or alter a light or signal with the intent to bring a ship vessel or boat into danger.
(NB: Charge sheet may also include Cody, as Co-A, (schedule 1, CPA) but not mandatory).

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

Dylan and Cody went to see a barrister, Karen JONES, before they were due to appear in the Magistrates' Court. During the conference, Dylan and Cody maintained their innocence, both stating to Ms Jones that they were home all night in Reservoir and that they did not interfere with the Lighthouse in Point Lonsdale. Cody then asked Ms Jones if she could act for them in the upcoming Magistrates' Court hearing without having to go through a solicitor. The following exchange occurred.

Ms Jones: Well it's not as simple as that…

Cody: *[looking at Dylan]* See, I told you this wouldn't work!

Dylan: Shut up!

Cody: I knew this was a dumb idea. I should never have agreed to your dumb plan.

Dylan: Shut the fuck up!

Cody: *[looking at Ms Jones]* Miss … the lighthouse was his idea. I didn't want any part of it.

QUESTION 2

Ethics: Discuss the ethical implications arising from what has occurred at Dylan and Cody's conference with Ms Jones. **[4 marks]**

Answer #1:
Ms Jones is obliged to accept briefs to appear from solicitors (r17). She may decline to accept brief direct from clients (r21). If she accepts brief, she must explain in writing content of rr 11 & 13 BR, they may need to instruct solicitor (or do work themselves) at short notice, any disadvantages of not having a solicitor, Ms Jones' relative capacity to do Barrister (B) work without solicitor and fair description of her experience (r22). Ms Jones must refuse brief if real possibility her ability to act as barrister seriously prejudiced without solicitor (r101(K)). Also, if Ms Jones has confidential information from a person that may cause conflict with a prospective client (r 101(a)). No conflict if person consents to use of information (r 114, 115 BR). If barrister briefed to appear for two or more clients, must determine ASAP if real possibility of conflict and, if so, represent only one client or (if conflict cannot be overcome), no clients (r 119). Here, Ms Jones is unlikely to be able to represent both - there will likely be "cut throat" defence run = clear conflict. Also, clients have disclosed to Ms Jones possible "confession" ("your dumb plan"). Ms Jones must explain plea options (r 39) but act for client if intends to lie (alibi/not there when likely there) (r 79,80). Ms Jones should discourage Co-Ds from lying (r 70) and explain effects of r 80. If hearing starts and client persists with lie, Ms Jones should not act (r 79). Must not tell court or P though.

Answer #2:
This conversation raises two ethical issues. First, whether Ms Jones can accept a direct access brief from the As. She may do so only if she has informed the As of the content of rules 11 and 13 (the work that a barrister can or cannot do), any disadvantages they may suffer as a result of not being a solicitor and that there may be a need to engage a solicitor at short notice. She would also have to inform them of her advocacy experience. The As would need to sign an acknowledgement that this information has been provided. Further, Ms Jones cannot accept the brief if she believes the As would be prejudiced by not having a solicitor, which they may be, in light of the complexity of the case and the likely large numbers of witnesses. This is not an appropriate case for a direct access brief. Second, there is the issue of whether Ms Jones can act for both the As, given there may be a conflict between them. The conversation reveals that Cody will be blaming Dylan. It is therefore inappropriate to act for both or either if there are now conflicting issues. There is also the issue of whether the As have now revealed they are guilty. Ms Jones can still act in these circumstances (although the issue of conflict discussed above may preclude her anyway) but could not argue that someone else was to blame or advance a factual scenario that is inconsistent with the As' confession.

QUESTION 3

Criminal Procedure: What is the difference between a summary hearing and a committal hearing? Which is most likely to occur in relation to the charges against Dylan and Cody? Is it possible that one brother can have his charge determined in a summary hearing, while the other brother has his matter disposed of at a committal hearing? Explain. **[4 marks]**

Answer #1:
A summary hearing occurs in the Magistrates Court for summary offences. Summary hearings (hear the charge and make a finding) may result in penalties of imprisonment for up to 2 years for one offence. A summary hearing can also be held for indictable offences triable summarily. A committal hearing is held for indictable offences (not summary ones). It is hard to consider whether the evidence is of sufficient weight that the accused should stand trial. A magistrate at committal may offer a summary hearing.

In this case, it is more likely that co-accused will be subject of committal proceedings. While the offence charged is an indictable one, it may be triable summarily because it is a level 5 offence (s.28(i)(b)(i) CP Act). There's no suggestion of a request for summary jurisdiction. Given the serious nature of the offence (noting quantum of danger), the apparently high degree of organisation by the co-accused, the criminal records of the accused and under s 29 (z)(c) of the CP Act – a co-accused, particularly one who will not plead guilty, a court would consider it not appropriate to hear the charges in a summary hearing. Both co-accused would both be subject to committal.

Answer #2:
A summary hearing is heard in the Magistrates' Court and determines a charge for a summary offence, or for an indictable offence which may be heard summarily. A committal hearing is an administrative process heard in the Magistrates Court for the purpose of determining if there is sufficient evidence to support a conviction. If so, the accused is committed and will stand trial in the County Court or Supreme Court. Here, the charges (assuming Cody faces the same charge) are indictable offences, liable to level 5 imprisonment. This means they may be heard summarily, if the Magistrates Court considers it appropriate and the accused consents: ss 28 (1)(b) and 29 (1). Here, given the seriousness of the charge, and in particular the significant value of the damage caused and the Magistrates Courts 2-year imprisonment maximum/capacity, a summary hearing is unlikely.
Although in theory the two co-accused may be separated and one go through the summary procedure, on a s 29(1) application, it is a relevant consideration that there is a co-accused. Considerations of fairness and, ultimately, parity, would indicate this factor (see s 29(z)(c)), would lean against a Magistrate allowing a summary procedure for only one brother.

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

Dylan and Cody are represented by different Counsel (neither Counsel is Ms Jones). Both have been committed to stand trial in the County Court of Victoria at Melbourne. At the conclusion of the committal hearing, the Magistrate asked each Co-Accused how he intended to plead to the charge. Dylan pleaded **guilty**. Cody pleaded **not guilty**. Each brother has no intention of changing his plea until the proceedings have been finally determined.

QUESTION 4

Criminal Procedure: Explain the following legal concepts and how they are likely to be applied in relation to each Co-Accused, highlighting practical differences in their application due to the conflicting pleas entered by each brother:

i. 'sentence' **[2 marks]**';
ii. 'trial' **[2 marks]**;
iii. 'arraignment' **[2 marks]**;

4i. Answer #1:

A sentence is the outcome of a finding of guilt. It serves one or more purposes (s5 SA) eg. Punishment, rehabilitation, general and specific deterrence. A court has regard to a number of principles in coming to the correct sentence. Here, for each co-accused, principles of parity will be important (ie. Should not be unjustifiable serve of grievance between sentence of co-accused's). Dylan will likely get a reduced sentence because of his early guilty plea (s5(2)(e)).

4i Answer #2:
A sentence is the punishment that an offender receives if he or she pleads guilty to an offence or is found guilty by a judge or a jury. The purposes of a sentence include: punishment, specific and general deterrence, community protection, denunciation, rehabilitation. A plea of guilty is a mitigating factor when sentencing because it demonstrates the A's remorse. As such, Dylan may receive a less severe sentence than Cody. A sentence may only be as severe as is necessary to achieve the sentencing purpose.

4ii Answer #1:
Trial is the contested hearing of a matter in the County or Supreme Courts before a judge and jury. There are many pre-trial requirements. After opening addresses, evidence, submissions, directions, the jury returns a verdict (or may be hung → retrial). Here, as C has PG, no trial (just plea hearing). D will go to trial.

4ii Answer #2:
Only Cody will have a trial in the County Court because his pleading is not guilty. Trial will be heard before a judge and a jury of 12. Judge will decide evidentiary and other procedural issues and jury will determine guilt or innocence. Because Dylan is pleading guilty, he will have a plea hearing before a judge alone who will hand down sentence.

4iii Answer #1:
"Arraignment" – Arraignment is the A's opportunity to formally enter – plea to the charge(s) of indictment. The A will be asked to identify themselves before the charge(s) is/are read. They will then enter a guilty or not guilty plea. If A is pleading not guilty, arraignment must occur before the jury. That is what will occur for the brother pleading not guilty. The brother who is pleading guilty will also be arraigned, but that will occur at a Directions Hearing or a Plea Hearing.

