VICTORIAN BAR

Candidate Number:

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

7 MAY 2019

Annotated with Sample Answers

This document is a reproduction of the Readers' Course Entrance Exam which candidates sat 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.

Dr Jason Harkess
Chief Examiner
22 July 2019

Candidate Number:

EXAM DURATION: **3 hours** writing time

30 minutes perusal time (prior to commencement of exam)

INSTRUCTIONS TO CANDIDATES:

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

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

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

4) **Part A** contains 15 questions (Questions 1 to 15) and is worth a total of 50 marks. Part A commences with a preliminary statement of facts giving rise to a hypothetical **criminal proceeding**. Questions 1 to 15 then follow. In answering Part A, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part A informs you of the following: (i) whether you are being tested on rule(s) of criminal procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part A is: Criminal Procedure (22 marks), Evidence (22 marks) and Legal Ethics (6 marks).

5) **Part B** contains 16 questions (Questions 16 to 31) 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 31 then follow. In answering Part B, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part B informs you of

the following: (i) whether you are being tested on rule(s) of civil procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part B is: Civil Procedure (20 marks), Evidence (18 marks) and Legal Ethics (12 marks).

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

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

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

9) Your attention is also drawn to the following:

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

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

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

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

TABLE – SUGGESTED TIME SPENT ANSWERING QUESTION BASED ON MARKS ALLOCATED

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

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

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

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

The Accused is Sean FINNIGAN and is 45 years old (date of birth 21/01/74).

Scarlett JONES and Lucy JONES are sisters. They are the owners and operators of a small kennel in Brighton, Victoria trading under the name of 'Winter Glade Kennels'. They breed a very rare type of dog known as the Shih Terridor. The Shih Terridor is a cross between the relatively common dog breeds of Shih Tzu, Yorkshire Terrier and the Labrador Retriever. Its genetic make-up is very specific. A 'true' Shih Terridor comprises exactly 68% pure Shih Tzu, 23.5% pure Yorkshire and 8.5% pure Labrador Retriever. This precise combination produces a breed of dog that is very small, extremely affectionate towards humans, highly intelligent, independent and comfortable with being alone for hours at a time. The Shih Terridor has the perfect temperament for babies, toddlers, adults and strangers alike. It rarely barks and, when it does, the bark is barely audible. It does not require walking. The average lifespan of a purebred Shih Terridor is 14 years. For all these reasons, the Shih Terridor is highly sought after as a pet around the world. Demand for Shih Terridor puppies is especially high in Asia. Reputable breeders typically sell healthy Shih Terridor puppies at between $80,000 and $120,000 per puppy, with most buyers of Australian-bred Shih Terridors located in China.

The building from which Winter Glade Kennels operates is a small pre-frabricated structure made to specification for housing up to 20 Shih Terridors at any one time ('the kennel'). The kennel is located at the back of the property where Scarlett JONES lives with her two teenage children. The address of the residential property (and the kennel) is 32 Seashells Grove, Brighton. The kennel is located approximately 30 metres west of the residential dwelling. The kennel is secured with a 24-hour electronic monitoring system which includes CCTV cameras located inside and outside the kennel that 'live stream' footage to a secure internet site that is only accessible by password. It also includes a security code door entry and lock system and an alarm system. The system is continuously monitored by Securicorp Systems Pty Ltd ('Securicorp'), the company that supplied and installed the security system in January 2016.

On Tuesday, 30 January 2018 at approximately 2:00 AM, the Accused, together with Co-Accused Lily HANOVER and Jaden VINCENT, attended 32 Seashells Grove, Brighton. They made their way to the back of the property and by-passed the security system to gain access to the kennel. Once inside, they took seven Shih Terridor puppies that were six weeks old. The seven puppies had been sold

under contracts to various clients of Winter Glade Kennels and were due to be despatched to China on 2 February 2018. The puppies had each sold for $110,000 bringing the total value of the puppies to $770,000. The puppies were taken by the Accused and Co-Accused without the permission of the owners of Winter Glade Kennels.

As a result of information received, on 19 February 2018 Victoria Police obtained and executed a search warrant at a warehouse located at 4 Freight Road, Tullamarine. The seven puppies were located in a consignment crate on the ground floor of the premises. Co-Accused HANOVER and VINCENT were at the premises at the time the search warrant was executed. They were arrested and conveyed to Caulfield Police Station. They both made 'no comment' interviews before being charged in relation to the theft and burglary that had occurred at Winter Glade Kennels on 30 January 2018.

The seven puppies were examined by a registered veterinarian at 4 Freight Road, Tullamarine and were found to be in a poor state of health due to malnourishment. Five of the puppies were assessed as being unlikely to survive and were euthanased with the consent of the owners of Winter Glade Kennels. The surviving two puppies were returned to Winter Glade Kennels.

As a result of further information received a year later, on 3 March 2019 Victoria Police attended 2/33 Kilgour Avenue, Clayton, being the last known address of the Accused. The Accused identified himself and he was then arrested on suspicion of having been involved in the theft and burglary that had occurred at Winter Glade Kennels on 30 January 2018. He was conveyed to Caulfield Police Station where he made a 'no comment' interview following which he was released on charge and summons.

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The Accused has been charged with several offences, the most serious of which are theft and burglary under ss 74 and 76 of the *Crimes Act 1985* (Vic), which provide:

> **74 Theft**
>
> (1) A person guilty of theft is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
>
> …
>
> **76 Burglary**
>
> (1) A person is guilty of burglary if he enters any building or part of a building as a trespasser with intent—
>
> (a) to steal anything in the building or part in question; or
>
> …
>
> which is punishable with imprisonment for a term of five years or more.
>
> …
>
> (3) A person guilty of burglary is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

The first page of the charge sheet and summons that was served on the Accused is reproduced on the next page.

Candidate Number:

FORM 3

Magistrates' Court Criminal Procedure Rules 2009

Charge-Sheet and Summons

(Copy for the Accused)

To the Accused	Sean Kane FINNIGAN 2/33 Kilgour Avenue Clayton VIC 3168	☑Male ☐ Female	Date of Birth 21/11/1974
	You have been charged with an offence. Read these pages to see what you must do.	Registration No. / State	
		Licence No. / .State	

DETAILS OF THE CHARGE AGAINST YOU

What is the charge? (Description of offence)	1 The accused did, at Brighton, steal some puppies worth a total of $770,000.		
Under what law?	☑State ☑ Act ☐ Other-specify ☐C'wealth ☐ Reg.	Act or Regulation No. *Crimes Act* 6231/58	Section or Clause (Full Ref.) 73
Are there more charges?	☐No ☑ Yes – See Continuation of Charges attached		
Request for Committal Proceedings	☐ No ☑ Yes		
Type of offence	☐ Summary Offence (You should go to Court)	☑ Indictable offence (You must go to Court)	
Who filed the charge-sheet(s)? (informant)	Joanne HARRINGTON	Email: jharrington@police.vic.gov.au	
Agency and Address	Caufield Police Station 289 Hawthorn Road Malvern VIC 3162	Phone: (03) 9876 5432 Fax: (03) 1234 5678 Ref: PMZ9732/21	
Signature of Informant	*J Harrington*	Date: 3 March 2019	

Charge filed at	MELBOURNE (Venue)	on	(Date)

WHERE WILL THE CASE BE HEARD

Where you must go	The Magistrates' Court of Victoria at MELBOURNE			
Address	233 William Street, Melbourne VIC 3000		Phone: (03) 9628 7777	
When	Time 10.00am	Day 7TH	Month MAY	Year 2019

DETAILS ABOUT THIS SUMMONS

Issued at	Caufield Police Station 289 Hawthorn Road Malvern VIC 3162	Date: 3 March 2019
Issued by (Signature)	*J Harrington*	☐ Registrar ☐ Magistrate ☐ Public Official ☑ Member of Police Force ☐ Prescribed Person

QUESTION 1

Criminal Procedure:	The proceeding against the Accused in this matter commences at what point in time?
Your answer: ***(circle ONE)***	a) When the Co-Accused are arrested at Tullamarine on 19 February 2018. b) When the Accused is arrested at Clayton on 3 March 2019. c) When the charge and summons is signed by Joanne Harrington. d) When the Accused is handed the charge and summons. e) When the matter is first heard on 7 May 2019. f) When the Director of Public Prosecutions files the indictment (on a date yet to be determined).
[1 mark]	

QUESTION 2

Criminal Procedure: Refer to the charge and summons that has been reproduced on the previous page. The Accused has come to you, as Counsel, for advice. He hands you the charge and summons and states: *'Can I try to get out of this on a technicality? The charge says nothing. It doesn't even say who I've apparently stolen these puppies from and how many puppies I stole, and they've got my date of birth completely wrong too. And this happened more than 12 months ago. Isn't there a statute of limitations that stops them from charging me after 12 months? This case is joke!'*

Does the Accused's complaint have any merit? Identify any other defects in how the charge is expressed and explain how the Prosecutor could seek to have these rectified when the matter is first heard on 7 May 2019. **[4 marks]**

Answer 1: The A's complaint has merit in so far as the defects in the charge sheet are concerned. The charge sheet must comply with Sch, however, a failure to do so does not mean it is invalid. The defects in this charge sheet include:

- Date of alleged offence not included;
- Name of the accused not included;
- Name of victim not included;
- Refers to s 73 Crimes Act, yet it alleges a theft which is s 74;
- Generally lacks sufficient particulars necessary.

The P can seek an order under s 8 CPA for the charge sheet to be amended to cure the defects. MC can order the charge sheet be amended at any time unless this would cause injustice to the accused.

An amendment cannot have the effect of charging A with a new offence – this may be in issue here (given it alleges ‘s 73’ offence, however, the Magistrates' Court's likely to view this as an error which does not cause injustice to A because the particulars allege a theft– the amendment would simply rectify the provision number. MC will likely allow the charge sheet to be amended. Charge sheet may name co-accused, but not required. No merit in A’s complaint regarding ‘statute of limitations’. S 7(2) CPA provides that a proceeding for an indictable offence (as in here) can be commenced at any time, except where provided by an Act.

