LEGAL FUNDAMENTALS IN AUSTRALIA
Activity Centre: Unit 3 AOS 2

SECTION A

Question 1

Conciliation is a more cooperative method of dispute resolution than arbitration. In conciliation, the parties engage in a conversation, and take turns talking about their points of view and willingness to compromise. In arbitration the focus is not on discussion as much as it is on the parties putting forward their points of view to a third party, trying to convince the third party of the strength of their side. This leads to another difference, which is that the parties are in charge of the outcome in conciliation, whereas in arbitration the third party makes that decision for them – although the conciliator will be able to provide input on proposed solutions, they do not enforce a resolution.

Question 2
Explain the burden of proof in a civil trial. **2 marks**

A clear and complete answer that defines the burden of proof as the responsibility to bring evidence to prove the claims made; and that names the party with the burden – the plaintiff.

Question 3

a. *Vivek can take part in a representative proceeding because these types of proceedings require a group of seven or more people who share a common legal interest. This is satisfied because there were at least 8 people injured and they all share the same legal interest because the harm was (potentially) caused to all of them by the festival's negligent actions in allowing the exits to become congested.*

b. Examples:

- *Vivek should consider the availability of negotiation options before initiating this civil claim. In particular, representative proceedings are not permitted to settle at a pre-trial conference or mediation without the consent of the court and without group members being notified. Given that the scenario suggests the possibility of a representative proceeding, this element of the case might limit the negotiation options he has available.*
- *Vivek should consider the costs of civil action before initiating this civil claim. Cost is always an important factor to consider, but even more so if he ends up being the named plaintiff in a representative proceeding because they are responsible for all costs of the action, including any adverse costs award. Vivek may be unwilling or unable to take this risk.*
- *Vivek should consider the scope of liability. He may have a liability argument against the festival organisers, but there are a range of other organisations and people who contributed to this harm. The security company may have hired untrained personnel, and they may have managed the gates improperly; even the other attendees may have been negligent, because some may have triggered the stampede. Vivek should consider the party most likely to be held liable by the court.*

c. *The standard of proof in Vivek's case will be on the balance of probabilities, since it is a civil case. This means that, for Vivek to be successful, he will only need to convince the judge (or jury) that it is more probable than not that his argument is the correct one.*

d. *Arranging courts in a hierarchy or jurisdiction allows for decisions to be appealed to higher courts with the power to review the decisions made by courts inferior to them. Appeals can be on questions of fact (including, for instance, awards for damages) or on questions of law, and involve the higher court being asked to scrutinise the original decision-maker. Vivek's decision could be appealed on the basis of the costs awarded, if there was some reason to believe an error had been made – for example, an error made as a result of incorrectly accounting for the differing harms to the variety of claimants in the representative proceeding.*

e. Example arguments:

- ✓ *Discovery offers the opportunity for Vivek and the festival organisers to each see documents and other evidence held by the opposing party, and therefore to judge the strength of each case. This can encourage pre-trial resolution, perhaps because the organisers will see the strength of Vivek's case and how many other attendees give the same account of the facts as him, and may speed up the process required to gain closure if the organisers are willing to offer a fair settlement amount.*
- ✓ *Discovery allows both Vivek and the festival organisers to ask the judge for rulings on the admissibility of evidence. This promotes **fairness**, and ensures greater **equality** as one party is less able to manipulate inappropriate evidence to gain an advantage over the other – in this case that is most likely to be the organisers, as they are the defendants wanting to avoid financial loss, and they are also likely to be more experienced than Vivek in legal matters.*
- ✓ *Every document filed with the court attracts a fee that must be paid, and will usually be drafted by a solicitor who is paid hundreds of dollars an hour. This can reduce **access** Vivek, if he is without the resources to easily afford the cost; and, if the organisers can afford it, it also reduces **equality** of opportunity.*
- ✓ *During pleadings, each party finds out the claims of fact the other side will be making, and the main law they will be relying on. This produces relative **equality** of information between them, and helps each party prepare effectively and efficiently for trial, reducing barriers to **access.***
- ✓ *Even with time limits the pleadings can take weeks or months to be completed. Further and better particulars, especially, can be very detailed and time-consuming. This is **unfair** for the plaintiff, Vivek, in particular, as he has a vested interest in resolving the matter quickly because he has injuries and possibly less employment as a result.*

Question 4

Refer to sources in the Question and Answer Booklet.

a. Example arguments:

- *Damages are often able to return the plaintiff to the position she or he was in before the harm was suffered, because frequently the harm is financial in nature.*

- *Conversely, in representative proceedings involving litigation funders, an average of only 58 percent of damages was distributed to the plaintiffs, with the rest being taken by the litigation funder and legal costs. This means that the capacity of damages to compensate and restore plaintiffs will be significantly reduced, as the reduced sums may neither compensate plaintiffs to the full extent of their harm nor fully restore them.*

- *Damages are able to compensate the plaintiff for rights infringements, even if the harm was not financial and cannot be literally restored, because the courts work with complex estimates of the value of different kinds of harm. This keeps the treatment of different plaintiffs somewhat equal. Even in representative proceedings the courts will calculate different levels of damages to acknowledge different levels of harm suffered by group members.*

- *Ultimately, damages are awards of money. They may financially restore a plaintiff or a group member on paper, but this might be years after the event and after time, money and emotional effort has been spent*

on the lawsuit. This may be even more the case when representative proceedings and litigation funders are involved as they can add further time and complexity to resolving a dispute.