4iii Answer #2:
Arraignment: The arraignment is the formal process whereby as accused formally enters a plea to charges on an indictment in CC or SC. The accused must first confirm with the court that they are the person named on indictment before entering a plea of not guilty to all or some of the charges. DB's arraignment will likely occur at his plea hearing. CB's arraignment for his not guilty plea, must take place in the presence of the jury panel (s217 CPA).

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

Dylan's plea of guilty was the culmination of successful negotiations between his legal representatives and the Prosecution to resolve his charge. The Prosecution accepted Dylan's proposal that, if Dylan pleaded guilty and gave evidence for the Prosecution in the case against Cody, the Prosecution would not press for a term of imprisonment to be imposed against Dylan. In accordance with this agreement, Dylan made a formal written statement that was prepared by Victoria Police for the purposes of the brief of evidence in the case against Cody. It was signed by Dylan in the presence of Victoria Police and Dylan's solicitor. A copy of the statement was later supplied to Cody's legal representatives. Dylan's statement included the following:

> *'Cody was really keen to muck up shipping coming into and out of Port Phillip. He's been against the dredging of the bay for years. He got involved in the SeaLegs group a few years ago. He got me to go along to one of their meetings once. I only went a couple of times after that because they were weird. They were always on about their next protest. When Cody told me about his plan to cover up the lighthouse, I told him he was mad. But*

he was dead set on it. He said he'd been tracking shipping movements on the internet for months to work out when the best time to do it would be. He also promised me an ounce of weed if I helped him out. So I went along. I didn't think a ship would crash.'

Dylan's sentencing hearing occurred a few months after the committal hearing. The evidence relating to his guilty plea and co-operation with the Prosecution in relation to the case against Cody were presented to the sentencing judge, as well as the following evidence:

- 1 x prior conviction for cannabis use in 2015; 1 x prior conviction for theft (shop-steal) in 2016.
- Psychological report from Dr Helena Smythe stating, *'Dylan has borderline personality disorder. He has a complex relationship with his brother Cody, who he reported pressured him significantly into committing the present offending. He seems to behave subserviently to his brother.'*
- Dylan had a difficult childhood due to an abusive father.
- Dylan is a regular user of cannabis.
- Dylan regularly drinks alcohol.
- Dylan no longer lives with his brother Cody, having moved out of the family home two weeks before the sentencing hearing, and is now house-sharing in Preston.

The Judge is contemplating making a community corrections order for a period of 2 years.

QUESTION 5

Criminal Procedure: What is a 'community corrections order' and what sentencing purpose(s) does it serve? Would a term of imprisonment be a more suitable outcome in Dylan's case? Explain. **[3 marks]**

Answer #1:
A community correction is an order that requires the offender to comply with a number of core conditions as well as any discretionary conditions imposed by the Court. The order is served in the community and is an alternative to a term of imprisonment. The CoA held in Boulton that a CCO was capable of satisfying a number of sentencing purposes, including just punishment and rehabilitation. The purpose of rehabilitation, however is the predominant purpose that supports the imposition of a CCO.
In this case, a CCO appears appropriate. Although the offending is serious, Dylan appears to have a range of issues that would be addressed by a CCO – eg. Drug and alcohol issues, as well as mental health issues which may not make him an appropriate vehicle for GD and/or SD. Also, given his undertaking to give evidence which is a significant part in mitigation, a CCO seems appropriate.

Answer #2:
A CCO is effectively a community-based sentence whereby the A serves his or her sentence in the community (s36). It may be used for a wide range of offending behaviour and incorporates aspects such as requirement to attend drug treatment programs, to perform community work, report to a CCO officer etc. The sentencing purpose is outlined in s5(1) – eg to rehabilitate, denounce, punish etc. Dylan is a young offender, and whilst he has some priors they are all for relatively minor offences. We also know that he has a difficult background and has some psychological issues – all of these factors for to his degree of culpability. On balance, would need to reflect on whether the sentencing purposes can be achieved

through a CCO (ie. the requirement for parsimony). As he is young, prospects for rehabilitation are high. In circumstances, CCO might be the best course of action.

QUESTION 6

Criminal Procedure: Specify **FOUR (4)** conditions that are responsive to Dylan's specific circumstances which the Judge could attach to Dylan's community corrections order. **[2 marks]**

Answer #1:
1. Community work to specifically deter him
2. Alcohol treatment to address problems
3. Drug treatment to address problems
4. Mental health treatment to address problems

Could also consider non-association condition with C, but would have to consider their relationship as brothers (if not already ruined!).

Answer #2:

- Unpaid community work: Judge can attach work hour conditions to address need for punishment/deterrence factors in sentencing considerations.
- Treatment + rehabilitation for drug use: This may include ongoing drug treatment/screens for cannabis use.
- Treatment for mental health: This may include an assessment and counselling requirements and may assist DB in getting help with BPD.
- Non-association order: This would prevent DB from associating with CB. This may be considered overly onerous given that they are brothers (s48F).

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

Dylan was convicted and ordered to undertake a community corrections order for a period of 2 years. Cody is to be tried before a judge and jury. Cody has instructed Defence Counsel as follows:

- Cody has a mild intellectual disability and IQ of 84. He was diagnosed with borderline personality disorder in 2013. As a result, he has always had trouble establishing and maintaining friendships. He has always been eager to please his older brother Dylan. Until now, Cody had always regarded Dylan as his 'best friend'. (**Note**: Cody has provided a written report of Dr Thomas YOUNG, a psychiatrist, that independently supports these contentions).
- Cody was not aware that Dylan was going to plead guilty until he heard the plea at the end of the committal hearing. He was unaware of any negotiations Dylan had with the Prosecution until Cody's legal representatives were served with Dylan's written. Cody was unaware that Dylan also had borderline personality disorder until his legal representatives told him that this evidence was presented at Dylan's plea hearing.
- Dylan has been involved with SeaLegs for many years. Cody went along to a few meetings at SeaLegs in early 2017 at Dylan's request. However, Cody is not interested in the issues that

SeaLegs represents. Dylan asked Cody to help cover up the Lighthouse as a '*practical joke*'. Cody was not keen on the idea but Dylan kept '*hassling'* him for a week before Cody finally agreed to do it. That night, Dylan drove them both to Point Lonsdale in Dylan's car. As they were stopped at the traffic lights on Bell Street passing through Coburg, Cody saw an old school friend, Erin FAULDER, in the car next to him. They waved and smiled at each other.

- Cody had no idea that there were ships nearby when they covered the Lighthouse. He would never have done anything deliberately to endanger the *MS Haast*, had he known it was nearby.
- Cody made a 'no comment' interview when arrested because Dylan had impressed upon him the need to '*tell the pigs nothing*'.

The Prosecution intends to call Dylan and Ms Faulder to give evidence.

Defence Counsel believes that Dylan's evidence is a fabrication because it effectively reverses the roles played by each brother. Defence Counsel also thinks Dylan must have feigned Cody's behaviour when he met with his psychologist, Dr Smythe, resulting in a false diagnosis of borderline personality disorder.

QUESTION 7

Evidence: When Dylan negotiated with Police and made his formal written statement, he was never formally 'cautioned' (i.e. Police did not advise him of his right to silence, his right to consult a lawyer, etc.). At the time, Police assumed (*erroneously*) that a formal caution was not required because Dylan was always with his solicitor. Explain the basis upon which Cody's Defence Counsel could now apply to exclude the entirety of Dylan's evidence and whether such an application is likely to be successful (***Note:*** You should assume that the Police were legally obliged to caution Dylan before making his statement in these circumstances). **[3 marks]**

Answer #1:
Assuming police were legally obliged, there is an argument that they have obtained D's evidence improperly. DC could apply under s138 to have the evidence excluded. D has onus to establish impropriety or balance of probabilities, then shifts to P to show that desirability of admitting evidence outweighs undesirability given how obtained.
Factors in subsection (3) relevant to that question. Relevantly for present purposes, the gravity could be seen as high; the Court will not want to condone the failure of police to undertake such a fundamental task. The evidence could arguably be easily obtained if still cautioned. Might be contended that it was an oversight and hence reckless cf. deliberate. However, probative value is very high (importance high), given D places C at the scene. For that reason, the court may decline to exclude.