Answer 2: The charge for an indictable offence – which this is, both for burglary and theft - can per s 7(2)(b) CPA be heard and determined summarily though more than 12 months after event. Errors in the charge-sheet are not necessarily fatal lie which may lead up to invalidity: s 9. This omission to state time at which offence committed does not alone invalidate the charge-sheet: s 9(2). But the charge-sheet must comply with Schedule 1. It does not. It states the offence of theft Sch 1 (Cl. 1(a)) in ordinary language (cl. 2(1)): acceptable. But it does not state the alleged offence of burglary at all. As to theft charges, is insufficient: wrong section number means the statutory/ provision creating the offence not identified per cl. 3(2)(a). The charge lacks requisite clarity: not ‘reasonably clear’ what it refers to (the particular breed of puppies): cl. 7. Charge should describe the dogs – the alleged stolen property – ‘with reasonable clarity’: cl. 10(1)(b). Not done here. But need not name owners or at least one co-owner (cl. 10(3)(a)) because special value of property is not part of the offence. The prosecutor could seek amendment of these on return date of summons if amendment (s 8) cf amendment necessary and can be made without injustice to the accused. Likely to satisfy this.

QUESTION 3

Ethics: The Accused has asked you to be his legal representative. He has not sought assistance from a solicitor. What factors should you, as Counsel, take into account in deciding whether to act for the Accused on a ‘direct access’ basis? Should you accept the direct access brief? **[3 marks]**

Answer 1: Nothing in the Rules obliges me to accept instructions from a person who is not a solicitor (r 21). This is an exception to the cab-rank principle in r 17. If I were to accept, I would need to explain the effect of rules 11 and 13 to the client, the fact he may need to retain a solicitor at short notice, any disadvantage I believe he may suffer without a solicitor, my capacity to supply requested services and facilities without a solicitor and give him a fair description of my advocacy experience. I would need a written acknowledgment (signed) from him that he has been informed

of these matters. Here, A faces indictable offences and P has indicated it wants indictable jurisdiction. This matter is too complex for me to act alone, particularly given there are co-accused, if he pleads not guilty, it will proceed to trial in the County Court and witnesses will be called. S 101(k) provides that I must refuse this brief as I have reasonable grounds to believe the failure of A to retain a solicitor would, as a real possibility, prejudice my ability to advance and proceed A's interests in accordance with the law and the rules.

Answer 2: Counsel is not required to accept a direct brief (r 21, 105(A) BCR). In fact, counsel must refuse to accept a direct brief if they believe on reasonable grounds the failure to have an instructor would seriously prejudice the client's case (r 101(k)). This is serious criminal mater that is likely to proceed in the County Court. I consider there is sufficient prejudice to reject a direct access brief. If counsel did accept, must inform and get a written acknowledgment from the client the effect of rules 11 & 13 of the BCR, there may be a need to get an instructor at short notice, any other potential disadvantages counsel perceives, the capacity of counsel to conduct the matter without an instructor and a fair summary of counsel's advocacy experience (r 22).

QUESTION 4

Criminal Procedure: Having regard to the contents of the Charge-Sheet and Summons alone (and assuming any perceived defects in it are cured), in what court's jurisdiction is the Prosecution likely to seek to have the charge against the Accused ultimately determined?

Your answer:
(circle ONE)

a) Magistrates' Court's summary jurisdiction.
b) Magistrates' Court's indictable jurisdiction.
c) County Court's summary jurisdiction.
d) County Court's indictable jurisdiction.
e) Partly in the Magistrates' Court's summary jurisdiction and partly in the County Court's indictable jurisdiction.
f) Supreme Court's inherent jurisdiction.

[1 mark]

QUESTION 5

i. Criminal Procedure: The offences under ss 74 and 76 of the *Crimes Act 1958* are indictable offences that may be heard and determined summarily. What are the essential points of distinction between summary offences, indictable offences and indictable offences that may be heard and determined summarily? **[2 marks]**

Answer 1: Summary offences are relatively minor offences and are dealt with in the Magistrates' Court (level 7-12 offences) (ss109, 112 SA). They may also be nominated as offences in the Summary Offences Act. They must be heard by Magistrate done in the Magistrates' court and cannot be heard in the county or supreme courts. Indictable offences are serious offences (level 1-6), that will be committed for hearing in the Supreme Court or County Court by the Magistrates' Court to be heard by judge and jury if there is a plea of not guilty. IOTS offences are level 5 and 6 offences and may be heard summarily in the MC (s28 Criminal Procedure Act).

Answer 2: Indictable offences are punishable by levels 1 – 6 imprisonment or fine. Any other offence subject to contrary intention in statute is a summary offence. IOTS offences are indictable offences that satisfy criteria in s 28(1) of Crim PA including max 10 years imprisonment and other requirements for IOTS offence are that A consents to summary hearing and Court considers appropriate to hear and determine offence summarily applying factors in s 29(2). So one essential point of distinction is available penalties. Other distinction is process of determination – summary offences heard determined by Magistrate alone, indictable by jury in County Court or Supreme Court following committal, IOTS can be heard pursuant to either process depending on if Court allows IOTS offence to be heard/ determined summarily.

ii. **Criminal Procedure:** Identify and explain TWO (2) practical *advantages* and TWO (2) practical *disadvantages* for an accused in any criminal proceeding having a matter determined summarily as opposed to it being determined in the indictable jurisdiction. **[2 marks]**

Answer 1:

ADVANTAGES –

1 - The maximum cumulative sentence for both offences in the MC is 4 years (2 years for each charge – s 113A, s 113B SA) as opposed to 20 years in the County court.

2 - The A has an automatic right of appeal to the CC for a full rehearing against conviction and or sentence de novo (s 254 CPA)

DISADVANTAGES –

1 - The A forgoes a right to a jury trial and judge by M alone instead of jury of peers.

2- Any evidentiary rulings made by the MC cannot be appealed to the COA through the appeals process (s 295) as they are not 'final orders' (s 272).

Answer 2: Advantages – (i) Cheaper as less procedural steps (no committal hearing, just mention, case conference, contest mention if complex, summary hearing); (ii) May get lower sentence if summary as will be determined in Magistrate Court and MC has limited sentencing jurisdiction 2 years for one offence, 5 years for multiple.
Disadvantages – (i) committal hearing allows A to test case against him or her, cross-examination witnesses with leave, generally get disclosure of P's case and you do not get this opportunity with a summary hearing; (ii) committal hearing also will lead to trial with jury (assuming evidence of sufficient weight to support committal) and A may perceive jury trial as advantageous depending on circumstances of offending – no jury for offence being determined summarily.

iii. **Criminal Procedure:** What is a 'committal' hearing? Explain the procedures associated with a committal hearing and on what basis an accused may be 'committed to stand trial'. Why is the Accused in this case more likely to be committed to stand trial rather than having his case determined summarily? **[3 marks]**

Answer 1: The committal hearing is an administrative hearing designed as a judicial check on the power of the executive (DPP) to charge citizens with serious criminal offences. A committal proceeding must be held for indictable offences that will not be heard summarily (s 96) and commences with a filing hearing, committal mention and the committal hearing itself, in which the MC will determine if there is evidence of sufficient weight to support a conviction (s 141(4)). The A must jointly file a case direction notice (Form 32) with the DPP 7 days before committal mention if seeking leave to cross examine witnesses. In this case, the accused may seek to have the matter heard summarily but the court will have regard to the seriousness of the offence, adequacy of sentence in the MC, complexity of the proceedings and whether there are co-A (s 296(2)). Given the sum of money allegedly involved the potential complexity of the case, is unlikely to be heard summarily and more likely to be committed to stand trial.

Answer 2: Committal hearing is hearing in MC where Magistrate determines whether evidence of sufficient weight to support committing A for trial. Procedures – P will serve hand up brief 42 days prior to committal mention hearing, 7 days out P and A must serve CDN identifying among other things if A seeks leave to cross examination witnesses, and if A does seek such leave, the issue, relevance of their evidence and justification for cross-examination and P's position. Next steps case conference generally held on same day as committal mention, then committal, and if evidence of

sufficient weight, A committed to stand trial in accordance with s 144 CPA. Test for whether A is committed to stand trial is whether evidence of sufficient weight to support a conviction and this is not a particularly high threshold. A here likely to be committed to stand trial because if sought to have offences heard and determined summarily (possible as both IOTS) application would likely be rejected given complexity of offending, presence of co-accused, multiple offences charged limited and given the sentencing options available to MC. Likely A will be committed as low threshold assuming P has material linking A to allegations e.g: fingerprints.

QUESTION 6

Criminal Procedure:	Assuming the Accused is committed to stand trial, how many people are likely to constitute the jury in this case?
Your answer: ***(circle ONE)***	a) 0 (it will be tried without a jury). b) 6. c) 10. d) 11. e) 12. f) 13.
[1 mark]	

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

The matter has been set down for trial. The Accused has instructed Defence Counsel that he denies all involvement in the alleged burglary and theft, but otherwise does not deny that it occurred. Defence Counsel has identified several matters relating to the admissibility of the evidence proposed to be adduced by the Prosecution in the course of the trial. These objections include:

i. an objection to the admissibility of any evidence that discloses the value of the puppies being $110,000 per puppy (and the total value of $770,000) on the basis that '*such evidence is not relevant or, alternatively, the probative value of the evidence does not outweigh the unfair prejudice that would be caused to the Accused if the Prosecution is permitted to adduce it'* ('the **Relevance Objection**');

ii. assuming the Relevance Objection is rejected by the trial judge, an objection to the admissibility of the seven contracts of sale between Winter Glade Kennels and each of its seven Asian-based clients, on the basis that *'the value of the puppies specified in each contract is opinion evidence and not admissible by the operation of s 76 of the Evidence Act 2008'* ('the **Opinion Objection**');

iii. assuming the Relevance and Opinion Objections are both rejected by the trial judge, an objection to the admissibility of the same seven contracts on the basis that *'they are all hearsay and not admissible by the operation of s 59 of the Evidence Act 2008'* ('the **Hearsay Objection**');

QUESTION 7

Criminal Procedure: At what stage in the proceeding should Defence Counsel first raise the Relevance Objection, Opinion Objection and Hearsay Objection? Explain. **[2 marks]**

Answer 1: An A has a right to silence, and to put the P to proof. However, under s 183, s 199/200 (and s 189 + 190) the A has certain limited pre-trial disclosure obligations. Here, if the admissibility of these pieces of evidence is the subject of the P's pre-trial notice admission (s 182 CPA), then under s 183, D is obliged to identify the issues in dispute as to admissibility and the basis on which such issues are raised. Further, under s 200, D is required to notify P of these disputed issues re admissibility of evidence and notify the court as to the order for exclusion that is sought. If D fails to do so, this may result in adverse comment by the TJ, or a grant of leave to P to comment, on the failure (s 237 CPA). However, the TJ will not allow such adverse comment lightly given A's right to silence and right to put the Crown to proof.

