

LEGAL PROFESSION ADMISSION BOARD

MARCH 2014

LEGAL INSTITUTIONS

Time: Three Hours This paper consists of **six** questions.

Candidates are required to attempt any **four** questions.

If a candidate answers more than the specified number of questions, only the first **four** questions attempted will be marked.

All questions are of equal value.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade

This examination is worth 80% of the total marks in this subject.

Permitted Materials: This is an open book examination. Candidates may refer to any books and any printed or handwritten material they have brought into the examination room.

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

Question 1

This question is divided into two parts. Both parts carry equal marks. Both parts should be attempted.

Part A

In 1610 the House of Commons petitioned James I, arguing the case for the maintenance of what they described as the rule of law:

Amongst many other points of happiness and freedom which your majesty's subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by the certain rule of the law which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government...

How would you describe the rule of law, using your own words? What are some indicators of a society, which is premised on the rule of law? Was the colony of NSW founded based on principles of rule of law or the need to maintain penal discipline over unruly convicts? Support your answer by reference to examples drawn from NSW colonial history.

Part B

What is the legal reason why Commonwealth bodies such as the Australian Institute of Sport are established in the Australian Capital Territory? Support your answer by reference to relevant authority.

(Question 2 follows)

Question 2

This question is divided into two parts. Both parts carry equal marks. Both parts should be attempted.

Part A

The doctrine of precedent requires that each court is bound by the decisions of higher courts in the same judicial hierarchy. Is the High Court of Australia bound by the doctrine of precedent to follow earlier case law? Why? Why not? Discuss the attitude of the High Court of Australia to precedent by referring to two or more cases.

Part B

'Representative government will not be achieved in NSW until all who pay tax can vote. Accordingly the voting age must be lowered to 14 years and 9 months immediately'

Do you agree with the view expressed above? Using your own words, what do you think is meant by representative government? Outline the steps in the development of representative government in NSW.

(Question 3 follows)

Question 3

The *Australian Capital Territory (Self-Government) Act 1988* provides at s28:

Inconsistency with other laws

- (1) *A provision of an enactment [of the ACT Legislative Assembly] has no effect to the extent that it is inconsistent with a law [in force in the Territory, because for example of the exercise of Commonwealth legislative power] ... but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.*

In a recent High Court case, (*The Commonwealth v Australian Capital Territory* [2013] HCA 55) decided on 12 December 2013 the High Court considered whether or not marriage equality laws passed by the ACT Legislative Assembly were inconsistent, within the meaning of s28 above, with Commonwealth legislation in relation to marriage. The Full Court held that the whole of the *Marriage Equality (Same Sex) Act 2013* (ACT) is **inconsistent** with the *Marriage Act 1961* (Cth). In their reasoning they noted that the Commonwealth had constitutional power to make laws with respect to marriage (s51xxi) and that the *Marriage Act 1961* (Cth) provides a **complete and exhaustive** statement of the law with respect to the creation and recognition of the legal status of marriage [at 57].

To consider the issue of inconsistency of laws, why is the High Court using s28 (above) rather than s109 of the Commonwealth Constitution? With respect to the cases which expand and explain s109 what is the significance of the High Court's finding that the *Marriage Act 1961* provides a complete and exhaustive statement of the law? By what phrase is this concept often expressed in the cases? By reference to the case law outline the High Court's attitude to determining the question of whether or not Commonwealth legislation provides a complete and exhaustive statement of the law in a particular area, and the legal consequences if it does.

(Question 4 follows)

Question 4

This question consists of four parts. Each part has equal marks, and each should be attempted.

There is no Commonwealth legislative power with respect to the legal profession. Thus, to achieve a national approach to regulation of the profession, it is not possible to legislate with national effect.

- a. **How could Commonwealth legislative power in this area be increased? How likely is this method to be successful? Support your answer by reference to the Commonwealth Constitution.**
- b. The *Mutual Recognition (New South Wales) Act 1992* (NSW) was one example of an attempt to increase Commonwealth legislative power over the professions.

What was the constitutional mechanism which was employed? What are the challenges and limitations of this method?

- c. The *Legal Profession Reform Act 1993* (NSW) and the *Legal Profession Act 2004* (NSW) are examples of another attempt to provide for a national approach to the regulation of the Legal Profession.

How would you describe the approach taken by this legislation, and how does it operate?

- d. The proposed *Legal Profession National Law* (which follows the same pattern as *The Australian Consumer Law*) demonstrates a different attempt to provide for a national approach to the regulation of the profession.

How would you describe this approach and how does it work?

(Question 5 follows)

Question 5

This question is divided into two parts. Both parts carry equal marks. Both parts should be attempted.

Part A

In November 1975 there was intractable conflict between the two houses of the Commonwealth Parliament over the issue of the passage of the supply bills.

What mechanism was employed to resolve this conflict? Who exercised the power and what was the nature of the power being exercised? What is the method of conflict resolution contemplated by the Commonwealth Constitution? Describe how it operates.

Part B

What considerations would you take into account when advising a client to pursue their matter through a Tribunal, rather than a Court.

Question 6

Sir Edward Coke, as Chief Justice of the Court of Common Pleas in the time of James 1 began the practice of recording his judgements. In the case of *Prohibitions del Roy* he describes a dispute with the King about the role of the common law courts and the ability of the King to decide matters personally. He notes the arguments of the King and his response in the following extract:

...the King himselfe may decide it in his Royall person; and that the Judges are but the Delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himselfe...., that such Authority belongs to the King ... To which it was answered by me, in the presence, and with the cleer consent of all the Justices of England and Barons of the Exchequer, that the King in his own person cannot adjudge any case ... but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custome of England, ...And the Judges informed the King, that no King after the conquest assumed to himselfe to give any Judgment in any cause whatsoever, which concerned the administration of Justice within this Realme, but these were solely determined in the Courts of Justice.

What is the important doctrine which Sir Edward Coke is defending? How important do you believe it is in modern Australia, and why?

When was it recognised in legislation? Where would you find it recognised in the Commonwealth Constitution? What are some indicators that this doctrine forms part of our constitutional understanding? How does the NSW Constitution reflect this understanding? Describe the novel steps taken in NSW and discuss an example where this process has been used.

END OF PAPER