Answer #2:
Assuming that police were legally obliged to caution Dylan prior to making his statement, DC could seek to have such evidence excluded on the basis of s138 – ie. that it was obtained improperly by police. Such evidence is not to be admitted unless the TJ finds that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained through impropriety. The TJ will consider a range of factors, including the probative value of the evidence, the importance of the evidence, the nature of the relevant offence and the gravity of the impropriety.

Here, the evidence is of strong probative value and it is very important to the case, which is for a serious offence. The impropriety was relatively minor, appears to have been reckless and Dylan's lawyer was present.

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

The trial judge has ruled that Dylan's evidence is not admissible in the case against Cody. Nobody apart from Dylan can place Cody at the Lighthouse at the time of the offending.

QUESTION 8

Evidence: Explain the difference between a case based on 'direct' evidence and a case based on 'circumstantial' evidence. Why is the Prosecution's case now best characterisable as a case of the latter kind? **[2 marks]**

Answer #1:
Direct evidence is evidence of a W who heard, saw or otherwise perceived something occurring and who later gives evidence about what they saw, heard or otherwise perceived. Circumstantial evidence is not evidence of someone who witnessed an event, but rather evidence of different circumstances that means that A must have committed the offence. The prosecution's case is now circumstantial because Dylan was the only person who saw Cody commit the offence, therefore there is now no direct evidence. Only circumstantial evidence is not available – ie. ID evidence and abseiling equipment seized.

Answer #2:
Direct evidence is where the P leads evidence directly implicating the A in the crime eg. An eyewitness says "I saw D shoot V with the gun and kill him." Circumstantial evidence is evidence that relies upon the drawing of inferences to conclude A is guilty eg. W says "I saw him 2 minutes after the shooting holding a gun." D's evidence in this case directly implicates C in the offence. Without it, P will have to rely on inferences from other evidence to prove that C did it, therefore circumstantial (and a weak circumstantial case!).

QUESTION 9

Criminal Procedure: Explain whether there is any recourse for the Prosecution and what steps need to be taken to have the trial judge's ruling in relation to Dylan's evidence overturned. Will the Prosecution be successful? **[3 marks]**

Answer #1:
The prosecution can file an interlocutory appeal against the trial judge's ruling. Will need to get the TJ to certify that if the evidence is ruled inadmissible it will substantially weaken or eliminate the prosecution's case. TJ is likely to certify that in this case, although the prosecution can seek a review of the decision, not to certify if TJ doesn't.
The prosecution will need to file a notice of appeal and serve it on A. It will need to be filed within either 2 or 10 days depending on when ruling is made. The CoA will give leave to appeal if it is in the interests of justice to do so, having regard to a range of factors including disruption to the trial and whether the evidence would render the trial unnecessary. Although interlocutory appeals are governed by House principle, the prosecution will likely be successful here. Will need to show some specific effort or that TJ's ruling was not reasonably open. Difficult test, but likely to be overcome here.

Answer #2:
Prosecution can seek to have an interlocutory appeal. Prosecution must first get the trial judge to certify that the decision related to admissibility of evidence (YES – not in issue) and that excluding the evidence has eliminated or substantially weakened the prosecution's case (s295(3)). Given that this witness forms the only direct evidence linking CB to the scene,

the judge is likely to certify that the prosecution's case has been substantially weakened. Once certified, the prosecution must seek leave to appeal in CoA. If no certification, can seek review in CoA. To grant leave CoA must be of view it is in interest of justice (taking into account delay, issues raised and reducing change of appeal later). If leave granted CoA will hear appeal. They can grant appeal, make new orders and remit it back for trial.
Prosecution are likely to be successful, given case substantially weakened. CoA would examine whether s138 applied correctly and high chance that they will disagree with the trial judge given the high probative value of evidence.

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

Until now, Cody's Defence Counsel had been planning to conduct the Defence's case on the basis that Cody should be acquitted because he did not have the requisite 'intent' to cause any harm. However, now that Dylan's evidence has been excluded, Counsel is thinking about suggesting to the jury that Cody was not even involved in the offending because no Prosecution witness can place him at the Lighthouse. The only 'identification' witness in this regard is that of Ms Faulder, who places Cody in a car in Coburg shortly before midnight.

QUESTION 10

Evidence: Explain the basis upon which Ms Faulder's evidence may be characterised as 'identification evidence' and the criteria that must be satisfied for her evidence to be admissible. In giving your answer, you should outline any directions the trial judge is likely to give in relation to such evidence if it is ruled to be admissible. **[4 marks]**

Answer #1:
Ms Faulder's evidence is "visual identification evidence" under s114 of the Evidence Act, as it does not involve the use of pictures (see s115). There are a number of procedural requirements for this evidence to be admissible, relating to the need to hold an identification parade involving Cody. However, here, as Cody and Ms Faulder are old school friends, such a parade would be inappropriate (as Faulder could clearly be able to identify her old school friend). Accordingly, under s114(2), the court may be satisfied given s114(3)(d), that is was not "reasonable" to hold such a parade. Accordingly, Ms Faulder's evidence will be admissible.
Under the Jury Directions Act, prosecution and defence may request the judge to direct the Jury on identification evidence. Such directions are intended to reduce the "seductive quality" of identification evidence (cf. The Queen v Dickman).
The judge may then, if requested, warn the jury to exercise caution in determining whether to accept the evidence and in particular, may indicate matters which may suggest it is unreliable – here being the weather. Although P would say the fact they waved to each other overcomes this. Given it is circumstantial evidence, D may then also request a general direction in respect of reasonable doubt and what must be phrased to that standard (ss61 and 64).

Answer #2:
Ms F's evidence is ID evidence because it is an assertion by her that A (or person resembling A) was at/near the place where the offence occurred, at the time of occurrence. Here, the ID evidence is "visual ID evidence" (s114) because the ID is wholly based on what Ms F saw.
To admit Ms F's ID, P must have held an ID parade including A unless not reasonable to do so or A refused. "Not reasonable" may include where A is well known to W (ie. family member). Also consider s114(3) factors. Picture ID can be used if no ID parade occurs (and not reasonable in the circumstances – see s115(5)). Only if criteria under s114 or both s115 (with s114) are met can P adduce Ms F's evidence.
TJ is likely to direct the jury under s36 JDA (assuming P or D requests direction under s12). This warns jury of unreliability of ID evidence. Given scope of s36, not really required to give s32JDA direction – they can cover field but can if requested.
If ID evidence's probative value outweighed by prejudicial effect (eg. Overvalued), TJ can exclude (s137EA).

QUESTION 11

Ethics: Consider the ethical implications arising from any decision by Defence Counsel to change the way in which Cody's case is conducted (i.e. by suggesting that Cody was 'not involved' rather than 'not intending harm'). **[3 marks]**

Answer #1:
Counsel must not mislead/deceive court (r24) or opponent (r49). Assuming changing the case theory doesn't offend these rules, B may lead evidence subject to rr79 and 80 BR (B may be required to in exercise of duty to fearlessly promote client's best interest). DC must not run case which falsely suggests A not involved, or run case inconsistent with confession (s80(b) and (c)). If has those instructions, DC likely to breach rule. If A insists run positive defence inconsistent with confession, DC should advise against and if need to refuse to take further action. DC should also explain forensic disadvantage of changing case mid-hearing. Lastly, if change case, DC should inform court and P of intent to depart from response to prosecution summary (s184 CPA).

Answer #2:
Not clear if new counsel was aware of admission by Cody of involvement.
R80 of the barrister's rules requires client that has confessed guilt but maintains a plea of not guilty must not set up an alternative case inconsistent with the confession, but may argue that not guilty because of the failure of prosecution to prove element of intent.
R69: Has a duty not to condone his client giving false evidence and must not suggest to any other witness to do so.

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

The trial judge's original ruling to exclude Dylan's evidence has been reversed. The Prosecution will now be permitted to call Dylan to give evidence in the case against Cody.

When the Prosecution calls Dylan, he enters the court room and sees Cody. Dylan suddenly feels terrible about having to give evidence against his brother. Before he enters the witness box, he says to the Judge that he does not want to give evidence against his brother and that he is extremely upset about being in court.