Answer 2: Technically, DC should raise these objections either in the presence of A to P's opening and notice of pre-trial admission, as per s 183. This must be done at least 14 days before trial. At the very least, DC has obligation under s 200 to notify P of these objections and see if an agreement can be reached (ie P withdraws evidence – unlikely) and if no agreement, must then notify the court. DC must do this notification as soon as possible after becoming aware of the objection it wishes to make and at least 14 days before trial (or if knowledge comes later, as soon as possible after becoming aware). While DC may want to hold off objecting, it would be criticised and having objection not heard. See also s 199 objection likely determined pre-trial.

QUESTION 8

Evidence: Refer to the **Relevance Objection** and discuss the merit of it. In the course of giving your answer, you should explain the legal distinction between the concepts of *relevance*, *probative value* and *unfair prejudice*. **[4 marks]**

Answer 1: Evidence is relevant evidence, if accepted, could rationally affect the assessment of the existence of the probability of a fact in issue (s 55 EA). Probative value of the evidence is the extent to which evidence could rationally affect the assessment of the probability of the existence of a fact

in issue (Dictionary). Probative value is taken at its highest without consideration of credibility or reliability of the evidence (*IMM*). Unfair prejudice is the danger the evidence will be misused by the jury (*B v D*) by it being given too much weight (*Lisoff*) or the inability to cross-examine on the evidence (*Lee*). Here, the value of the puppies is not strictly a fact in issue – that is, it does not go to the elements of the offence. Therefore, its probative value, even taken at its highest, is likely to be low (*Dickman*), although it is not likely to unfairly prejudice the A in the jury placing too much weight on it such that its PV is outweighed (s 137). However, relevance is a low threshold to pass, and for this reason it is likely the evidence is admissible.

Answer 2: Relevance and PV are closely related concepts. Relevance under s 55 EA connotes a minimal, logical connection with a fact in issue and is a low threshold (*Papakosmas*). PV refers to the extent of the relevance – that is the extent to which certain evidence, if accepted, could rationally affect the jury's assessment of the probability of the existence of a fact in issue. Given the low threshold set by "relevance", the relevance objection has no merit – the high volume of the puppies provides a clear motive or reason for stocking them and therefore the evidence is relevant and prima facie admissible under s 56(1) unless excluded by another EA provision. Here, DC relies on s 137 to argue the evidence must be excluded because of its PV is outweighed by the risk of unfair prejudice to A. In assessing PV for s 137 purpose, the evidence is taken at its highest, that is, assuming credibility and reliability (*IMM, Bauer No. 2*). Here, the PV is high to very high – supplying motive. The risk of unfair prejudice is not merely that the evidence makes conviction more likely (*Dupas*). Rather, there must be a risk the jury will misuse or overweigh the evidence in some unfair way, or the evidence must be of a nature to evoke horror/ strong desire to punish (see eg, *Hughes* [17]). Here, the unfair prejudice is difficult to fathom. The evidence is relevant and will not be excluded under s 137 or s 135 – which posits a higher threshold. **(3.5/4)**

QUESTION 9

Evidence: Refer to the **Opinion Objection** and discuss the merit in it. In the course of giving your answer, you should explain what is meant by the distinction between *fact* and *opinion* and whether this particular distinction would have any bearing on the trial judge's ruling in relation to this objection. **[3 marks]**

Answer 1: Fact and opinion exist in a continuum, with no bright line to distinguish them (*Smith*). 'Opinion' is not defined by EA, but case law confirms that it includes an inference drawn from observable data (*Honeysett*) and is often something open to debate. Here, assuming this constitutes

evidence of 'opinion', s 76 operates to exclude it unless a relevant exception under Pt 3.3 applies (ss 78, 79 EA). However, in this case it is not clear that P's purpose in adducing the contracts is to show that each puppy was intrinsically valued at this amount, but rather that an agreement was reached with a buyer to pay this sum. This fact of agreement, as evidenced in writing, is not properly or best understood as an "opinion" as to value, but rather, as the "fact" having agreed to this market price. Thus, s 76 is not triggered by this evidence and it is not necessary to consider the exceptions to the exclusionary rule in Pt 3.3 EA.

Answer 2: An opinion is in general terms, an inference drawn from observable data (*Allstate v ANZ*). As opposed to a fact which could be observed by a witness directly. Opinion evidence is excluded under s 76 but is subject to various exceptions. The problem with the objection here is that the evidence is based on actual contracts of sale. Accordingly, it is difficult to characterise the evidence as 'opinion': it is based on the legal consequence of the contract.

QUESTION 10

Evidence: Refer to the **Hearsay Objection** and discuss the merit in it. **[3 marks]**

Answer 1: Hearsay evidence is evidence of a previous representation made by a person that it can reasonably be supposed the person intended to assert, which is adduced to prove the truth of the representation. The problem here is that the contract themselves are not hearsay evidence. The contracts have a legal significance in themselves – which creates the value of $110,000 for each puppy (see discretion in *Subramanian*). The contracts are not used to prove the truth of the representations of a person within them. Accordingly, this argument cannot succeed. To extent used for non-hearsay purpose, note s 60.

Answer 2: Evidence of a prior representation adduced to prove the facts asserted by the representation is not admissible subject to exceptions. The contact constitutes a hearsay representation as the representation of the puppies worth was made out of court and sought to be adduced in court. However, the P do not intend to adduce the evidence to prove the representation of the dogs' value that was made, rather to give context that their value is $770,000. This is a non-hearsay purpose and admissible (s 60). Even if adduced for hearsay purpose, contract forms BR and admissible as an exception.

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

The case against the Accused is primarily based on the evidence proposed to be adduced by the Prosecution from witness (and Co-Accused) Lily HANOVER. Ms Hanover was also charged with

theft and burglary. Although she made a 'no comment' interview, the case against her was easily established because she was caught in possession of the puppies. She was also an employee of Securicorp at the time of the Winter Glade Kennels burglary and theft. The evidence establishes that on 25 January 2018, while working her shift as a systems monitoring officer at Securicorp's headquarters in Essendon, Ms Hanover accessed Winter Glade Kennels' electronic client file for no legitimate purpose. The file contained the passwords that allowed the offenders to disable Winter Glade Kennels' security system and gain access to the kennel without being detected. Although Ms Hanover's involvement in the offending was clearly established, Police concluded that neither Ms Hanover nor Mr Vincent had the connections that would allow them to sell the puppies on the black market. Eventually, Police were led to suspect the Accused's involvement, who did have such connections. However, Ms Hanover and Mr Vincent both refused to implicate the Accused, at least initially.

Ms Hanover was on bail awaiting her own committal hearing scheduled to take place in early November 2018. On 28 October 2018, Detective Sergeant Richard LONG ('DS Long') attended Ms Hanover's private residence in Essendon to make further inquiries of her without the knowledge of her solicitors. Without formally cautioning her, DS Long applied significant pressure on Ms Hanover to disclose the identity of any further accomplices involved in the theft and burglary at Winter Glade Kennels. He told her, '*if you don't co-operate you'll be going inside for a very long time, and you'll have to get a girlfriend in jail if you don't wanna to get hurt or killed.'* The pressure was too much for Ms Hanover. She buckled and immediately disclosed the following:

- Ms Hanover had met the Accused at a bar in Melbourne in March 2017. They developed an intimate relationship.
- The Accused came up with the idea of stealing the puppies after Ms Hanover mentioned Winter Glade Kennels to the Accused within the context of talking about Securicorp's 'unusual' clients.
- The Accused was present and effectively 'in charge' of the Co-Accused when they stole the puppies from the kennel on 30 January 2018.
- Ms Hanover was not aware of who the puppies were going to be sold to after they stole them, but she had agreed to watch them with Mr Vincent at the Tullamarine premises where they were found.
- Ms Hanover had refused to comment earlier because the Accused had threatened to kill her if she spoke to police.

The conversation was secretly recorded without Ms Hanover's knowledge. Upon advice from her own lawyer, Ms Hanover subsequently made a formal Police statement (this time, after being formally cautioned) detailing the Accused's involvement in the theft and burglary. She undertook to

give evidence for the Prosecution against the Accused. All of this was done for the express purpose of Ms Hanover securing a significant reduction in her sentence following a plea of guilty. It worked. As a result of her undertaking to co-operate with Police in relation to the Accused's pending trial, Ms Hanover received a significant discount on being sentenced following a plea of guilty. On 15 March 2019, she was convicted and sentenced to a serve a community corrections order for a period of 3 years.

While Ms Hanover has been subpoenaed to attend the trial of the Accused as a Prosecution witness, she failed to answer the subpoena on the first day of trial. Police are unable to locate her and suspect that she no longer wishes to co-operate with the prosecution of the Accused.

The Prosecutor now proposes to adduce both the covert recording and the formal police statement, submitting that it is *'admissible as an exception to the hearsay rule in the proceeding against the Accused,*' in the absence of Ms Hanover attending court to give the evidence in person. Defence Counsel objects on the following articulated bases:

- the evidence is not admissible as hearsay, even as an exception to the hearsay rule ('the **Hearsay Exception Objection**');
- alternatively, the evidence is not admissible as it constitutes an '*unauthorised admission contrary to s 87 of the Evidence Act 2008*' ('the **Section 87 Objection'**);
- alternatively, the evidence is not admissible because it was '*obtained in an oppressive manner contrary to s 84 of the Evidence Act 2008*' ('the **Section 84 Objection**');
- alternatively, the evidence is not admissible because it was obtained '*improperly, illegally or in consequence of impropriety or illegality*' ('the **Improperly Obtained Evidence Objection**').

