

Examiner's Comments

Evidence

September 2009

General Comment: Most candidates identified the issues and included statutory sections (with minimal or no case law) that supported their arguments, thus resulting in many Pass and/or low Pass with Merit grades. Other candidates who cited and applied case law to their answers received higher marks accordingly. A number of candidates cited case names at the end of paragraphs, but fail to apply them, or discuss their relevance to the issues.

Unless otherwise specified all reference to sections below are references to the Evidence Act 1995. Cases and section below are not intended to be a complete or exhaustive mention of the “answers” to each question, but rather some of the major points that should have been included in candidates’ answers.

Question 1:

The evidentiary issues needed to be identified by the candidates (issues included the fact this was a civil case, lay opinion evidence, legal professional privilege (*Eso Australian Resources Ltd v Federal Commission of Taxation* (2000) 168 ALR 123, privilege extending to negotiations and the right to an interpreter: s30 and *Gradidge v Grace Bros* (1988) 93 FLR 414) – the best candidates identified the issues early on in their opening paragraphs, and then used headings, or clearly moved on to discuss each of the issues in turn. The better answers identified the issues, and had statute and case law to support the discussion as to the issue, and then a clear conclusion with the answer to the evidentiary issue.

Some of the lower standard of essays quoted large sections of case law or copied out the legislation. Others just “name dropped” cases into the essay, and didn’t bother to discuss or apply the cases, which added nothing to the discussion.

Many candidates would give a “superficial treatment” of the answer – that is mention only bare bones legislation and little or no case law. Whilst they may have identified the correct legislative section, their answer showed little to no real grasp of the evidence laws and the complexities of the issues they have been studying.

Question 2:

This question asks you to consider the relevant issues as a trial judge (issues included hearsay s59 onwards and cases such as *Subramaniam v. Public Prosecutor* [1956] W.L.R. 965 , admissibility of ID evidence in ss113 – 115 and reliability warnings to the jury regarding uncorroborated and unreliable evidence: ss164 and 165 and law in relation to views: s53 and cases such as *Milat*). Many candidates took the direction to consider

issues as a trial judge literally, and wrote the answer in first person. Whilst a certain amount of “I find that...” was acceptable, some candidates went overboard, writing the essay completely as “I think... I would accept... I would”. Note that the answer is not asking you to deliver a judgment – this is still an academic essay and should be written as such.

Most candidates worked through the answer systematically using headings to clearly label the a, b, and c parts of the question. This showed clearly the candidates that could identify and address all issues, but also showed those who were weaker in certain parts and had very little to say/no supporting case law or statute in a certain section.

Question 3:

The best candidates identified the evidentiary issues raised in an introduction, and then proceeded to work through those issues systematically (issues included hearsay: s59 onwards and cases such as *Teper v. R* [1952]A.C. 447, and *Subramaniam v. Public Prosecutor* [1956] W.L.R. 965, Expert opinion evidence and the burden of proof and cases such as *Green v R* (1971) 126 CLR 28 and *Shepherd v R* (1990) 97 ALR 161.. Almost all candidates identified the correct issues and supported their answers with statute. However many failed to include any case law, or only had one case per issue discussed. This limited their answer. Some candidates “name dropped” case names, without setting out the legal principles involved in the case or applying them to the facts (just adding the name in at the end of a paragraph), which did not assist their answer.

Question 4:

Candidates attempting this question generally answered it well. Candidates are reminded that the reasons for the decision rather than the facts of the charges should attract the most attention and that candidates are expected to comment on the contribution made by the case to the development of the law in the area.

Candidates who used headings (not necessarily those I have set out above, but any) usually showed a clearer direction in their case note. There is no need to quote large extracts from the case (one candidate quoted 22 lines from the case – this did not assist the answer). Some candidates point-formed the case note, which usually did not assist the answer and made the answer more truncated.

Question 5:

The weaker answers to this question failed to view it holistically and did not answer the general question as to whether the current law in relation to creditability evidence is misconceived. Candidates tended to miss the overall question, and focus exclusively on the three subparts, instead of realising the question stated they were things to “include in your answer at least”, as opposed to three questions in themselves to answer strictly under headings.

The best candidates wrote an essay, with an introduction and a conclusion, included the three a, b and c areas and had a strong “evaluation” of the rule at the end. The conclusion reached was less important than the argument and supporting statute and case law that

each candidate used to support their views. Most candidates did not have a strong evaluation/opinion/conclusion at the end of the essay.