QUESTION 12

Evidence: *Your answer:* ***(circle ONE)***	Which **ONE (1)** of the following propositions is correct? a) Dylan has an unqualified right to refuse to give evidence for the Prosecution because the Accused is his brother. b) Dylan may refuse to give evidence if the Judge finds that harm might be caused to the brothers' relationship were Dylan to give evidence, and this harm outweighs the desirability of forcing Dylan to give the evidence. c) Dylan may refuse to give evidence if the trial Judge finds that Dylan will suffer psychological distress were he to give evidence. d) Dylan must give evidence, but the Judge may direct the Prosecutor not to ask questions that cause Dylan psychological distress. e) Dylan must give evidence, but he may refuse to answer any questions that relate to Cody's involvement in the alleged offending. f) Dylan is a compellable witness for the Prosecution who has no general right to object to giving evidence.
[1 mark]	

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

Dylan's objection is overruled. He enters the witness box and is administered the oath. However, he remains a reluctant witness for the Prosecution. In response to preliminary questioning by the Prosecutor, Dylan says, *'I can't remember anything'*.

QUESTION 13

Evidence: Assume that Dylan is genuine when he says that he *'can't remember'*. Explain how the Prosecutor is likely to attempt to elicit the desired evidence from Dylan. **[2 marks]**

Answer #1:
If Dylan genuinely can't remember, the prosecutor is likely to seek leave from the court to show Dylan his police statement. Court will consider s192 factors (ie. importance of the evidence) as well as whether Dylan genuinely cannot remember, as well as if the events were fresh in his mind when he made the statement and was found to be accurate by him. Leave would be granted to allow P to show Dylan his statement.

Answer #2:
Pursuant to s32 of the Evidence Act, prosecutor may seek leave for Dylan to be able to refer to his witness statement in order to revive his memory about its contents. The court will consider, in such an application, his ability to recall independently and whether the document records events that were fresh in Dylan's mind when they were recorded (or affirmed by him): s38(2)(b))
If leave is given, Dylan may be allowed to read aloud relevant parts of his statement.

QUESTION 14

Evidence: Assume Dylan is being deliberately uncooperative with the Prosecution, and that he maintains his position that he *'can't remember anything'.* Is the Prosecutor permitted to read aloud Dylan's statement and then invite Dylan, in front of the jury, to accept its contents as the truth? Alternatively, is there some other way that the Prosecutor can present the statement to the jury? Explain. **[4 marks]**

Answer #1:
No, the prosecutor would not be permitted to simply read out Dylan's statement as it is hearsay evidence and prima facie inadmissible to prove the truth of its contexts. P will be able to tender the statement to prove the truth of its contents, but must follow this path: s38 – P must apply to have Dylan declared unfavourable on the basis that he is not making a genuine attempt to recall the evidence or has made a prior inconsistent statement. P seek leave to cross examine Dylan, which will be granted having regard to s192 factors.
S43 – P can now cross examine Dylan, but only re the matters on which leave was granted. If Dylan still stays he can't remember, P must inform Dylan of enough of the circumstances of the making of the statement to enable Dylan to ID statement and draw Dylan's attention to so much of the statement that is inconsistent.
S106 – If Dylan still says he can't remember, P can tender statement as rebuttal evidence.
S103 – P can also tender statement as credibility evidence that substantially affects the assessment of Dylan's evidence.
S60 – Once admitted for this reason, if is admissible to prove the truth of the statement's contents.

Answer #2:
The general position is that the prosecutor cannot read aloud a statement and ask if Dylan accepts it. That course would involve leading questions – ie. questions which either point to the answer sought or assume facts in issue. However, if D is being deliberately uncooperative, P may seek leave under s38 of the Evidence Act, to cross-examine him on the basis that he is an unfavourable witness. If successful, leading questions will be allowed and P can ask them in the manner proposed.
Section 43 requires the substance of prior inconsistent statements to be put to a witness in cross examination before seeking to tender the document. This means that, if Dylan still refuses to accept the statement as accurate, having put the substance of the statement to him, P can now attempt to produce it as going to Dylan's credit (s101A). Leave is not required to lead the evidence (ie. through the person who took the statement) as it is a prior inconsistent statement (s106(2)(c)) and it will substantially affect the assessment of Dylan's credibility (s103(1)).
Once the statement us admitted for a credit purpose, prosecution can use it for a hearsay purpose (s60) – ie. to prove the truth of what it asserts.

QUESTION 15

Evidence: Assume that the jury is permitted to hear what Dylan said to Police about Cody's involvement in the offending at the Lighthouse. Cody now tells his Counsel that he wants to give evidence and tell the jury his side of the story. What advice should Defence Counsel give Cody at this point? **[4 marks]**

Answer #1:
Counsel should advise as follows:
1. P is required to prove its case beyond reasonable doubt (s141).
2. Cody has the right to silence which is a paramount right afforded to protect the accused.
3. The in giving evidence, Cody may be cross-examined and counsel should explain the right re cross-examination and the pressure he might feel when under cross-examination.
4. Counsel should advise that no negative inference can be drawn by the jury as to the silence and that counsel will be asking the TJ to give a direction to the jury regarding this.

5. Cody will not be allowed to lie – should explain perjury – contempt of court and will be required to give truthful evidence and explain that there is a risk he may incriminate himself.
If Cody instructs that he should give evidence, counsel may continue to act and should act in accordance to instructions. Counsel should not act if there is a conflict.

Answer #2:
DC should advise Cody that as an A, Cody does not have an obligation to give evidence in his own case and that no adverse inferences can be drawn by the jury if Cody does not give evidence (s41 JDA). In addition, DC should advise Cody that he has no onus of proof in his trial and that the onus is on the prosecution to prove its case beyond reasonable doubt.
DC should advise Cody that he would be subject to cross-examination by the prosecutor re his involvement and that it may not be in his best interests to give evidence now, especially after making a "no comment" interview. Counsel should advise Cody that the prosecutor will likely suggest that his evidence is a recent intention given "no comment" interview and not guilty plea. If Cody says he wants to give evidence to say it was all Dylan's idea, DC should advise Cody that he may be giving evidence of an admission to having the requisite intent to commit the offence and that it is unlikely that the jury would be satisfied that Cody was acting under duress of his brother.

QUESTION 16

Criminal Procedure: In breach of his undertaking given to the Prosecution, Dylan refused to co-operate with the Prosecution in Cody's trial. Can the Prosecution now seek to re-open Dylan's case and request to have him re-sentenced to a term of imprisonment? Explain. **[3 marks]**

Answer #1:
Yes, the prosecution can file an appeal against the sentence imposed on Dylan under s291 of the Crim PA. The DPP can appeal to the Court of Appeal if the A received a more lenient sentence because they gave an undertaking to assist authorities after sentence and the DPP considers that A failed to fulfil the undertaking, wholly or partly. DPP will need to file a notice for appeal which must be served on Dylan within 14 days. The CoA may allow the appeal if it considers that Dylan failed either wholly or partly to fulfil his undertaking. CoA likely to be satisfied here. If satisfied, CoA can set aside the original sentence and impose a sentence that it considers appropriate which will most likely be a term of imprisonment.

Answer #2:
Yes. Pursuant to s291, where a sentence is imposed on an offender and it is less severe on account of an undertaking given, the DPP may appeal to the Court of Appeal on the basis that the undertaking was not fulfilled. If the Court of Appeal considers that Dylan failed to comply, it may set aside his original sentence (the CCO) and in its place impose the sentence it considers appropriate in light of the initial offence and the failure to fulfil the undertaking. Such a new sentence may involve a term of imprisonment if appropriate.

END OF PART A

PART B (Questions 17 to 34) – 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.

The *MS Haask*'s cargo, the 20,000 tonnes of coffee beans, had been pre-paid for by the consignee (buyer), Gourmet Coffee Distribution Australia Pty Ltd ('**GCDA**'), a company based in Melbourne. GCDA had taken out a $80m insurance policy with World Wide Insurance Limited ('**WWI'**) before the *MS Haask* had left a Colombian port with the consignment in early July 2017.

The *MS Haask* is owned by International Søfartsselskab A/S ('**ISA'**), a Danish company based in Denmark. The crew of the *MS Haask* are all Danish nationals and employees of ISA.

The Lighthouse is operated by the Victorian Regional Channels Authority ('**VRCA'**), a statutory agency controlled by the Victorian state government.

The rescue operation was carried out by various emergency service agencies controlled by the Victorian state government.

Following its grounding, the *MS Haask* was eventually tugged into Melbourne ports and repairs were carried out by Port of Melbourne Limited ('**PoM'**), a publicly listed company on the Australian Stock Exchange.

Several disputes between these parties have arisen, outlined below.