QUESTION 11

Evidence: Is the evidence of the covert recording and/or the formal statement made by Ms Hanover admissible as part of the Prosecution's case? Outline the Prosecution's likely submissions and discuss each of Defence Counsel's four objections identified above. **[9 marks]**

Answer 1: The first question of admissibility is relevance (s 56). But this evidence is clearly relevant since it relates directly to the identity and involvement of A in this offending.

Both the covert recording and the statement contain hearsay, since they are assertions of fact made by Ms Hanover and sought to be adduced for their truth. Whether an exception under s 65 EA turns on whether Ms Hanover is 'unavailable' is that all reasonable efforts have been made to compel her attendance unsuccessfully. We need more information about the efforts police made, but assuming the subpoena was properly served and police made all reasonable efforts, an exception under s 65 may be enlivened. Notice would need to be given. Since the statement was made in her own interest (a sentencing discount), she is an unreliable person being involved in the offending (s 31 JDA), it is unlikely s 65(2) could be called in aid. An admission is an exception to the hearsay rule (s 81) but it does not apply to admissions against third parties (which the accused is in this instance). So she must somehow have made it as an agent for A (s 87). But this simply cannot be correct since the statement is clearly not made for a common purpose. I do not consider that the statement of recording, therefore is an admission. Assuming I am wrong, s 84 prevents an admission being admitted if it is influenced by violent, oppressive, inhuman or degrading conduct. I am not sure police's conduct quite rises to that level, but both would more likely be excluded under s 85 since in all circumstances it is not likely to be truthful (going back to credibility of witness) or under s 90 on the basis it would be unfair to admit in all the circumstances.

The evidence is likely to be excluded under s 138 as improperly obtained. If it is an admission, the failure to caution (s 139) and the pressure from the police (s 138(2)) likely makes it improper.

But even if not an admission, it was obtained under police pressure. Even though the statement was voluntary, it would surely be considered fruit of the poisonous tree. Having regard to the factors set out in s 138(3), the desirability of the evidence being given is probably outweighed by the undesirability. If all else failed, the evidence (especially the covert recording) could be excluded on the basis it would cause a fundamentally unfair trial to the accused (*Haddara*).

Answer 2: Both the recording and the statement are hearsay because they are evidence of a previous representation made by a person who intended to assert what they are being used to prove (that A was the mastermind). P would most likely seek to rely on s 65 of the EA as an exception. This division only applies to previous representations made by a person who has personal knowledge of the asserted facts, Here, Ms Hanover had personal knowledge of A's involvement because she was the one who heard them. The recording and the statement are both first-hand hearsay of what Ms Hanover said because they were prepared by her/ are direct evidence of her representation. The threshold questions for the exception are met. P will agree that Ms Hanover is not available because she has been subpoenaed and has not attended. If the Court considers that this amounts to "all reasonable steps" to compel her, then s 65 may be used. To satisfy s 65, P would rely on the fact that the statements are against her interests because they show that she committed a criminal offence. However, if she has already pleaded guilty, there may be not merit to that argument. Secondly the P would need to show that he circumstances mean it is likely to be reliable. Probably not made out since she was fearful of police and would say anything to appease them. Even if made out, the exception would not extend to what Hanover said that A said because this is second-hand hearsay.

With regard to s 87 and s 84 objections, DC is referring to the rules which exclude admissions. An admission is a statement against the parties' interests, Here, Hanover is not a party and therefore the statements are not admissions in these proceedings. To the extent that she says what A has said to her, this may be evidence of an admission (and the necessary surrounding representations could also be admitted under s 81(2)(b) as reasonably necessary to understand). However, the admissions exception only apply to first-hand admissions (ie if Hanover attended to give evidence). If adduced through her statement, it is second-hand and cannot rely on admissions exception. If Hanover's statement was made on authority of A, this would bring it back into first-hand as she would have been speaking for him and her statement is therefore first-hand of that. However, no evidence that she was so authorised under s 87. Although they are co-defendants, this statement was not made in furtherance of that offence. Even if she was, the pressure exerted by police would likely exclude the evidence under s 84 as she was threatened/ oppressed. Even if all obstacles overcome, can be excluded under s 138 as improperly obtained. This was improper for recording as no caution and therefore presumed improper. The threats/ pressure may also make it improper. Test is whether desirability of admitting outweighs undesirability given the way it was obtained. Unlikely to be admitted here as court will not want to condone, and failure to caution seems deliberate. Ultimately, can also ask for exclusion under s 137 as unfair prejudice since no chance to cross-examine her.

QUESTION 12

Criminal Procedure: Assume the trial judge rules both the covert recording and Ms Hanover's formal statement to be inadmissible. Explain whether there is any recourse for the Prosecution and what steps need to be taken to have this ruling overturned. Will the Prosecution be successful? Explain. **[3 marks]**

Answer 1: The prosecution can consider in interlocutory appeal under s295. To seek leave, TJ would first need to certify that the evidence substantially weakens P's case. Here that may be satisfied as no other evidence of A's involvement. TJ would also need to certify that failure to raise this before trial is not the P's fault (if raised during trial). If TJ refuses to certify that decision is reasonable. CoA will consider whether granting leave to appeal is in the interests of justice. CoA will consider disruption to trial, whether the leave would avoid the need for a trial altogether or avoid appeal etc. Here I think it may be granted because of CoA rules inadmissible P may drop case (provided the trial has not yet commenced) this would be efficient.

Answer 2: P can lodge an interlocutory appeal in the CoA against TJ's interlocutory decision (s 295). Must do so within 2 days if the trial has commenced or 10 days if trial has not commenced. P first needs TJ to certify that if ruled inadmissible, the evidence would eliminate or substantially weaken the P case. TJ is likely to certify here given H's statement/ recording is the only direct evidence implicating A in the offending. If TJ does not certify, P can seek review against refusal. Assuming TJ certifies, Court will only grant leave to appeal if it is in the interests of justice to do so. CoA will have regard to matters in s 297 and will likely grant leave because the determination of the appeal will resolve an important evidentiary issue in the trial, P will reduce chances of a successful conviction appeal. CoA must not give LTA unless the response for doing so clearly outweigh any disruption to the trial. Assuming jury has not been empanelled, any disruption is outweighed be importance of this issue being resolved for the purpose of the proper conduct.

QUESTION 13

Evidence: Assume the Prosecution is permitted to adduce evidence of the covert recording. Apart from adducing evidence of the recording itself, the Prosecution will also need to call DS Long to give evidence of his attendance at Ms Hanover's residence in Essendon on 28 October 2018 to describe what occurred. DS Long made notes of the encounter at the time, which he dated but did not sign. He also made his own formal statement, signed and dated, about the encounter a month later. Will DS Long simply be able to read from his notes and/or his statement in giving evidence about the encounter or will he have to recall the encounter without referring to these documents? In the course

of giving your answer, you should explain the relationship and distinction between ss 32 and 33 of the *Evidence Act 2008*. **[3 marks]**

Answer 1: Firstly, Long is not able to simply read out the contents of his notes and statement. P should exhaust Long's memory in EIC regarding the notes and if he cannot recall, P can seek leave (court will consider s 192 factors) to refresh L's memory under s 32. If Long cannot adequately recall without recourse to his notes, then leave is likely to be granted. Given the notes were made at the time, this would satisfy 'fresh in memory' requirement. If he is given leave, he can read aloud as part of his evidence so much of his notes as required. Different principles apply to the statement. S 33 allows Long to give EIC by reading aloud/ being led through his statement. May not be able to here though, because statement made a month later, so it may not be 'soon' after the occurrence of the events. However, if court says it is soon after and it is dated (and presuming included in brief, so DC has a copy), he can be led through his statement.

Answer 2: DS Long will not simply be able to read from his notes and/or statement. In terms of his notes, the use of these during his viva voce evidence is governed by s 32 EA, and requires the Court's leave before using the notes to try to revive his memory about the encounter in Essendon on 28 October 2018. The Court must also consider the factors outlined at s 192 EA: here, the grant will be unlikely to unduly delay or lengthen the trial; there is little forensic disadvantage to A for use of the notes given they form presumably part of the statement and so has notice of the contents. Further, the Court may consider s 32(2): whether DS Long could recall any facts or opinions without recourse to the notes (unclear on the facts) and whether the notes were written when fresh in the memory (appears to be the case). Assuming DS Long's memory is exhausted (Da Silva), he will be permitted with leave to read aloud as part of his evidence the content of the notes as they relate to the opinion or fact for which he is being questioned. The position in respect of the statement is governed by s 33 EA. Unlike s 32, s 33 mandates a formal statement (cf. notes) may in evidence in chief give evidence by reading or being led through their statement. To this extent, it operates as a unique displacement of the hearsay rules and permits on its face the prosecutor to elect when to utilise this mechanism (that is, displacing the Court's control over its own proceeding). The statement cannot be read or led through unless it was made at the time or soon after the occurrence of the events, it was signed (complied with) and copy provided to the other party (unclear on the facts). Problematically, the statement does not appear to comply with the temporal requirement for it to be read (s 33(2)(a) EA). It is difficult to see how a month later, the events can reasonably be construed as effectively still being "fresh" given the effluxion of time and the nature of the police work would mean supervening events would likely displace many of the so-called "fresh" details contained in the statement. On balance, the temporal disconnect is too

great to enliven the operation of the provision. The statement cannot be read or DS Long cannot be led through it.

QUESTION 14

Criminal Procedure: Can the Prosecution seek to re-open Ms Hanover's case and request to have her re-sentenced to a term of imprisonment? Explain. **[3 marks]**

Answer 1: Ms Hanover's failure to cooperate in the prosecution of A permits the P to appeal to the Court of Appeal imposed by an originating court against the sentence imposed on Ms Hanover given the sentence was less severe because of an undertaking to assist authorities, and the DPP considers that she has failed wholly or partly to fulfil that undertaking (this seems clear on the facts given her intransigence in giving evidence) (s 291 CPA). The appeal would be commenced by filing a notice of appeal and must be signed personally by the DPP (Kerri Judd QC) (s 292(1) and (2)). That must then be served personally on Ms Hanover within 14 days after the day on which the appeal notice is filed. If the Court of Appeal considers that Ms Hanover has failed wholly or partly to fulfil the undertaking, it may set aside the 2Y CCO imposed by the originating court and impose a sentence that it considers appropriate having regards to the failure to fulfil the undertaking. The P may suggest a term of imprisonment is warranted but is otherwise constricted by Barbaro from suggesting a particular range of term of imprisonment. On the whole, given the role played by Ms Hanover, it does seem a term of imprisonment would be most likely disposition following from the re-opening of the sentencing discretion.