- *Injunctions have the power to order the defendant to perform concrete actions that either prevent the harm from occurring in the first place, or put some aspect of the wrongdoing right again. For example, a publisher may be ordered to print a retraction and apology following a lawsuit for defamation. On the one hand this may be able to avoid some of the issues with damages in representative proceedings, because a litigation funder can't (for example) take a percentage cut of an apology. On the other hand, injunctions are simply not useful in all cases, and sometimes damages are the only way to properly compensate or restore a plaintiff.*

- *There is a fairly defined scope for court orders such as injunctions, and this may not be flexible enough to deal with the range of circumstances in which rights can be infringed. Negotiated agreements through a process such as mediation are more flexible, but representative proceedings are not permitted to settle at a pre-trial conference or mediation without the consent of the court and without group members being notified. This can slow down negotiated settlements, and reduce the ability for an injunction to be timely enough to achieve its purpose.*

b. *The Victorian Civil and Administrative Tribunal ('VCAT') is a quasi-judicial tribunal created to provide a forum for the resolution of relatively simple civil disputes that is less expensive, more informal, and quicker than court. VCAT provides expertise in dispute resolution deals by resolving different disputes across a range of highly-specialised sections called 'lists'. These include disputes regarding the purchase and supply of goods, such as faulty goods, regarding discrimination and sexual harassment, and regarding rental agreements. One way in which VCAT's role is differentiated from courts is that VCAT is unable to hear representative proceedings like the ones mentioned in the source material. VCAT is also able to address one of the issues raised by the source – that being the potential costliness of legal proceedings – because VCAT fees are designed to minimise the expense of bringing a claim. For some lists, such as the Human Rights and Guardianship Lists, there are no fees. In some lists such as the Civil Claims List, application fees are scaled depending on the amount of the claim: as of the 2019-2020 financial year, for instance, fees for individuals range from $65.30 for claims of under $3000 to $1669.10 for claims of over $5 million dollars.*

c. Example arguments:

- *Even though they also have a duty to the court, the task for lawyers is to gain the best outcome possible for their client, and act on instruction from that client. This dual duty balances well the need to give access to the parties with the need to serve justice and overall fairness in terms of the system. Experienced legal representatives are responsible for helping the each party to present their cases in the best possible light. This gives the plaintiff and defendant confidence in the system, and a better chance at a fair and just trial.*

- *The use of expert and experienced legal practitioners saves the courts time and money, because they know the correct way to prepare documents, the correct way to make legal submissions and elicit evidence from witnesses, and the best arguments to make to allow the court to home in on the significant issues. This efficiency increases overall access to the system because it allows the courts to operate more quickly. In large cases such as those usually the subject of representative proceedings, this is even more important, because of the quantity of evidence and the additional rules regarding class actions.*

- *Justice may belong to the accused who is able to afford the better legal representative, rather than the accused who is truly in the right, and this decreases proper access to justice. The adversary system of trial is, after all, a battle of proof rather than a search for the truth. Historically, individual claimants who have tried to sue tobacco companies for hiding evidence of the cancer-causing properties of cigarettes have been fought by dozens of lawyers and strategic delays. Some claimants have died of their tobacco-related illness before the case was concluded.*

- *Lawyers can make the process even more adversarial in their quest for the win – they can discourage cooperation in negotiations because it is not always in the lawyer's best interests to register a settlement, or they may believe they can win a 'not liable' verdict outright for their client. Alternatively, the plaintiff may*

reject a fair settlement offer, or accept an inappropriate one, in order to get an easy 'win' on the board for their career. Especially if a litigation funder is involved, lawyers may make strategic decisions about likely damages rather than work for a recognition of the harm suffered by the group members – if going to trial might be more risky.

d. Example

- An answer that clearly identifies and provides some detail on one appropriate recommended reform; and
- That provides one or more thoughtful and subjective points on the benefits of this reform, supported by content detail; and
- That integrates elements of justice into the arguments, although the wording of the question allows students to go beyond the strict 'principles' listed in the Study Design; and
- That uses the source material.

Note that benefits of the reform may also include criticisms of the current system and reasons why the reform is needed.

Problematic examples:

× *One recommended reform is to provide more funding for legal aid for civil matters. This would benefit the system because… [etc]*

This is an example of a reform that is too general. There is no clear change, no plan for implementation, no source, and no clear identification of what the funding is to be used for specifically.

× *In October 2015 the Victorian Department of Justice and Regulation was asked by the state attorney-general to undertake the Access to Justice Review, specifically focusing on (amongst other things) the best way to support self-represented litigants ('SRLs') in civil disputes. Two recommendations specifically relating to SRLs were made: to broadly improve the way courts and VCAT work with SRLs; and to establish a Self-Representation Service ('SRS') in courts and VCAT, to provide general legal advice for parties considering their options for resolution or preparing their case.*

This answer focuses too much on the factual content of the reform and fails to engage with the 'comment' part of the question.