1. ***GCDA v WWI*** **(Breach of Contract):** GCDA is claiming $80m from WWI, for the perished coffee, pursuant to its insurance contract. WWI is denying cover on the basis that the interference by Dan and Cody with the Lighthouse constituted an 'act of terror', a circumstance which expressly exempts WWI from liability under the insurance contract (***Note:*** WWI's argument, while arguable, is very weak and their legal representatives have advised them that a Victorian court is unlikely to accept that WWI is exempted from liability on this basis).
2. ***GCDA v ISA*** **(Negligence)**: GCDA seeks damages against ISA for breach of its duty of care, by the crew of *MS Haask*, in that they failed to exercise due care and skill in navigating through the entrance to Port Phillip bay even where there was no Lighthouse to guide them. GCDA seeks $80m.
3. ***ISA v State of Victoria*** **(Negligence):** ISA claims the State of Victoria, by VRCA, failed to take reasonable steps to secure the Lighthouse premises from interference by members of the public. A natural and foreseeable consequence of this omission was the offence committed by Dylan and

Cody. ISA claims its losses under the carriage contract, $2,180,000 for ship repairs and $165,000 rescue operation costs.

4. ***ISA v State of Victoria (*Negligence*)***: ISA claims the State of Victoria, by Victoria Police, failed to act on an anonymous 'tip-off', communicated to the Police on 22 July 2017 (i.e. a week before the Lighthouse offence occurred), that Dylan was planning to interfere with the Lighthouse.
5. ***State of Victoria v ISA* (*Quantum Meruit* claim)**: The State of Victoria claims ISA has failed to pay $165,000 for emergency services rendered. ISA denies liability on the basis of its own claims against the State of Victoria.
6. ***PoM v ISA* (Breach of Contract):** ISA requested PoM to carry out repairs to the ship pursuant to an oral contract. The sum agreed was $2,180,000. The repairs were carried out. PoM has demanded payment but ISA has refused to pay because ISA believes its claims against the State of Victoria (see 3. and 4. above) need to be paid first.

QUESTION 17

Civil Procedure: *Your answer:* ***(circle ONE)*** **[1 mark]**	Proceedings are likely to be brought by GCDA against WWI in relation to the breach of insurance contract claim in which court? a) Admiralty Court of Victoria. b) International Court of Arbitration. c) Magistrates' Court of Victoria d) Supreme Court of Victoria. e) Court of Admiralty Claims. f) Victorian Court of Marine Insurance Disputes.

QUESTION 18

Ethics: *Your answers:* ***(circle ONE)*** **[1 mark]**	Which **ONE** of the following is an overarching obligation in civil proceedings, as set out in Part 2.3 of the *Civil Procedure Act 2010*? a) to act consistently. b) to act impartially. c) to act promptly. d) to avoid prejudice. e) to maximise the number of claims/defences available. f) to minimise risk for all parties in the proceeding.

QUESTION 19

Ethics:	In civil proceedings, the 'paramount duty to the court' is best explained as:
Your answers: ***(circle ONE)***	a) A duty to co-operate with other parties in the proceeding. b) A duty to act fairly in advocating a client's position. c) A duty not to mislead the court. d) A duty to further the administration of justice. e) All of the above. f) None of the above.
[1 mark]	

QUESTION 20

Ethics:	The work of a barrister includes which **ONE** of the following?
Your answer: ***(circle ONE)***	a) Advising clients as to their prospects of success in litigation. b) Empathising with a client's litigation predicament. c) Providing career advice to junior legal practitioners. d) Reporting situations of professional misconduct committed by other barristers. e) Networking and other brief-snaring strategies. f) Obtaining Continuing Professional Development points.
[1 mark]	

QUESTION 21

Civil Procedure: Is it possible that any of the claims (numbered 1 to 6 above) can be heard together? Explain why this is/is not likely to occur in relation to each claim. **[4 marks]**

Answer #1:
Pursuant to s9.12(1) of the Supreme Court Rules, two or more pending proceedings may be heard together where some common questions of law or fact arise in them or the rights to relief claimed in them arise from the same series of transactions. The court retains a discretion not to hear the proceedings together.
Proceedings 5 and 6 deal with discrete claims which do not share a factual basis with the other claims, and so are unlikely to be heard together with the other claims. Although claim 5 is a discrete quantum meruit claim, maybe it should be heard with claims 1-4 in that it also involves consideration of the federal circumstances of the incident – ie. to prove the extent to which the rescue was necessary.
The first four claims might be heard might be heard together, as they all deal with the interference with the lighthouse and the duties owed by various parties with respect to it. Not hearing the matters together might lead to inconsistent outcomes: ie. a determination that the interference was an "act of terror" however unlikely, but also a determination that in claim 3 the state didn't take reasonable steps to prevent a natural and foreseeable consequence.

Answer #2:
It is possible for claims to be heard together under 09.02 (ie. for multiple plaintiffs and defendants to be joined) where there is a common question of law/fact that would arise if separate proceedings or no proceedings arise out of the same/series of transactions. This will not be the case if the joinder is inconvenient where embarrassment/deals may exist and trials can be separated. Further, it is possible at any stage of a proceeding to add, remove or distribute to a claim (with leave of the party or the court's leave). For all questions to be properly determined/adjudicated upon in relation to connected claims in the proceeding. Here, I believe that GCDA should seek to issue proceedings naming WWI and ISA as defendants given GCDA's claim of negligence against ISA is the basis of seeking the indemnity under WWI. Evidence in relation to the negligence proceedings would also inform the evidence in respect of the "act of terror" definition connected dispute. ISA should seek to name the state as a defendant to a proceeding and allege both causes of action in the statement of claim. Whilst they are two separate causes of action if there is no reason why the two incidents/causes of action couldn't be pleaded in a statement of claim provided appropriate facts/particulars are provided under order 13. Further, it would be appropriate for the state to seek to file a defence and counter claim against ISA for the state's quantum meruit claim in respect of the energy services. PoM could seek to separately sue ISA for the breach of contract for the cost of the repairs to the ship and breach of contract allegation. However, given ISA indicates that its claim against the state would first need to be determined these two proceedings would be consolidated and heard together under 9.12.
However, I think It would make more sense for a judge to hear all of these arguments on a consolidated basis under rule 9.12. Here, it may be most efficient and in line with the purpose/requirements of the CPA to have the matters heard one after each other.

QUESTION 22

Ethics: PoM is considering briefing a barrister directly (i.e. without an instructing solicitor). Explain whether this is/is not permissible. **[2 marks]**

Answer #1:

Rule 22 of the Barristers Rules states that a barrister must do certain things if they want to accept a direct access brief from a "person." "Person" is not defined in the Rules, so therefore a little unclear if barrister could accept a brief from a corporation. Unclear whether "person" is a legal or natural person. In any event, this is far too complex a matter for a barrister to accept a direct access brief, so counsel shouldn't accept it.

Answer #2:

Under r21 of Conduct Rules, B can accept a direct brief. However to do so, must first inform PoM in writing of effect of rr 11 and 13 (ie limitations of what counsel can do, cannot act in solicitor's capacity re. filing, marshalling witnesses, managing evidence etc. Counsel must further advise that circumstances may require an instructor to be briefed at short notice and that there may be disadvantage to PoM in relation to not having an instructor (ie. complexity of matters, managing paperwork challenging especially if joined to other proceedings.) Barrister must disclose level of experience. If PoM signs in writing that acknowledges can act. However, under r 101(k) barrister should decline here as evidence too complex and could not acquit oneself properly in advancing PoM case.

QUESTION 23

Ethics: Karen JONES, who had the initial conference with Dylan and Cody (see preamble to Question 2 above), has been asked to provide written advice to the State of Victoria in relation to the claims relating to ISA. She believes that she can accept this brief because: (i) she only had a preliminary conference with Dylan and Cody; (ii) she did not charge them a fee; and (iii) their criminal matters have been finally determined. Are there any ethical implications arising from a decision to accept the brief in these circumstances? Explain. **[3 marks]**

Answer #1:

There may be some ethical implications arising from KJ's decision to accept a brief in these circumstances. Reasons (i) and (ii) are not relevant to the determination of whether KJ can accept brief. Reason (iii) may allow her to act as the substance of what Cody and Dylan told her was that they had committed the conduct. This is confidential information that KJ must not divulge. However, their involvement is now a matter of public record by virtue of their conviction. Therefore, KJ will not be divulging confidential information. There may be an issue re: the tip off if KJ was told more (ie. whether or not they planned to commit offending), although it seems she can act. Dylan and Cody are not a party, so is issue that she has discussed case with them.