Answer 2:

1) Per s 291, P has a right of appeal because her sentence is less severe because of her undertaking to assist police in investigating/ prosecuting the co-accused and H did give a written statement but did not wholly fulfil her undertaking by giving evidence in court.
2) The notice of appeal under s 291 must be personally signed by the DPP and served personally on H within 14 days after filing, with a copy provided to H's lawyer if identifiable.
3) Given H has partly failed to fulfil the undertaking, CoA will allow the appeal and it is open to the CoA to impose a sentence of imprisonment if considered appropriate – given parity, if other co-accused are imprisoned, it is likely she will be imprisoned too. CoA must not take double jeopardy into account and impose a less severe sentence.

QUESTION 15

Ethics: In what circumstances might a barrister be involved in this case on a 'devilling' basis? Is devilling ethically permissible? Explain. **[3 marks]**

Answer 1: Devilling exception is an exception to the sole practitioner rule (BR 113). Barrister briefed can give a task to another barrister so long as briefed barrister takes full responsibility, work delivered under his/her name (ie: barrister actually briefed), arrangement does not go beyond ordinary devilling arrangement, and it does not enable briefed barrister to make profit beyond reasonable remuneration for supervision and responsibility (BR 113). Note, the devil will be bound by same duties of confidentiality as barrister (BR 117). Here, an example of a permissible devilling arrangement is if the briefed barrister gives a discrete research task: eg: "could you research the admissibility of the recording statement (in Q 11)?"

Answer 2: Yes, devilling is permissible and does not contravene r 12 or r 114 BCR provided that it is done in accordance with r 113. This requires that the barrister briefed takes full responsibility for the work, it is delivered under their name and it does not go beyond an ordinary "devilling" arrangement. Notably the "devilled" counsel is also subject to the same obligations of confidentiality as apply to the briefed barrister. The briefed counsel cannot engage the other counsel with the view of earning a profit from their work. Here, the counsel briefed might ask a chamber-mate to undertake legal research required to prepare, for eg: submissions of law.

Turn the page for Part B

PART B (Questions 16 to 31) – 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.

Forensic testing conducted by Police on the deceased Shih Terridor puppies disclosed certain genetic anomalies which prompted the forensic testing team to send tissue samples for further genetic analysis to a laboratory in the United States. That laboratory, Sequenial Genetic Testing Laboratories, Inc. ('**Sequenial'**), provided its report to Police on 15 January 2019. The report suggested that a certain gene, IGF-2A, may have been deleted from the puppies' DNA *'as a result of human intervention and unknown technical methods of genetic manipulation … although we cannot exclude the possibility that the missing gene IGF-2A may be the result of random and spontaneous gene mutation that was inherited.'* If the puppies' genes had been deliberately altered, an indictable offence would probably have been committed under the *Gene Technology Act 2000* (Cth). However, due to the lack of confidence in the conclusion contained in Sequenial's report, Police did not make any further inquiries in relation to this issue.

If the suggestion contained in Sequenial's report is correct, the person most likely responsible for the genetic manipulation of the Shih Terridor puppies' DNA is Scarlett JONES ('**Scarlett'**). Scarlett holds a PhD in biochemical engineering, awarded by Johns Hopkins University in 2011. The subject of her doctoral thesis concerned the modification of insulin-generating genes of the Yorkshire Terrier. Scarlett is also primarily responsible for the breeding of the puppies at Winter Glade Kennels while her sister, Lucy JONES ('**Lucy'**), handles the 'business' aspect.

The two surviving Shih Terridor puppies were unable to be sold due to long-term health issues arising from their severe malnourishment. None of seven original purchasers of the stolen puppies wished to proceed with their contracts. On 1 March 2019, Scarlett and Lucy lodged a formal claim with their insurance company, JIW Insurance Ltd ('**JIW'**), for indemnity in the sum of $770,000 pursuant to an insurance policy they have had in place for more than seven years. The insurance policy indemnified the sisters from any losses arising from the theft, destruction or devaluation of the puppies arising from ill-health due to criminal acts of third parties. On 18 March 2019, the sisters were notified by letter from JIW that their claim was rejected on the basis that *'JIW has reasonable grounds to conclude that unlawful genetic modifications were made to the puppies, contrary to the Gene Technology Act 2000 and clause 13.18 of the policy*'. Clause 13.18 of the insurance contract permits JIW to deny the policy holder's claim if *'there are reasonable grounds to believe that the policy*

holder has deliberately modified the genetic make-up of the insured property contrary to any law of Australia.' The sisters were shocked at what the letter from JIW insinuated.

On 19 March 2019, the sisters received another letter from the Dog Breeders Association of Australia, Incorporated ('**DBAA'**), an organisation that the sisters have both been members of since establishing Winter Glade Kennels in 2009. The letter stated that they are *'both hereby expelled from DBAA for having engaged in reprehensible conduct that is likely to bring DBAA into disrepute, namely the deliberate genetic modification of Shih Terridor embryos for commercial purposes.'* Both sisters are shocked at the letter and are at a loss as to the allegations made by DBAA.

Scarlett and Lucy have together decided to institute proceedings in the Supreme Court of Victoria against JIW, alleging breach of the insurance contract, and seeking indemnity in the sum of $770,000 ('**the JIW claim'**). They have also decided to sue DBAA, alleging breaches of a variety of clauses of DBAA's constitution relating to the sisters' purported expulsion from the organisation and for breaching an implied obligation to accord them natural justice ('**the DBAA claim'**). The DBAA claim is also founded in contract law on the basis that the sisters' relationship with the organisation is founded under a contract of membership with DBAA. In relation to the DBAA claim, the sisters seek an order that they specifically have their membership re-instated and a declaration that their purported expulsion was unlawful.

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QUESTION 15

Civil Procedure: Scarlett and Lucy have chosen to commence their proceedings by filing *writs* rather than *originating motions*. On the given facts, what considerations would have impacted on their decision to commence proceedings by writ rather than by originating motion? **[3 marks]**

Answer 1: A writ is ordinarily used to commence proceeding unless the specific circumstances under rules 4.05 and 4.06 apply. Here, Scarlett and Lucy are likely to want discovery and to file pleadings to assist in narrowing issues in dispute. Further, they are aware that there will be a wide range of factual disputes, such that writ is appropriate. They may also want trial by jury (O 47 SLR). The need for discovery is likely to have played a large role in their decision to commence by writ as Lucy and Scarlett do not know why JIW and DBAA have each alleged genetic manipulation and will want to find out pre-trial.

Answer 2: A writ is the required form of originating process (r 4.04) unless there is no defendant or an OM is required (r 4.05). Proceedings may optionally be commenced by OM if there is unlikely

to be a substantial dispute of fact and for that reason it is appropriate that there be no pleadings or discovery (r 4.06). Here there are defendants JIW, and there is likely to be a substantial dispute of fact regarding whether the dogs were genetically modified, whether they have breached breeder ethics and so on – pleadings and discovery are necessary and so writ is the appropriate originating process.

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

JIW has filed and served its Defence on Scarlett and Lucy. DBAA has also filed and served its Defence.

It is apparent from the pleadings that both JIW and DBAA will be alleging that Scarlett genetically modified the Shih Terridor puppies (with or without Lucy's knowledge) and that Scarlett's actions constituted a criminal offence under the *Gene Technology Act 2000* (Cth). On this basis, JIW alleges it was justified in rejecting the insurance claim and DBAA's alleges it was justified in expelling the sisters from their organisation. A critical fact in issue in both proceedings will therefore be whether Scarlett deliberately modified the genetic make-up of the puppy embryos. Beyond that, the legal issues likely to arise in each case will be significantly different.

It is also apparent from the pleadings that both JIW and DBAA sourced their information relating to this fact in issue from the contents of the Sequenial report provided to Victoria Police on 15 January 2019 from a police 'leak' (the report should never have been disclosed to anyone).

Lucy and Scarlett intend to deny the allegation that Scarlett genetically modified the puppies. They are now contemplating issuing additional proceedings:

- against Victoria Police, alleging claims of breach of confidence, misfeasance in a public office, and defamation;
- Sequenial, alleging negligence in their analysis of the puppy DNA; and
- Securicorp, alleging breach of contract and negligence for allowing their security system to be compromised (this is effectively a 'safety net' claim to recover the $770,000 in the event that JIW is found by the court to be entitled to deny the insurance claim).

QUESTION 16

Civil Procedure: *Your answers:* ***(circle TWO)*** **[2 marks]**	Which **TWO** of the following are **not** overarching obligations in civil proceedings, as set out in Part 2.3 of the *Civil Procedure Act 2010*? a) to avoid making frivolous claims. b) to act impartially. c) to act honestly. d) to co-operate with other parties in connection with the proceeding. e) to minimise litigation risk for all parties in the proceeding. f) to use reasonable endeavours to resolve the dispute.

QUESTION 17

Civil Procedure: *Your answers:* ***(circle TWO)*** **[2 marks]**	Which **TWO** features of pleadings are **not required** to be included in the Plaintiff's Statement of Claim? a) Material facts upon which the Plaintiff relies in support of its causes of action. b) Material witnesses upon whose evidence the Plaintiff intends to rely. c) Pleadings must be type-written and double-spaced. d) Pleadings must be divided into paragraphs and numbered consecutively. e) Specification of any statutory provisions relied upon in its claim. f) Statement of relief/remedy sought.