Answer #2:

Yes. Jones has confidential information in relation to Cody/Dylan's cases from her initial meeting with them (even though it was only a "preliminary conference" and she wasn't fair for it didn't charge a fee). It is possible that Jones will not be able to fully and completely devote herself to the pursuit of ISA's best interests (subject to the overriding duty to the court) without being able to disclose the information. However, it may be permissible for Jones to proceed if (i) she obtains Cody/Dylan's consent to disclose any of the information she possesses and/or if anything said in her preliminary conference with the brothers is now on file public record eg. disclosed during their cases.

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

GCDA has filed and served proceedings against WWI for breach of the insurance contract, claiming $80m, costs and interest. WWI has filed a defence that largely admits all material allegations contained in the claim, save that it pleads it is not liable because Dylan and Cody's actions constituted an *'an act of terror'* by the terms of the contract which expressly exempts WWI from liability. The case will turn entirely on the court's interpretation of the meaning of *'act of terror'* and whether Dylan and Cody's actions are captured by that expression.

GCDA is contemplating making an application for 'summary judgment'.

WWI is contemplating making an 'offer of compromise' to make the claim 'go away'.

QUESTION 24

Civil Procedure: What is 'summary judgment'? Explain the procedural steps that both GCDA and WWI would have to take in relation to such an application. Explain why you think an application for summary judgment is/is not a sensible course to take in this case. **[4 marks]**.

Answer #1:

Summary judgment is a judgment entered in favour of one of the parties in a civil proceeding summarily (ie. without the need for a trial) on the basis that the party's case has no real prospects of success. The procedural steps are outlined in O27 (also see pt 4.9.) GCDA would need to file a summary and affidavit in support of the summons which clearly articulates why WWI has no real prospects of success. D may reply by affidavit or otherwise as the court deems appropriate and the GCDA could respond to WWI's affidavit. Summary judgment may be appropriate in this case given that the D has effectively admitted all allegations of fact. Having said this the court's determination of the meaning "act of terror" may result in a favourable outcome for the D and be a total defence to all claims made by the P. In this sense,

the D's defence has some prospect of success. Accordingly, the application should not be brought as it is a power rarely exercised and unlikely to be successful in the circumstances. Parties should remember their overarching obligations. If unlikely to be successful – don't bring application because it will increase costs unnecessarily and counsel should not take steps which are unnecessary. Further, there is an offer or compromise on the table which should be considered as weighing against bringing application.

Answer #2:
Summary judgment is where the Court enters judgment for/against a party without a hearing on the merits. The GCDA wishes to make an application, it must bring such an application under s61 CPA by filing a summons with an affidavit in support verifying the facts on which the claim is based and setting out how the defence to the claim has no real prospects of success. This is the relevant test (Lysaught). The WWI may then show case by filing an affidavit in reply. The Court may then order that the deponents if the affidavit be cross examined at the hearing of the application.
Here, such an application is certainly open to the GCDA. The factual circumstances surrounding the claim are largely undisputed and will turn on the court's interpretation of "act of terror." It is essentially a legal argument that does not require a full hearing on the merits. I would advise GCDA that such an application is suitable in these circumstances.
The court has a discretion to allow the matter to proceed to a full hearing on the merits despite the finding that a defence has no real prospect of success.

QUESTION 25

Civil Procedure: What is an 'offer of compromise' and what is the effect of such an offer on costs at trial? What do the rules require an offer of compromise to contain? **[4 marks]**.

Answer #1:
An offer of compromise is an offer to compromise (or settle) any or all claims in a proceeding on specified terms (v 26.02). An offer must be in writing and state that is served in accordance with order 26 (r 26.02(3)). Must state whether exclusive or inclusive of costs (r 20.02(4)). May be served at any time before verdict/judgment (r26.03). May be time limited (r26.03(3)). May state time for payment of money, otherwise 28 days (r26.03.1). Should be stated to be without prejudice but presumed to be so (r26.04).
The effect on courts is set out in r26.08. Where offer made by P is not accepted and P obtain judgment no less favourable than term of the offer, then, when court order overcome, entitles costs as per r26.08(2)(a) or (b). ie. Indemnity costs (for injury claim)
Where offer made by D not accepted and P obtains judgment no less favourable, then D presumptively entitled to D's costs on ordinary basis after second business day after service. When offer made by D and P unreasonably fails to accept, cost consequences are better for D (see 26.08(4)).

Answer #2:
Offer of compromise is an offer to resolve the dispute in the proceedings on terms, without the necessity for a hearing. Cost consequences depend on who is making it.
If, as here, it is WWI and the offer is not accepted, but GCDA does no better at trial, then the offer; Court must generally enter that WWI pay GCDA's costs on a party/party basis up to 11am on 2nd business day of day offer was served and, thereafter, GCDA must pay WWI's costs of the proceeding on a party/party basis.
Court may otherwise order (eg prior offers; conduct; offending civil procedure act etc) order 26. Rules require:
- In writing
- State served in accordance with offer
- Either state inclusive of costs or exclusive
- Open for acceptance for not less than 14 days
- Prepared in accordance with rules
- May stipulate time for payment

Doesn't preclude offers → which have no mandatory effect on Court but may affect cash consequences.

QUESTION 26

Civil Procedure: Assume GCDA accepts WWI's offer of compromise. Subsequently WWI fails to adhere to its terms. What are GCDA's options at this point? **[2 marks]**.

Answer #1:

It depends on whether the Ct has made orders dismissing the proceeding. If it has then the Ct is effectively functus officio. GCDA will likely have to issue new proceedings cause of action would be breach of settlement terms. Alternatively, if B final orders have not been made, could seek orders under r26.07.1 that Ct give effect to offer; stay/dismiss etc.

Answer #2:
GCDA can apply to the court under Order 20.07.07 on the basis of WWI's default and seek order that the court:
- Give effect to the accepted offer
- Strike out WWI's defence

This is providing claim has not been validly withdrawn. Can put evidence of offer and accept before court for this purpose.

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

GCDA has filed a claim naming itself as Plaintiff and ISA as Defendant (see claim No 2 above). The State of Victoria has also been named in the proceeding as a Third Party (see claim Nos 3-5 above).

As part of GCDA's claim against ISA for negligence, GCDA has made the following allegations in its statement of claim:

- the captain of the *MS Haast*, Espen HOLM, had been drinking rum (alcohol) on the bridge at the time they were navigating into Port Phillip bay, which impaired his judgment, and this was the principal cause of the grounding of the ship;
- the entrance to Port Phillip bay would have been navigable by a competent captain and crew in stormy conditions at night even without the Lighthouse in operation.

ISA has denied these allegations in its Defence.

QUESTION 27

Evidence: Counsel for the Plaintiff intends to call Christina MEREDITH, an emergency services worker who assessed Captain Holm for possible injuries at 5.00 am on the morning of the rescue. Ms Meredith has stated in a written statement that she *'smelt liquor on the captain's breath*' as she was talking to him. Counsel for the Defendant objects to the evidence on the basis that '*it is* ***not relevant***, ***not admissible****, and the witness is* ***no expert*** *on alcohol consumption anyway.*' Consider the merits of the objection. **[4 marks]**

Answer #1:

The evidence is relevant because if it was accepted it could rationally affect the assessment of the probability of the existence of a fact in issue, being whether the ship crashed due to the negligence of its crew. It is thus prima facie admissible (s56 Evidence Act).

The evidence is opinion evidence because it is adduced to prove the existence of a fact (the breath smelt like liquor) about which the opinion was expressed. Thus, it is prima facie excluded under s76.

The evidence need not be expert opinion evidence to be admissible. Here, we have no reason to believe Ms Meredith is an alcohol consumption expert (although arguable based on her experience as an ES worker she would have specialised knowledge of identifying when people have been drinking….) so accepting that s79 is not available (in any case she has not set out reasoning etc), we use the s78 lay opinion exception to the exclusion. Ms Meredith's opinion is necessary to obtain an adequate account of her perception. So it will be admissible (cf. if she has said "he was drunk" where it is one step removed from what she perceived.)

Answer #2:

CM's evidence is relevant because it can affect rational assessment of whether fact in issue exists. He fact in issue here is whether EH was drunk – CM's evidence goes to establishing that fact, so is relevant (ss55, 56).