QUESTION 18

Civil Procedure: Lucy and Scarlett are conscious of costs and would prefer to have all of their claims heard together. Is it possible for all of their claims against JIW, DBAA, Victoria Police, Sequenial and Securicorp to be heard and determined together in the same Supreme Court proceeding? Explain. **[3 marks]**

Answer 1: Yes, it is possible to have all the claims heard together, under O 9 SCR. Firstly, given there are currently two proceedings on foot (*P v JIW* and *P v DBAA*) and the defences have already been served, P could apply for consolidation of the two trials under r 9.12, on the basis that there is a common question of fact (whether Scarlett deliberately modified the embryos- relevant JIW as

this is their only basis for denying liability; and relevant to DBAA as their reason for expelling them.

The court will have regard to the overarching purpose of the CPA in s 7, and make an order that is in the interests of the just, efficient, timely and cost-effective resolution of the real issues in dispute. If the common question will take up most of the time of the trial, the court will likely order consolidation. If the legal issues which are separate will take up most of the time, the court could order a stay on the DBAA proceeding, which can be determined quickly and easily after the JIW proceeding (which is far more serious due to the money claimed) is determined.

To add VicPol; Sequenial and Securicorp, P could apply for an order under r 9.06 on the basis that they ought to be joined and their presence before the court is necessary to ensure that all questions are properly adjudicated upon. Here, the key determination will be whether SJ illegally genetically manipulated the puppies. Sequenial are necessary for this determination as it is their report that led to this conclusion, and they ought to be added. The presence of VicPol and Securicorp are not as vital, but it would be in the interests of s 7 to add them to ensure that all claims arising out of this incident are adjudicated upon effectually and finally, which would reduce costs for the plaintiff and save on court time and resources.

(Alternatively, the defendants can issue third party notices under O 11, but the question focused on the plaintiffs).

Answer 2: In theory, the process of consolidation (SCR 9.12) would be the process by which the claims could be amalgamated (assuming there have been filings made independently against each party). Here, consolidating the proceeding would be available where there is a common question of law or fact arising in all proceeding (the fact of the truth of the embryo manipulation) and the rights to relief arising out of the same transaction (if construed liberally, it may be that reliance on the report can be considered a transaction given the causal link between it and the relevant actions of the defendant) or for any other reason it is desirable. The Court will consider the question with reference to the overarching purpose (s 7 Civil Procedure Act) and the objects of s 9 including the (c) efficient use of the business of the Court, (d) efficient use of judicial resources, (e) minimising delay and (2)(f) any prejudice that may be suffered by the making of a consolidation order (*Lee v Korean Society of Victoria*). Here, there is a critical question of fact but the legal issues likely to arise will be quite different. In furtherance of the overarching purposes, however, there is a definite interest in avoiding a multiplicity of proceedings. The presence of 5 defendants is not so unwieldy as to be prima facie indicative of injustice (*Birtles v Cth*) and the determination of the factual issue will illuminate the respective liabilities of the defendants, if any. Arguably, the greater injustice

would be to permit only one proceeding for the plaintiffs and (assuming their cause of action was established) to then, in seriatim, initiate proceedings against three more defendants for a complete vindication of their position. On balance, the centrality of the report to the actions of each party represents a powerful factor in favour of consolidation. Given under s 24 of the Supreme Court Act, the Court retains ultimate discretion with regard to costs, it may make tailored costs orders in respect of the defendants whose presences is not necessary for portions of the proceedings so as to ameliorate the risk of substantial injustice, and ensure a maintenance of reasonable and proportionate costs (s 24 Civil Procedure Act).

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

Victoria Police, Sequenial and Securicorp have been joined to the proceeding so that all claims will be determined together.

QUESTION 19

Ethics: *Your answers:* ***(circle TWO)*** **[2 marks]**	Identify **TWO** situations in which Counsel **must** refuse to act for the Plaintiffs in this matter? a) Counsel is a non-executive director of Securicorp. b) Counsel owns a small parcel of shares (worth approximately $2,000) in JIW. c) Counsel has no experience in commercial matters of this complexity and magnitude (she has only ever acted in criminal matters and personal injury claims). It will involve twice as much work for her as it would for more experienced commercial counsel. d) Counsel's husband, a psychologist, is currently treating Joanne Harrington, a principal witness in Victoria Police's defence, for a major depressive and anxiety disorder. He has mentioned this to her at home in breach of his own professional obligations of confidentiality. e) The solicitor acting for Sequenial is a friend of Counsel. It is likely the solicitor will give evidence for Sequenial and Counsel will have to engage in a line of cross-examination that attacks the solicitor's credibility as a witness. f) Counsel believes the Plaintiffs are likely to lose the case.

QUESTION 20

Ethics: In what circumstances can counsel represent two parties in a proceeding? Having regard to the information available, is it possible that Scarlett and Lucy could be represented by one barrister, and all Defendants represented by another? Explain. **[3 marks]**

Answer 1: Counsel can act for two parties if there is no real possibility of a conflict of interest. Counsel must enquire as soon as possible whether there is a real possibility client's interests may conflict. Here, unlikely to be a conflict between Scarlett and Lucy, their interests appear aligned in proving their case and provided there is no confidential information that advantages one over the other. It is unknown whether there is conflict of interest between all or some Ds, a conflict will arise if they wish to seek contribution or indemnity from another D. Counsel can act for more than one party if no real possibility of conflict and those parties who wish to brief same barrister give informed consent. Scarlett and Lucy can be represented by same counsel per r 119.

Answer 2: Counsel acting for 2 or more parties must ensure that she determines as soon as possible whether there is a real possibility the interests of the clients may conflict and if so, counsel must return the brief for all clients where r 114 would apply or to one or more to remove the conflict. A counsel must not be constrained by their continuing obligations of confidentiality under r 114 (& noting r 101(a)) from being able to discharge her duty under r 35. Thus, here Lucy and Scarlett may not be able to be jointly represented if there is a risk that Lucy acted without Scarlett's knowledge to modify the genes and this gives rise to a conflict of interests where Scarlett. but not Lucy may, for eg: be able to be reinstated by DBAA on making out her claim. Vic Police and Sequential have potentially adverse interests – as Vic Police may have "leaked" against the wishes/ without approval and in breach of confidentiality owed to Sequential. JIW and DBAA can most likely be jointly represented as there is no clear area of conflict arising between their interests, Sequential may have approved the leak, or not, but this unlikely to cause conflict with DBAA or JIW and so can be jointly represented.

QUESTION 21

Civil Procedure: Explain the processes by which the Plaintiffs can obtain a copy of the Sequenial report dated 15 January 2019 from one or more of the Defendants. If more than one Defendant is in

possession of the report, who would be expected to provide it to them? If no Defendant is willing to provide it to them, what steps could they take to force them to provide it? **[4 marks]**

Answer 1: The defendants should arguably provide the report either under the critical documents obligation in s 26 of the CPA – overarching obligation to disclose documents of which defendants are aware, which considers/ ought reasonably consider are critical to the resolution of dispute at earliest reasonable time. Otherwise defendants must provide pursuant to discovery obligations – that is defendants must disclose documents which they are aware after reasonable search on which they rely/ adversely affect their case or documents which adversely affect or support another party's case. Plaintiffs can serve a notice for discovery after close of pleadings and then the party on whom notice is served must make discovery within 42 days by affidavit of documents, then plaintiffs can serve notice to produce and inspect the documents. Defendants do not have to provide a document if reasonably believe another party has provided it, so in terms of who will be expected to provide it will depend on whom plaintiffs first serve notice of discovery as if that defendant provides it and other defendants are aware it has been provided, they will not be obliged to also discover it.

If defendants are not willing to provide documents, plaintiffs could seek an order for particular discovery under r 29.08 requiring defendants to put on an affidavit stating whether they have the document or what has become of it; or seek to cross-examine defendants on discovery obligations under s 57 of the CPA if there is a reasonable basis to think D has failed to provide discoverable document. Could serve a default notice if defendants fail to make discovery generally and if defendants do not subsequently make discovery, serious consequences can arise including dismissal/ strike out of defendants' claims. Also, sanctions available under CPA for default of discovery obligations – see s 56 CPA including for failure to comply with any order in relation to discovery or general failure to comply with discovery obligations including an order that proceedings for contempt be initiated.

Answer 2: The plaintiffs would seek discovery (O 29) from Sequential (as the author of the report) by Notice of Discovery (Form 29A) after the close of pleadings. Sequential would produce an affidavit of documents with all relevant documents in 42 days (Form 29B) after which the plaintiff could seek inspection of the document (Form 29C) provided for by Sequential in 7 days. If no defendants produced the documents, the court could under s 57 CPA order cross-examination of relevant defendants (all must have been served with Form 29A) and make appropriate order such as for particular discovery. If the Ds still do not comply, plaintiff may serve a default notice under

Form 29D on the parties. If within 2 days, there is still non-compliance, the Court may dismiss the defendants (s 56(2)(j)) or make cost orders, the defendants may be liable for committal (r 29.14).

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

The Defendants have no evidence in support of the allegation that Scarlett genetically modified the puppies other than what Sequential articulated in its report of 15 January 2019. All further testing of the puppy tissues proved 'inconclusive'.

QUESTION 22

Civil Procedure: The Plaintiff sisters are now contemplating making an application for summary judgment in relation to all their claims. What is 'summary judgment'? Would you, as Counsel, advise the sisters to take this course? Explain. If they elect to do so, explain what procedural steps both the Plaintiffs and the Defendants must take in relation to the application. **[4 marks]**

Answer 1: P can make a summary judgment application (SJA) under s 61 CPA and complying with O 22 SCR. The P would argue that the defence should be dismissed summarily (ie: without any hearing on the merits) on the basis that the defence has 'no real prospect of success'. This statutory test is more liberal than at CL which required the defence be shown to be "hopeless" or "bound to fail" – *Lysaght*. Nonetheless it is ordered lightly, and the court retains a discretion under s 64 CPA not to do so even where the test is met. Notably, a SJA should not be made without proper basis (s 18 CPA) and where it is not necessary to resolve/ determine the dispute (s 19 CPA). Here, the Ds have some evidence (the Sequential Report) to support their defence, and it is possible they may be able to secure more (eg: further expert reports) such that summary judgment might not be ordered here. Ps can make an argument that the weight of the evidence favours them, but may find it difficult to establish "no real prospects" of a successfully defence. The other evidence is "inconclusive" rather than directly inconsistent. Nevertheless, the preponderance of evidence might be such that there is a proper basis to run an SJA and I would carefully consider it.

Answer 2: Summary judgment refers to the disposing of a matter without the necessity of a trial. P would make an application under s 61 of the Civil Procedure Act following the process under SCR 22.03 on the basis that the defence, or part of it, has no real prospect of success. This application would be made on summons supported by an affidavit verifying the facts on which the

claim to the application relates and stating in Scarlett's and Lucy's belief, the defence or a part of it has no real prospect of success (SCR 22.04(1)). This must be served together with any exhibits referred to in the affidavit on the defendant(s) not less than 14 days before the hearing date named in the summons (SCR 22.04(4)). The defendant(s) to the application may show cause by affidavit or otherwise to the Court's satisfaction against the application (SCR 22.05) no later than 3 days before the hearing. If that occurs, the sisters may serve an affidavit in reply. At the hearing, the Court may cross-examine any deponent of an affidavit and may otherwise hear and determine the application (SCR 22.07 and 22.08) On these facts, a summary judgment application should not be pursued given the Sequential report provides a concrete factual basis for the decisions taken by the defendants to the proceeding, it clearly requires adjudication as to the merits of the claims therein, and the appropriateness of the defendants' actions based on that document. These are substantial issues of fact (and law to a lesser degree) which ought properly be ventilated at trial. Consequently, there is no proper basis for making the application (CPA s 18); it does not minimise delay and it creates inevitable cost consequences for the defendants and the sisters in pursuing and defending an unmeritorious application. Assuming the claim were pursued, it is likely the defendants would be given leave to defend the claim unconditionally (SCR 22.08(c)).

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

The sisters applied for summary judgment and the application was dismissed. In the course of the Court receiving submissions as to what further directions should be made for the upcoming trial, Counsel for the Plaintiffs made the following submission in open court:

> Your Honour, notwithstanding the Plaintiffs' application has been dismissed, it is clear based on what has been discovered to date that the Defendants have absolutely no foundation in fact to be making an allegation that the puppy embryos were genetically altered by Scarlett Jones. Yet they plead the defence anyway, and no witness statements or reports have been filed that could satisfy the defence. I am ordinarily obliged to refer to opposing Counsel as my 'learned friends', but in these circumstances they appear not to be learned in the law at all. Indeed, the way they have conducted their defence to date is an absolute disgrace to the profession. They are intellectually dishonest and in breach of their overarching obligations under the Civil Procedure Act. Frankly, I am surprised they each hold a current practising certificate.

Counsel representing the Defendants have made a joint complaint to the Victorian Bar Ethics Committee in relation to these comments. The Ethics Committee has, in turn, referred the complaint

to the Legal Services Commissioner alleging that Counsel for the Plaintiffs engaged in 'professional misconduct' by making the comments.

QUESTION 23

Ethics: Discuss the merits in the complaint against Counsel for the Plaintiffs, with particular reference to the principles pronounced in the cases of *McDonald v Legal Services Commissioner* [2015] VSC 237 (Zammit J), *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 (Bell) and *Legal Services Commissioner v McDonald* [2019] VSCA 18, the rules as contained in the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and any other relevant legislation. **[7 marks]**

Answer 1: Counsel's conduct in making the allegations in open court that the opposing counsel are "intellectually dishonest", "breaching overarching obligations", "not learned at all" and "a disgrace" etc… is conduct that is highly likely to constitute a breach of r 8(a) and (c) as well as r 61 and r 65 BCR and thus to found a finding of 'professional misconduct' (s297 LPULAA) in that it shows counsel to be not a fit and proper person to practice law given such a grave error of judgment in abusing the privilege afforded to counsel in this way. As *McDonald,* Bell J and *McDonald* (VSCA) each made clear, in determining whether conduct amounts to a contravention of counsel's duty not to engage in conduct 'that is likely to diminish public confidence in the profession (r 8(c)), it is necessary to adopt an integrated and contextualised approach, (cf Zammit J in *McDonald* #1), which involves:

(a) Considering whether counsel had a "reasonable basis" for making the allegations in issue,
(b) Whether, in doing so, counsel was acting in legitimate pursuit of his client's interests; and
(c) Having close regard to the governing statutory wording of the Uniform Rules and the purpose served by the rules (see r 8).

Notably, while (a) and (b) are both relevant, neither is determinative of this issue, nor a substitute for close analysis as to compliance with the actual wording of the rules. Having said this, it is critical here that , at the time counsel made these submissions, the STA (O22) was dismissed and thus there was no remaining live issue to be pursued by alleging a lack of basis for the defence. This issue was moot following dismissal of the application. Thus, these comments were not made in compliance with the duty in r 35. Here, it can properly be said these comments were wholly extraneous to the pursuit of the P's interests (see *McDonald VSCA* referencing VCAT #2, and see also *Kavageorge* and *Clyne*). It is also clear that, even if counsel genuinely held this view of his opponents, this alone is not having a "reasonable basis" (see s 18 CPA, see also r 61 and r 65). Having had the SJA dismissed, in fact it ought have been clear to counsel these allegations lacked foundation – counsel seemed to be hoping prejudice would suffice where proof was lacking. This brings the profession into disrepute.

The remarks are of nature that is defamatory and abuses the privilege under r 61 (see *Clyne* as cited in *McDonald VSCA*). Counsel is highly unethical in having conducted himself this way, and is liable to be found guilty of professional misconduct and face sanctions, including those under s 299 and s 302 LPULAA. At best, he might hope that VCAT will consider the conduct as amounting to unsatisfactory conduct only – if an isolate incident and in heat of the moment. However here, given the serious slurs, more likely professional misconduct is made out.

Answer 2: The McDonald (McD) cases involved a solicitor who breached a previous version of Rule 21 by alleging that another solicitor was "fundamentally dishonest" – a statement made outside of court. Rule 21 required McD to be (among other things) "courteous" in all dealings. The rule has since been repealed and replaced by a more itemised rule 21. However, similar obligations to act professionally remain. At first instance McD argued that his conduct was covered by the "Clyne" privilege set out by the HCA which acknowledged the right and obligation of lawyers to speak out fearlessly in advancing their clients' cases. This was applied in 'Lander' and in McD 1 the SC formulated a two-step test to apply it – depending on whether the communication was in legitimate pursuit of a client's interest. This 2-step test was not favoured in McD 2 where Bell J considered the restrictions on lawyers' speech in light of the Human Rights Charter. In McD 2, Bell J determined that the rules constraining free speech of lawyers could only do so in pursuit of their legitimate aim. In the case of R 21, it was to protect the integrity of the legal profession, particularly given the immunity from defamation that advocates enjoy in court. In McD 3, the SCoA agreed with the approach that Bell J set out in McD 2. The SCoA considered that the words of the restricting rule itself should be the focus. The other considerations (such as whether the communication was in the interests of the client, whether it had a reasonable basis, etc…) were not the rules itself, but rather considerations to be taken into account when determining if the rule was breached. In this case, P counsel has arguably breached rule 61 – by making allegations which are not reasonably justified on the material (no basis for "dishonest" or allegation of breach of obligations). Furthermore, these comments seem principally intended to embarrass counsel for D ("absolute disgrace to profession").

Counsel for P has also arguably breached rule 65. By stating that counsel for D are unfit to hold a practicing certificate, they are alleging serious misconduct. There is no material available to support this allegation so it should not be put (even if client wants it put after knowing of its seriousness). The reasoning in McDonald (collectively) would not excuse the conduct because when considered in light of the available material, the comments have no reasonable basis and are not necessary for advancement of case. For the ethical rules to constrain this type of speech would not be undue restriction and is necessary to maintain integrity of the legal system. The conduct could amount to professional misconduct as it is quite a blatant breach, otherwise may be just unsatisfactory professional conduct. Professional misconduct is substantial (or consistent) failure to maintain reasonable standard of competence/ diligence.

QUESTION 24

Civil Procedure: Could these proceedings be heard before a jury? Explain your answer. **[2 marks]**

Answer 1: Yes. These claims were commenced by writ and concern contractual and tortious claims. Under O 47, P's can apply for jury trial in the writ, or D's by notice in the time stipulated. Jury will be 6 persons. Juries are assumed to be able to understand complex facts and follow directions (see, crime context, *DPP v Paulino*). Here, there is no reason to think court would exercise discretion under r 47.03 to order judge-alone trial (cf. *Svajcer*).

Answer 2: Yes. They were commenced by writ and relate to contract so a jury of 6 is available if either party makes application and pays the applicable fee (r 47.02 SCR). The court has residual discretion to refuse a jury if there is a special reason (*Svajcer*). Even though this proceeding will be complex, juries are assumed to be capable of dealing with complex issues.

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

The matter has been set down for trial. Witness statements have been signed, filed and served by all the parties. While the Plaintiffs in their pleadings deny any suggestion that Scarlett genetically modified the puppy embryos, the truth is that Scarlett did actually modify the embryos in a secret laboratory. She has kept the secret from her sister. Scarlett is the only one who knows the truth.

In her witness statement, Scarlett managed to avoid directly addressing the issue of whether she genetically modified the embryos using unconventional, ethically offensive and illegal gene-deletion techniques. In that respect, she did not explicitly lie in her witness statement. However, she is now faced with the dilemma of having to give evidence on oath at the upcoming trial. She would rather not give evidence at all.