CM's evidence is an opinion inference from observable data (Lithgow) so is an opinion. It is evidence used to prove fact which is subject of opinion so opinion rule applies (s76 EA). CM, as an emergency officer, may have experience dealing with intoxicated people – this could qualify as "specialised knowledge." Her opinion is substantially based on that knowledge so s79EA may apply.

If CM is not an expert, her evidence may qualify under lay opinion exception (s78). Her opinion is based on her first-hand perception and is necessary to obtain adequate account/understand her perception. Sobriety has been found to be a fact for which lay opinion rule applies (Lithgow). Thus, DC's objection is without merit. It is unlikely to be excluded under s135 – warning to jury would cure any unfairness.

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

Assume the evidence of Ms Meredith is admissible. Counsel for the Plaintiff also proposes to adduce the following evidence in support of its claim:

- On three separate occasions in the two years preceding 29 July 2017, the *MS Haast* docked at the Port of Melbourne with Captain Holm at the helm. On each of these occasions port workers who had direct dealings with Captain Holm reported observations of Captain Holm being intoxicated ('**Holm Prior Incidents**').
- On 15 separate occasions in the two years preceding 29 July 2017, other cargo vessels owned by ISA (excluding the *MS Haast*) docked at the Port of Melbourne where port workers reported observations of the captain (none of whom were Captain Holm) or members of the crew were intoxicated ('**Other ISA Prior Incidents**').

QUESTION 28

Evidence: Counsel for the Plaintiff considers that: (i) the Holm Prior Incidents demonstrate that he is the sort of person to drink alcohol while in control of a ship; and (ii) the Other ISA Prior Incidents

demonstrate ISA has a culture that condones and facilitates its shipping crew drinking alcohol while on duty. Is this evidence admissible? Explain. **[4 marks]**

Answer #1:

Holm Prior Incidents

The evidence is sought to be adduced as tendency evidence ie. to prove that Holm had a tendency to drink alcohol while in control of a shift (from which an inference is sought to be drawn that he acted in conformity with that tendency on this occasion.) Per s97 of the EA, the evidence would only be admissible if it has "significant probative value" (influential in the content of fact-finding: IMM) if proper notice is provided by the plaintiff. It would be necessary to assess (i) the extent to which the evidence supports the existence of the alleged tendency; (ii) whether the extent to which the tendency makes the conduct at issue more likely: Hughes majority. Here, although the 3 incidents described are a bit different from the case at hand (the MS Haast was docked at the Port of Melbourne, not grounded) this doesn't make the evidence inadmissible – tendency conduct need not have the same/substantially similar features as charged conduct: Hughes. However, for the probative value of the evidence to be established, more information would be needed – for example, when did the port workers interact with Holm; had he been in control of the ship immediately beforehand, etc. Without these facts, the second step in the analysis identified above would be hard to surmount. Also, how long has Holm been a captain for? Only 3 instances in 2 years. Defence would also argue for exclusion under s135 on the basis that the evidence is prejudicial ie. it paints Holm as drunk, irresponsible etc.

Other ISA Prior Incidents

Subject to the same qualifications as are set out above (requiring additional facts), this evidence may pass the probative value threshold, particularly given the number of occasions identified (15). Plaintiff would argue the instances support the existence of a tendency on the part of ISA to have a culture that condones/facilitates crew drinking alcohol and that the existence of that tendency makes it more likely on the occasion in question, Holm/the crew were intoxicated (relevant to breach of duty.)

Note, the IMM, for both alleged tendencies, Court would assume evidence of tendency witnesses it credible and reliable.

Answer #2:

GCDA seeks to adduce evidence of intoxication incidents as tendency – evidence of tendency/reputation/conduct used to prove person has tendency to act in a particular way (s97).

Here – tendency is to be/get drunk and condones such a culture. Hughes says such evidence is admissible if: (i) relevant to prove fact in issue, (ii) significant probative value determined by two steps = (A) evidence proves, to a significant extent, tendency and (B) tendency proves, to a significant extent, a fact in issue.

"Similarity" is not a touchstone. All that is needed is that evidence makes more probable than improbable the existence of a fact in issue. Specificity of tendency is important – generality may only make evidence relevant. Similarity can assist but is not determinative. Assume credibility and reliability (IMM).

If unfair prejudice substantially outweighs PV, TJ may exclude under s135. Evidence may also be coincidence evidence – two or more events to prove person acted/thought in particular way which makes improbably they're coincidence, considering similarity (s98). Here – evidence of Cpt H being drunk while controlling a ship may be considered sufficiently specific. The number of occasions may give force to tendency existing. Evidence of 15 occasions where sailors were drunk also supports probative value of tendencies. Likely admitted as tendency. Little detail about similarity, so may not be coincidence evidence.

QUESTION 29

Civil Procedure: Assume that the evidence of the Holm Prior Incidents and the Other ISA Prior Incidents is all ruled to be admissible. The Plaintiff has drafted a subpoena, to be issued and served on PoM, which would oblige PoM to produce *'all documents in PoM's possession pertaining to ISA ships that have entered and exited the Port of Melbourne since 1 January 2010 up to 30 July 2017'.*

Consider the wisdom in issuing such a subpoena with reference to the case of *Hera Project Pty Ltd v Bisognin (No 4)* [2017] VSC 270. **[4 marks]**

Answer #1:

The scope of this subpoena is far too broad. Thousands of ships are likely to have entered and exited the Port across the 7-year period specified. As discussed in Hera, the obligations under the CPA (overarching obligations) are relevant to the issue of a subpoena – including the overarching purpose of facilitating the just, timely, cost-effective and efficient resolution of the issues in dispute.

A subpoena at this breadth is likely to be oppressive; result in unnecessary delay and probably delay the trial. Whilst some latitude in drafting subpoenas is permitted, it is incumbent on solicitors to communicate and cooperate – here, the plaintiff's solicitors would be best advised to contract PoM's solicitors, notify them of the plaintiff's intention to issue the subpoena (and maybe some information about the issues in dispute) and discuss how the subpoena could be drafted to capture what the plaintiff is seeking without being oppressive: see Hera Project. This is a feature of the solicitor's overarching obligations. Here, plaintiff's solicitor could have discussed with PoM's solicitor how the subpoena could be framed to capture evidence of the Holm Prior incidents and ISA prior incidents.

Answer (3.5/4)

There may be wisdom in seeking documents by subpoena from PoM. The difficulty, however as in Hera Projects, is the breadth with which the subpoena is drawn. In Hera projects, Riordan J criticised the breadth of a subpoena addressed to a firm of solicitors which sought documents in relation to a particular property. The firm had multiple files in respect of that property and so producing documents or subpoena subject to review for legal privilege was a great effort and involved significant expense. His Honour suggested the subpoena should have been drafted with more specificity so as to not capture so many unwanted documents. Here, fore example, GCSA should consider any such narrowing of the subpoena possible.

Further, Riordan J said that where the party has in mind the particular documents it is seeking, it will be appropriate for that party to communicate in advance with the recipient of the subpoena to clarify the nature of the documents sought. A subpoena in this sense, although an order of the court, may be unilaterally reduced in scope by the party and so cooperation between GCSA and PoM as to the subpoena will reduce the onerousness of compliance and reduce the risks of adverse costs (above and beyond the conduct money GCSA may expect to pay) arising.

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

Prior to trial, ISA terminated the employment of Captain Holm following an internal investigation into his competence as a ship captain. ISA does not wish to have him give evidence in its Defence. While Captain Holm has consistently denied that he was drunk while in charge of the *MS Haast*, the ISA human resources manager, Belinda HANSEN, formed the view that he was not telling the truth.

QUESTION 30

Evidence: What advice should Counsel for the Defendant give ISA in relation to any decision made not to call Captain Holm? **[2 marks]**

Answer #1:

Counsel should advise that Jones v Dunkel reasoning will apply. Where a witness is squarely in the camp of one party (as is here, he is/was an employee of ISA) and where their evidence could elucidate a matter in the proceeding (here Holm could, he was captain of the ship on the night) and that witness is not called to give evidence, and no explanation is given for their absence, then the fact finder is entitled to infer that W evidence would not have assisted the case of the party who

did not call it. Jones v Dunkel applies here because this is a civil proceeding. Fact finder cannot use W absence to fill in gaps in evidence, only allowed to reason that evidence would to have assisted.

Answer #2:

If ISA fail to call the captain as a witness, it may enliven Jones v Dunkel rule. The judge/fact finder may be able to class an adverse interference; that is that his evidence would not have supported their case. D can only avoid this if they compromise an adequate explanation for not calling this (not apparent here) and it would be expected he would be called by D.

QUESTION 31

Evidence: Assume that Counsel for the Defendant calls Captain Holm to give evidence. Explain the rule in *Browne v Dunn* and how it is likely to be applied in the course of Captain Holm giving evidence in this case. **[3 marks]**

Answer #1:

The rule in Browne v Dunn requires a cross examiner who wishes to challenge a W's evidence to put to that W their view of the evidence so the W has an opportunity to respond. It is a rule that has its basis in fairness to the W. Failure to comply with the rule can result in a W being recalled under s46 right though to counsel being limited with what they can submit to the jury. Here, counsel for P would need to put to Captain Holm that he was drunk on the night of the crash and that because of his level of intoxication he was not able to have proper control of the vessel. Also, that if he wasn't drunk, he wouldn't have crashed the vessel.

Answer #2:

The rule in Browne v Dunn is a rule of fairness. It requires that Counsel put to a witness so must of the Counsel's case that concerns that witness, so that the witness has an opportunity to respond. This is particularly so for where counsel intends to rely on a case theory which is directly or indirectly contradictory to what a witness's evidence will be. In this case, P Counsel will need to put to Captain Holm that "you were drunk, weren't you" – "your ability to handle the ship was hampered because you were drunk wasn't it?" – "you've been drunk on the job before haven't you?" and questions of that nature.

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

For the purposes of proving that Port Phillip is navigable in stormy weather at night in the absence of an operating Lighthouse, the Plaintiff proposes to call Bernard SHEPHARD, a professor of maritime history at Melbourne University and Commodore serving in the Royal Australian Navy reserves. Professor Shephard has extensive knowledge of navigation and has personally piloted many different types of marine vessel through the entrance to Port Phillip bay over a period of twenty years. He is intimately familiar with the geography of the area and the different types of weather conditions that may impact on navigation in the area. He has steered vessels through the entrance to Port Phillip bay proximate to the Lighthouse several times at night when the Lighthouse has not been operating. He

is of the view that a competent captain would not have crashed the *MS Haast* despite the Lighthouse not being in operation at the time.

He has prepared a report to this effect upon receiving instructions from the Plaintiff's legal representatives.

QUESTION 32

Civil Procedure: Explain the procedural steps and requirements associated with the preparation and contents of Professor Shephard's report prior to trial. **[3 marks]**

Answer #1:

The report is evidence of expert opinion and so governed by s79 so far as admissibility. O44 of the CPA is also relevant.

To properly commission the report, D counsel must provide the expert with a copy of the expert witness code and a copy of the relevant legislation and must also provide the expert with so much of the facts and evidence as is required to assist the expert in formulating an opinion on those facts/evidence. It is necessary to outline these facts clearly, as the facts must then go on to be the subject of evidence at the trial before the expert report can be properly adduced and if evidence is adduced contrary to those facts then the report will lose weight or potentially no longer be relevant.

The report must be prepared and served on the parties (and filed with the court) no later than 14 days prior to the trial, or if not prepared before then, as soon as possible once it is prepared.

Depending on whether P wishes to cross examine the witness will depend on whether the witness is required to attend court. If yes, must come, if not, can just tender report at trial if no objection.

Answer #2:

Order 44 applies to any expert evidence. Party must provide PS with a copy of the expert code ASAP after engagement. It must serve his report at least 30 days before trial on each party. If any supplementary report is made, it must also be served to rely on either report. The report must be signed and include clear photos, maps etc.

In evidence in chief, party will be confined to the contents of the report.

In terms of the contents, must comply with s79 EA and principles in Wilson. Should be relevant, show expertise, identify factual assumptions and expose a statement of reasoning as to how opinion was reached on those facts, to conclude it was based on specialised knowledge.

QUESTION 33

Evidence: Counsel for the Defendant objects to the admissibility of Professor Shephard's on the basis that it *'goes to the ultimate issue'*. Is this objection sustainable? Explain. **[2 marks]**

Answer #1:

No, this objection is not sustainable. Section 80 of the EA abolished the common law rule that prevented an expert giving opinion evidence in relation to the ultimate issue. So long as the evidence falls under the exclusion to the opinion rule (ie. section 79 specialised knowledge exception), the evidence will be admissible, subject to any discretion exercised by the trial judge.

Answer #2:

It is not sustainable. Pursuant to s80 of the Evidence Act, the fact that an expert's opinion goes to the ultimate issue in the case is not itself grounds for inadmissibility, assuming the opinion satisfies the expert rule in s79.

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

Professor Shephard's evidence is ruled admissible. In the course of cross-examination by Counsel for the Defendant, it becomes clear that a critical issue will relate to the width of the seaborne entrance to Port Phillip bay. The following exchange takes place:

> **Professor Shephard:** The distance between the two points of land that create the entrance to Port Phillip is 3.42 kilometres.
>
> **Counsel for Defendant:** How do you know that? Have you measured it?
>
> **Professor Shephard:** No. It's common knowledge. You can work it out from any map. I have one right here [*Produces Googlemaps image*].
>
> **Counsel for Plaintiff:** Your Honour, in light of my learned friend making an issue out of this, I would seek to tender the map produced by the witness as proof of the distance.
>
> **Counsel for Defendant:** I object to that your Honour. It's hearsay evidence.
>
> **Counsel for Plaintiff:** That may be so, your Honour. But the principle of judicial notice and the section 69 exception would in any event permit it.

The map proposed to be tendered is reproduced below.

Proposed Exhibit – Port Phillip seaborne entrance (3.42 km wide)

QUESTION 34

Evidence: Outline the arguments that Counsel for the Plaintiff would need to make in relation to: (i) the 'judicial notice' submission; and (ii) the 'section 69 exception' submission. Which argument is more convincing? Explain. **[5 marks]**

Answer #1:
Section 144 of the EA allows judicial notice to be taken of matters which are not reasonably open to question are common knowledge/verifiable by reference to a document which is not reasonably open to question. It is debatable whether "Google Maps" meets the latter description, though there may be other maps/material by reference to which the matter in question (the distance between the two points of land) could be independently verified. Defence should explain the basis for its objection/whether it truly contests the assertion as to the 3.42km distance.
The map is arguably hearsay – an out of court representation being relied upon as proof of its contents (see s59), but if so, s69 (the business records exception) may permit its admission. Plaintiff would argue that the map is a record kept by a business (Google) for the purposes of its business – see Adams and it can reasonably be supposed to have been prepared by a person with first hand knowledge/based on information supplied by someone with first-hand knowledge. Defence would question the provenance of the map (how was it prepared? Was it reliant on satellite data? How is that data verifiable/based on actual knowledge?)
On balance, given the approach taken in Adams (judge prepared to draw inference as to provenance), the plaintiff's argument per s69 is slightly stronger here – though not defence could say that line between the two points was prepared for the purposes of the proceedings, which warrants exclusion under s69(3).

Answer #2:
Plaintiff could contend that, in accordance with s144 of the Evidence Act, the straight line distance between the heads is knowledge 'not reasonably open to question', either because it is common knowledge in Victoria or because it is capable of verification by reference to the documents authority of which cannot be reasonable questioned. It may not be common knowledge in Victoria (or the narrower locality) that the distance is 3.42km and leading evidence to prove this would rather defeat the purpose. P may contend, however that it may be confirmed by reference to a number of maps, although it may be possible in each instance to question the accuracy of them.

Under s69, previous representations such as those contained in the map which might otherwise be inadmissible by virtue of s59 of the Evidence Act (the hearsay rule) are admissible if they form part of a document made or recorded in the course of, or for the purposes of a business. This exception is based on the 'regularity and repetition' of business (K v Adams), which are said to provide reliability to the representation. There are 2 difficulties with the s69 argument here. The first is that the relevant representation, being the line on the map between the heads, may have been added by the plaintiff's counsel and so it won't be a representation kept in the course of a business – here, probably Google's business. Alternatively, if that line was drawn in any way in relation to this proceeding (or any proceeding K v Adams), the exception to the exception as contained in s69(3) will apply.

Accordingly, given the difficulties in the s69 exception being used and the relative weakness of any potential complaints about the verifiability of distances by reference to maps was judicial notice is more convincing.

END OF PART B

End of examination