QUESTION 25

Evidence: Discuss Scarlett's dilemma with particular reference to the rule in *Jones v Dunkel*, the rule in *Browne v Dunn* and the privilege against self-incrimination. What would you advise Scarlett to do? **[7 marks]**

Answer 1: If Scarlett does not give evidence, the rule in *Jones V Dunkel* will apply to allow the trial judge to direct the jury that it can infer from Scarlett's failure to testify that her evidence would not have assisted the P's case. Such direction is open here as Scarlett can be expected to be called by P and there is no satisfactory explanation for a failure to do so. If Scarlett does testify, she is under oath. She will be cross-examined and counsel for D will in compliance with rule in *Browne v Dunn* be required to put to her in cross-examination so much of the D's case that is relevant to Scarlett's evidence, including any inconsistencies or allegations that she is lying. Scarlett can expect to be carefully cross-examined as to her genetically modifying the puppies as this is central to D's case. Under s 128, Scarlett can object to giving this evidence on the basis that it would expose her to Victorian criminal liability. The court is then required to determine if she has reasonable grounds to object – given that it is a crime for which she has not yet been convicted, reasonable grounds would be made out. Hence, this does not mean Scarlett could refuse to answer the question. Rather, in this case, almost certain that the trial judge would require her to do so under cover of a certificate under s 128(4) – this is because the issue is central to the case, no other witness is able to give the evidence such that the interests of justice require it be given – s 128(4)(b). Thus, Scarlett will need to reveal under cross-examination what she has done, although she will have a certificate preventing this evidence (and any derivatively obtained evidence) being used against her in subsequent criminal proceedings for this offending. I would advise Scarlett that she is required to tell the truth in the stand and that she accordingly should not give evidence in the case. This will result in inferences being drawn that her evidence does not assist the case. Scarlett may need to contemplate discontinuance on basis that her claim cannot succeed. Counsel and Scarlett must (s 10 CPA) also have regard to overarching obligations including to have a proper basis for each fact claim and denial and each legal claim. Here, given Scarlett's position, she is already in breach of her obligations (ss 16 – 26 CPA). If counsel becomes aware, counsel will also be placed in breach if the correct rectifying steps are not taken (noting r 4(a), r 8(a), rr 23, 24, 25 and r 49).

Answer 2: The rule in *Jones v Dunkel* may apply if Scarlett is not called. It applies if

(1) A witness might reasonably be expected to give evidence for one party rather than another;
(2) The witness is expected to be able to give evidence on an issue; and
(3) The failure to call is not explained.

If so, the court may infer that the evidence would not have assisted the party expected to call the witness.

Browne v Dunn is a rule of fairness. It requires counsel to put to a witness any part of counsel's case that is inconsistent with the evidence given by that witness, or adverse inferences the counsel will ask the court to draw regarding that witness. Here, if Scarlett does give evidence, it is likely she will be asked directly whether she modified the embryos. She should be reminded of the consequences of pre-jury self-incrimination. Scarlett may be entitled to rely on the privilege of self-incrimination under EA s 128 since if asked whether she modified the embryos, the answer might tend to suggest she committed an offence under Australian law. The court will determine whether these are reasonable grounds for the objection. If so, it will tell her that she does not need to answer the question unless compelled, and if she is compelled or voluntarily gives the evidence, the court will give her a s 128 certificate. NB: court may only give a certificate if the evidence does not suggest a foreign offence and the interests of justice requires it. Here, if required to answer, she would need to do so – ie s 128 would not necessarily prevent the evidence being adduced.

Ethical dilemma – Counsel now know that the embryos were in fact modified. Counsel must be mindful that he cannot mislead the court (BR 23). Note that he should also reassess the pleadings as regard to proper basis.

Recommendation – here, Scarlett should give evidence. If she does not, *Jones v Dunkel* would mean adverse inferences could be drawn. She could rely on s 128 to mitigate the risk of criminal liability – but not necessarily prevent answering the question.

QUESTION 26

Evidence: *Your answer:* ***(circle ONE)*** **[1 mark]**	Which of the following questions most accurately reflects the correct legal test under the *Evidence Act 2008* for the 'relevance' of evidence in a civil proceeding? a) '*Is the evidence material to any issue raised in the pleadings?*' b) *'To what extent is the evidence capable of materially affecting the determination of a fact in issue?'* c) *'Could the evidence, assuming it is accepted, be relied upon by a jury properly instructed in determining a fact in issue'* d) '*Could the evidence, assuming it is accepted, rationally affect the determination of the existence of a fact in issue?*' e) *'Does the evidence have significant probative value?'* f) *'Does the evidence have sufficient probative value?'*

QUESTION 27

Evidence: *Your answer:* ***(circle ONE)*** **[1 mark]**	If Defence Counsel fails to comply with the rule in *Browne v Dunn*, non-compliance with the rule might be remedied by the operation of which provision of the *Evidence Act 2008*? a) Section 9. b) Section 12. c) Section 38. d) Section 46. e) Section 135. f) Section 189.

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

The trial is before a judge alone. Sequenial proposes to call Dr Helena SMYTHE, author of the Sequenial report dated 15 January 2019. In her witness statement filed for the purposes of the civil trial, she essential repeated what she said in her report.

QUESTION 28

Evidence: Counsel for the Plaintiffs seek to exclude the evidence under s 135 of the *Evidence Act 2008*. Outline the submissions that are likely to be made. Will the application to exclude this evidence be successful? Explain. **[3 marks]**

Answer 1: Evidence may be excluded under s 135 where its PV is substantially outweighed by the risk of unfair prejudice or that it is misleading/ confusing or an undue waste of time. In assessing the PV for s 135 purpose, the evidence is taken at its highest, assuming credit and reliability (*IMM*), unless the proviso is engaged (ie: that the evidence is so inherently incredible or fanciful that no rational jury could accept it: irrelevant and inadmissible s 56(2). Here, P would face difficulty in seeking to engage the proviso, and s 135 will need to be applied taking the evidence as both honest and accurate, therefore as having at least moderate to high PV. Thus, P would need to argue it was of a nature as to be "seductive" or as giving rise to the "CSI effect" (see *DPP v Wise*) and should be excluded as liable to be overweighted by even the judge. P may also contend it is confusing or time wasting. P unlikely to succeed and limited to submission as to proper weight. The P should also ensure O 44 SCR is complied with: relevant whether report furnished at least 30 days pre-trial and expert supplied with the code (Form 42A) upon engagement or as soon as practicable thereafter. The expert's evidence-in-chief must then be limited to the scope of the evidence in her report (as seems the case here).

Answer 2: Under s 135, the TJ may exclude evidence if probative value (PV) is substantially outweighed by an danger that it might be unfairly prejudiced; be misleading or confusing or be a waste of time.

Here, Ps could seek to exclude the evidence on each other above bases. Firstly, plaintiff's counsel could argue that it is unfairly prejudicial and/or misleading or confusing because it creates the impression that SJ engaged in illegal conduct, while the report in reality cannot exclude an innocent explanation, and therefore the fact finder may give it too much weight, particularly reading a propensity of fact finders to defer their reasoning to that of an expert. However, this argument is weakened by the fact that the weaknesses in the evidence are readily apparent, and there is no jury in this matter.

There is little weight to an argument about under waste of time.

Further, any danger discussed above needs to substantially outweigh PV. The PV here is high as the report is so central to the fact in issue and the basis for the entire proceeding.

The s 135 application would fail.

QUESTION 29

Evidence: Refer to the previous question. The trial judge requires that the admissibility of Dr Smythe's evidence '*be resolved by way of a voir dire*'. What is a 'voir dire'? Explain how a voir dire process could resolve the issue in this case. **[2 marks]**

Answer 1: A 'Voir Dire' is a 'trial within a trial' to determine a preliminary question, in this instance about the admissibility of evidence (s 189 EA). Questions on voir dire about admissibility are determined on balance of probabilities (s 142). You can call and cross-examine witnesses on a voir dire without it being admissible, in trial, other than if W dies or it is used as a prior inconsistent statement. In this VD, Dr Smythe could be called so the PV of her evidence can be assessed.

Answer 2: A voir dire is a trial within a trial, usually takes place when a question of admissibility arises. On a VD, a preliminary issue of fact can be resolved for determination of question of admissibility, as here, whether Dr Smythe's evidence ought to be admitted. Witnesses can be called with submissions made. VD will usually occur in the absence of the jury and rules of hearsay do not apply (r 75) provided that source of hearsay identified. Any evidence adduced on VD cannot be used in trial proper unless it is evidence of a prior inconsistent statement (see s 189 EA).

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

Dr Smythe's evidence is ruled admissible. In the course of giving evidence at trial, Dr Smythe states in examination-in-chief, *'I just want to clarify, that I now think it's 95% probable that the missing gene IGF-2A was removed in a laboratory by scientific techniques…'*.

In cross-examination, the following exchange takes place:

> **Plaintiffs' Counsel:** You appear to have changed your opinion, doctor?
>
> **Dr Smythe:** I beg your pardon?
>
> **Plaintiffs' Counsel:** You're contradicting what you said in your report to Victoria Police dated 15 January 2019. What do you say to that?

Dr Smythe could not answer. She then suddenly burst into tears. At this point Counsel for Sequenial objected to the question on the basis that it was 'improper'.

QUESTION 30

Evidence: *Your answer:* ***(circle ONE)*** **[1 marks]**	Counsel for the Plaintiffs' line of questioning appears to be an attempt at achieving which legitimate forensic goal? a) Attempting to have the witness declared 'unfavourable'. b) Complying with the rule in *Jones v Dunkel*. c) Discrediting the witness. d) Diverting the judge's attention from the facts in issue. e) Embarrassing the witness. f) Highlighting a prior consistent statement of the witness.

QUESTION 31

Evidence: Discuss the merit in the 'improper question' objection. **[3 marks]**

Answer 1: The improper question objection has little merit. The court now must disallow or inform witness not to answer improper questions in cross-examination if they are misleading/ confusing, harassing, annoying, put in a tone that is belittling or based on stereotype among others (s 41(3)). None of these appear to be made out. A question is not improper merely because the question challenges the truthfulness of the witness, or the consistency or accuracy of any statement made by the witness- which counsel would argue he is doing here by putting the prior inconsistent statement. He is able to do this as it would substantially diminish her credibility (s 103) (see also r 67 BR). There is nothing in as questioning that is improper.

Answer 2: The court must disallow improper questions in cross-examination or tell the witness that it does not have to answer. An improper question is, inter alia, that is offensive, oppressive, put in a unduly belittling manner, repetitive etc… It is not improper in cross-examination to question a witness' evidence. Rather a question is not improper merely because it challenges the truthfulness of a witness' evidence or asks the witness to comment on matters she really find distasteful. Here, counsel is quite reasonably testing Dr Smythe's evidence. In fact, D counsel later seeks to infer that her evidence has been improperly changed, he must put to Dr Smythe to comply with Brown v Dunn. Not improper and Dr Smythe must answer. The fact that she finds it upsetting does not , by itself makes it improper.

END OF PART B

End of examination